



ENFORCING
RELIGIOUS FREEDOM
IN PRISON

UNITED STATES COMMISSION ON CIVIL RIGHTS
SEPTEMBER 2008

UNITED STATES COMMISSION ON CIVIL RIGHTS

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, 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, disability, or national origin, or in the administration of justice.
- 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, disability, or national origin.
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SEPTEMBER 2008

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House

Sirs and Madam:

The United States Commission on Civil Rights transmits this report, *Enforcing Religious Freedom in Prison*, pursuant to Public Law 103-419. The report examines government efforts to enforce federal civil rights laws prohibiting religious discrimination in the administration and management of federal and state prisons.

To that end, the Commission reviewed federal and state laws and regulations applicable to inmates' religious observances and examined the roles of prison administrators in safeguarding prisoners' religious rights. It also examined the roles of the U.S. Department of Justice (DOJ) and the judiciary in enforcing and interpreting the law regarding prisoners' free exercise rights.

The findings indicate that the percentage of prisoners professing non-Christian faiths tends to be larger than their proportions within the non-incarcerated adult population in the United States aged 18 and older. These inmates are more likely than others to file complaints about free exercise limitations; however, religious grievances make up a very small proportion of all grievances filed in prisons. The number of Religious Land Use and Institutionalized Persons Act (RLUIPA) complaints received by DOJ, and the reported number of cases filed in federal court, have grown annually since 2001, but remain small compared to the number of state prisoners. The Commission also found that prison and inmate security, and lack of resources, are cited as the key reasons for any restrictions placed on inmates' religious exercise.

The Commission recommends that prison officials pay particular attention to ensuring that inmates of minority faiths are not having their free-exercise rights unduly burdened, and that prison ministries and prisoners' rights advocacy organizations should work to enhance the availability of professional legal representation for inmates. The Commission further notes that the Prison Litigation Reform Act has likely helped maintain the balance we see today between prisoners' rights and the interests of prison officials and the courts in minimizing the number of frivolous lawsuits.

On September 30, 2008, the Commission approved this report. Chapters 1–4 and the appendices were approved by Commissioners Thernstrom, Taylor, Kirsanow, Heriot and Gaziano; and objected to by Commissioner Yaki, with Commissioners Reynolds and Melendez not present. The findings and recommendations votes are noted in the report.

For the Commissioners,

A handwritten signature in dark ink, appearing to read "Gerald A. Reynolds". The signature is fluid and cursive, with the first name "Gerald" being more prominent.

Gerald A. Reynolds
Chairman

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EXECUTIVE SUMMARY

This report focuses on the government's efforts to enforce federal civil rights laws prohibiting religious discrimination in the administration and management of federal and state prisons. Prisoners in federal and state institutions retain certain religious exercise rights under the Constitution and statutes including the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Religious Freedom Restoration Act (RFRA), and the Civil Rights of Institutionalized Persons Act (CRIPA). Many states have similar provisions in their state constitutions and in state law modeled on RFRA. These rights must be balanced with the legitimate concerns of prison officials, including cost, staffing, and, most importantly, prison safety and security. Reconciling these rights and concerns can be a significant challenge for penal institutions, as well as the courts.

The United States Commission on Civil Rights examined the legal foundation of prisoners' religious exercise rights, and the rules and guidelines related to religion in federal and state prisons and jails. It also researched the mechanisms federal and state prisons and jails use to facilitate religious requests (where feasible), and to record and process prisoner grievances related to religious exercise. Finally, the Commission reviewed 250 reported RLUIPA cases initiated from 2001–2006, examining trends by religion, judicial circuit, type of accommodation requested, and other factors.

With the intent of furthering religious freedom in prisons while maintaining security, the Commission developed findings and recommendations based on its social science research, case law review, briefing testimony, and interrogatory responses received from the Department of Justice, several state and federal prisons, various prisoner advocacy groups, and other organizations. Highlights of the findings include:

- The percentage of prisoners professing non-Christian faiths tends to be larger than their proportions within the non-incarcerated adult population in the United States aged 18 and older.
- Inmates professing non-Christian faiths are more likely than other inmates to file complaints about free exercise limitations.
- Religious grievances make up a very small proportion of all grievances filed in prisons.
- The number of RLUIPA complaints received by the Justice Department, and the reported number of cases filed in federal court, have grown annually since 2001, but remain small compared to the number of prisoners in state correctional institutions.
- Prison and inmate security, and lack of resources, are cited as the key reasons for any restrictions placed on inmates' religious exercise.

Highlights of the recommendations include:

- Prison officials should pay particular attention to ensuring that inmates of non-Christian faiths are not having their free-exercise rights unduly burdened.
- The Prison Litigation Reform Act (PLRA) has likely helped maintain the balance we see today between prisoners' rights and the interests of prison officials and the courts in minimizing the number of frivolous lawsuits.
- Prison ministries and prisoners' rights advocacy organizations should work to enhance the availability of professional legal representation for inmates.
- This report was drafted according to the Commission's statutory mandate, requiring monitoring and assessment of the Federal Government's enforcement efforts in the area of civil rights.

Note on Religious Categories

There are several important limitations regarding the religious affiliations, categories, traditions, and practices of prisoners that are used in this report.

First, prisoners' religious affiliations are self-reported and, as such, are not easily subjected to verification against any external objective standard. Indeed, there is no universally accepted, objective definition of religious affiliation, tradition, or practice.

Second, various federal, state, and local authorities, as well as individual prisons and jails, use different methods for classifying the religious affiliation of inmates.

Third, the breadth and scope of prisoners' religious affiliations and traditions presented in this report have, in some cases, necessitated grouping "similar" religions together for the purpose of data analysis. This is an imperfect solution and various authorities disagree on which traditions can be combined into meaningfully "similar" categories.

CHAPTER 1: INTRODUCTION AND OVERVIEW

This report focuses on the government's efforts to enforce federal civil rights laws prohibiting religious discrimination in the administration and management of federal and state prisons. To that end, it reviews federal and state laws and regulations applicable to inmates' religious observances and examines the roles of prison administrators in safeguarding prisoners' religious rights. It also examines the roles of the U.S. Department of Justice (DOJ) and the judiciary in enforcing and interpreting the law regarding prisoners' free exercise rights.

The study examined allegations of religious discrimination against inmates at federal and state prisons, as well as private facilities operated under contract to state or federal entities. In addition, the Commission scrutinized religious discrimination against inmates in two county jails.

The Commission studied the processes through which prisoners sought redress for religious discrimination at four levels:

- correctional institutions' internal procedures through which inmates can file grievances and appeal outcomes;
- DOJ's complaint-processing systems, which prisoners may use after reaching an unsatisfactory resolution with the prison system;
- litigation in state or federal court; and
- court decisions resulting from these lawsuits.

In addition, this report considers the various prerequisites and accompaniments of enforcement efforts: coordination, compliance reviews, technical assistance, training, policy guidance, and record-keeping. In short, the study examines the administration and enforcement of prisoners' rights to religious freedom.

Methodology

To examine the scope of religious discrimination grievances in federal and state prisons throughout the United States, the study collects and presents qualitative and quantitative data of various types and at various times from 1990 through 2007. The Commission

- conducted legal and documentary research;
- heard expert and organizational testimony at a February 8, 2008, national briefing and at briefings conducted by some of the Commission's State Advisory Committees; and

- issued interrogatories to five different components of the Department of Justice (including the Bureau of Prisons), nine federal prisons, nine state prisons, two county jails, and eight prisoners' rights advocacy groups.

Through these methods, the Commission gathered the following data:

- 1) the religious affiliations of prisoners and the number and types of religious accommodations and services prisons provide to them;
- 2) the number and nature of religious discrimination grievances reported by prisoners, including allegations that institutions had failed to provide requisite accommodations for their religious observance;
- 3) the number and types of federal compliance efforts to reduce religious discrimination against prison inmates; and
- 4) the efforts of prisoners' rights organizations to assist prisoners.

Ascertaining Religious Needs and Accommodations

To demonstrate the diversity of religious practices and the frequency and types of accommodations that prisons must provide, the Commission sought statistical data from state departments of corrections. Information on the nature and extent of accommodations is presented wherever available.

Incidents of Alleged Religious Discrimination

The Commission has collected quantitative data on religious discrimination against inmates through a variety of sources at different process stages and will summarize and discuss them as appropriate. First, inmates must file grievances in their respective institutions. The Commission requested data on religious grievances from several prisons, including federal, state, and privately managed institutions and two jails. Second, prisoners may send complaints to the Commission or DOJ. The Commission reviewed its own file of complaints from prisoners involving religious issues. By its nature and mission, the Commission refers all complaints to other agencies, specifically DOJ on matters that are relevant to this report. Thus, the Commission sought DOJ's more comprehensive records of complaints of religious discrimination involving prisons. DOJ's Office of Special Litigation, a component of its Civil Rights Division, handles such matters. Third, the Commission's regional offices contacted advocacy groups to collect information about complaints and other relevant issues. Finally, the Commission carried out legal research to identify and analyze cases involving alleged infringement of the religious rights of prisoners.

The Commission analyzed information on inmate grievances, complaints, and litigation to the extent possible according to 1) the nature of the alleged discrimination or denial of religious accommodation; 2) the groups alleging religious discrimination; 3) the state where the facility was located; 4) whether the institution was federally, state-, or privately run; and 5) the timeframe of the alleged discrimination and its relevance to newly passed statutes.

Federal Enforcement of Prisoners' Religious Rights

In examining the federal government's efforts to protect prisoners' rights, the study looked at DOJ's civil rights enforcement policies and activities. The Commission sought and obtained a wide variety of information about Justice's Civil Rights Division, the Bureau of Prisons, and other relevant DOJ components. Internet searches for publicly available policies and regulations, requests for documents and responses to interrogatories sent to agency officials, follow-up interviews with DOJ representatives and external critics, and reviews of Congressional or other testimony and civil rights literature comprise the primary sources for the information assembled herein.

Together, the knowledge assembled through these various sources illustrates why, how, and to what degree religious discrimination is alleged to occur in federal and state prisons, what efforts government officials employ to combat this alleged discrimination, and whether allegations of religious discrimination have decreased or increased during the period examined.

Legal Background

While incarcerated persons enjoy a number of constitutional and statutory protections, those protections are tempered by the unique health, safety, and administrative concerns of state and federal correctional institutions. As the Supreme Court has stated, "[p]risoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."¹ At the same time, however, the right to exercise one's religion "is necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security."² The Court has recognized that deterrence, rehabilitation, and institutional security are all valid penological objectives that may result in limitations on prisoners' rights.³

Conflicts over the exercise of religious liberty in prisons are inherently difficult, even intractable at times. In some instances, correctional institutions have been found to have erected frivolous and arbitrary barriers that have unnecessarily interfered with prisoners' free exercise rights.⁴ However, not every denial of a religious accommodation amounts to discrimination on the basis of religion. For example, the stringent requirements of a particular religion may make it extraordinarily difficult for prisons to accommodate every inmate's specific religious requirements.⁵ Additionally, there may be very real safety,

¹ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

² *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987) (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987)).

³ *O'Lone*, 482 U.S. at 348 (citing *Pell v. Procunier*, 417 U.S. 817, 822–23 (1974)).

⁴ See 146 Cong. Rec. 16698, 16699 (Joint Statement of Sen. Hatch and Sen. Kennedy on Religious Land Use and Institutionalized Persons Act).

⁵ The Supreme Court recognized as much in *O'Lone*, in which it held that a Muslim prisoner's free exercise rights would not require prison officials to bus him (and other Muslim prisoners), from outside details back to

manpower, and other resource limitations on correctional facilities' ability to accommodate a prisoner's religious exercise in the exact way the prisoner might prefer.⁶ In analyzing whether a particular lack of accommodation constitutes religious discrimination, courts will frequently defer to officials in the specific prison in which the inmate is housed.⁷ The unique and fact-specific nature of prisoner free exercise cases results in a great degree of variation court-by-court and prison-by-prison in what will and will not be considered justifiable restraints on prisoners' religious liberties.

The following is a brief summary of the legal provisions relevant to the analysis of prisoners' free exercise claims.

I. First Amendment

The First Amendment to the United States Constitution directs Congress to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...."⁸ First Amendment cases involving prisoners necessarily weigh

the main prison building to attend Jumu'ah services, which the inmate's religious beliefs dictated could occur only at certain times. *O'Lone*, 482 U.S. at 351–52.

⁶ See, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008). In *Fowler*, an inmate demanded that prison officials make a sweat lodge available to him at least 17 times per year in order for him to practice his Native American faith. The prison was already working to accommodate the inmate's request for access to an outdoor area in which to practice his faith, but the inmate considered such efforts an insufficient substitute for a sweat lodge and alleged that the prison violated his free exercise rights under RLUIPA. The 8th Circuit found for the state prison, holding that denial of an inmate's request for a sweat lodge satisfied RLUIPA's strict scrutiny test. Prohibition of the sweat lodge furthered the state's compelling interest in preventing serious safety and security issues that could arise in the operation of a sweat lodge (including the burning of embers and hot coals, the use of blunt instruments such as split wood, large scalding rocks, sharp objects such as shovels, and deer antlers; and an enclosed area inaccessible to outside view), and limiting the strains on prison security's manpower caused by the typically six- to seven-hour-long sweat lodge ceremonies. *Id.* at 939. The court further found that denying the inmate access to a sweat lodge was the least restrictive means of achieving the state's interest, in part because the state had tried to accommodate the prisoner's religious practice in other, less burdensome ways which the inmate rejected. *Id.* at 939–40

⁷ The *Fowler* court did not find the operation of sweat lodges at other prisons determinative of the case at hand and refused to impose a one-size-fits-all rule on prisons by requiring them to make the same religious accommodations as other prisons. Instead, it set forth a deferential standard.

[A]s prisons differ, so may the means by which prison officials ensure order and stability:

Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their *own* institutions than outside observers.

Fowler, 534 F.3d at 942 (citing *Hamilton v. Schriro*, 74 F.3d 1545, 1557 n. 15 (8th Cir. 1996)). "The point is that prison officials may, quite reasonably, exercise their discretion differently based upon different institutional circumstances." *Id.*

But see *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (3rd Cir. 2005) ("[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

⁸ U.S. Const. amend. I.

basic individual rights against the realities of prison life, including safety concerns. A prisoner “retains those First Amendment Rights that are not inconsistent with his status as a prisoner,”⁹ including the “directive that no law shall prohibit the free exercise of religion.”¹⁰

A. The Free Exercise Clause

In reviewing governmental actions that may impinge on prisoners’ free exercise of religion, the courts use a “rational basis” test. Under this test, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹¹ The courts use the four so-called “Turner factors” to determine whether a challenged prison regulation satisfies this test:

First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, and the governmental objective itself must be a legitimate and neutral one. A second consideration is whether alternative means of exercising the right on which the regulation impinges remains open to prison inmates. A third consideration is the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources. Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.¹²

In 1990, the Supreme Court held in *Employment Division, Dept. of Human Resources of Oregon v. Smith* that the Free Exercise Clause does not prohibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct.¹³

B. The Establishment Clause

The Establishment Clause is a restriction on government that prevents, among other things, the founding of a national religion and the endorsement of any one religion over another.¹⁴ Recently, for example, the Eighth Circuit upheld a district court opinion that certain activities of a faith-based prison program violated the Establishment Clause,¹⁵ stating that “in administering aid, a government may not define recipients by reference to religion.”¹⁶ Notably, the Religious Land Use and Institutionalized Persons Act (RLUIPA)¹⁷ survived an

⁹ *Pell*, 417 U.S. at 822.

¹⁰ *O’Lone*, 482 U.S. at 348.

¹¹ *Turner v. Safely*, 482 U.S. 78, 89 (1987).

¹² *Jesus Christ Prison Ministry v. California Dept. of Corr.*, 456 F. Supp. 2d 1188, 1200 (E.D. Cal. 2006); citing *Turner*, 482 U.S. at 89–91.

¹³ *Employment Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990).

¹⁴ *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

¹⁵ The court, however, reversed in part the district court’s decision requiring defendants to repay the money they had received under the program. The defendants were only required to repay any funds received after June 2, 2006, the date on which the district court declared the funded InnerChange program unconstitutional. *Americans United Against Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426–28 (8th Cir. 2007).

¹⁶ *Id.* at 425.

¹⁷ Religious Land Use and Institutionalized Persons Act, Pub. L. 106-274, 114 Stat. 804 (codified at 42 U.S.C. 2000cc (2000)).

Establishment Clause challenge in 2005, when the Supreme Court found the statute to be a permissible tool for accommodation.¹⁸

II. Civil Rights of Institutionalized Persons Act of 1980

The Civil Rights of Institutionalized Persons Act (CRIPA) provides a mechanism for the Attorney General to initiate litigation against states or their agents, seeking equitable relief for deprivation of any institutionalized person's rights protected by the Constitution, where such deprivation has caused grievous harm and is part of a pattern or practice of resistance to the full enjoyment of rights.¹⁹ CRIPA also provides a mechanism for the Attorney General to intervene in certain actions on behalf of the United States.²⁰

III. Religious Freedom Restoration Act of 1993

Enacted in 1993 in response to the Supreme Court's decision in *Employment Division v. Smith*,²¹ the Religious Freedom Restoration Act of 1993 (RFRA)²² "established a single strict scrutiny standard for evaluating the validity of any law or regulation that substantially burdens religious exercise."²³ Less than four years after its enactment, the Supreme Court struck down the law as it applied to the states. In *City of Boerne v. Flores*, the Court ruled that, although Congress may enforce constitutional rights under Section 5 of the Fourteenth Amendment, RFRA exceeded Congress's Enforcement Clause authority, going beyond prevention or remediation and attempting "substantive change in constitutional protections."²⁴

RFRA's provisions remain available to federal prisoners, who are not covered by RLUIPA. In *Gonzales v. O Centro Espirita Beneficente Unias Do Vegetal*, the Supreme Court applied RFRA to actions of the federal government, mooting earlier questions as to its applicability in federal cases.²⁵

IV. Religious Land Use and Institutionalized Persons Act of 2000

RLUIPA establishes a strict scrutiny standard for governmental actions that substantially burden the free exercise of religion by institutionalized persons. Specifically, section 2000cc-1 provides that "[n]o government shall impose a substantial burden on the religious

¹⁸ *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

¹⁹ 42 U.S.C. § 1997 *et seq.* (2000). For the full text of the statute, see appendix A.

²⁰ *Id.* at § 1997(c) (2000).

²¹ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

²² 42 U.S.C. § 2000bb *et seq.* (2000). For the full text of RFRA, see appendix A.

²³ Derek Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 509 (2005).

²⁴ *City of Boerne v. Flores*, 521 US 507, 532 (1997).

²⁵ *Gonzales v. O Centro Espirita Beneficente Unias Do Vegetal*, 126 S. Ct. 1211 (2006).

exercise of a person residing in or confined to [a covered] institution, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person” advances a “compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”²⁶

Congress defined the statute’s scope broadly within the ambit of congressional authority under the Spending and Commerce Clauses. Specifically, this section of RLUIPA applies to any “program or activity that receives Federal financial assistance” or to any “substantial burden [which] affects, or [for which] removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.”²⁷

Institutionalized persons who believe that their rights under RLUIPA have been violated may initiate private civil suits for injunctive relief and damages, utilizing the statute’s strict scrutiny standard to obtain relief that might have been unavailable under the more deferential *Turner* standard.²⁸ The Justice Department is empowered to investigate alleged RLUIPA violations and may bring suits to enforce the statute, obtaining injunctive relief.²⁹ RLUIPA does not create a cause of action against the federal government or its correctional facilities.³⁰ Federal inmates may utilize RFRA for such claims.

Congress passed RLUIPA unanimously in 2000, as an attempt to protect religious liberty from unnecessary government interference in the wake of the Supreme Court’s 1997 decision in *City of Boerne v. Flores*. The bill’s congressional sponsors, however, emphasized their view that courts interpreting RLUIPA should give due deference to the judgment of prison officials, given their expertise and the significant security concerns addressed by prison regulations.³¹

The Supreme Court examined RLUIPA in *Cutter*, and held unanimously that section three of RLUIPA, on its face, qualifies as a permissible accommodation of religion that is not barred by the Establishment Clause.³²

²⁶ 42 U.S.C. § 2000cc-1 (2000). Additional sections of the act set forth requirements for and restrictions on judicial relief, rules of construction, and information on the act’s relation to the Establishment Clause.

²⁷ *Id.*

²⁸ *Freeman v. Tex. Dep’t of Criminal Justice*, 369 F.3d 854, 858 (5th Cir. 2004) (“[T]he RLUIPA standard poses a far greater challenge than does *Turner* to prison regulations that impinge on inmates’ free exercise of religion.”).

²⁹ U.S. Department of Justice, *A Guide to Federal Religious Land Use Protections*, 3 (2000), http://www.usdoj.gov/crt/religdisc/rluiipa_guide.pdf (last visited July 2, 2008).

³⁰ *Yerushalayim v. U.S. Dep’t of Corrections*, 374 F. 3d 89, 92 (2d Cir. 2004) (*per curiam*).

³¹ S. Rep. No. 103-111 at 10 (1993); 146 Cong. Rec. S7775 (daily ed. July 27, 2000).

³² *Cutter*, 544 U.S. at 714.

V. State Religious Freedom Restoration Acts

In the wake of the Supreme Court's holding in *City of Boerne*, that RFRA was unconstitutional to the extent that it is applied to state and local laws, a number of states passed their own religious freedom acts. These include Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas.³³ These state laws are called "state RFRA's," since their provisions frequently mirror those of their federal antecedent. In many cases, the analysis in state RFRA litigation mirrors that employed by RLUIPA. For example, the First District Court of Appeals in Texas stated that "[t]he language of RLUIPA regarding the burdens of proof required to demonstrate a violation is substantially similar to that language in the Texas Religious Freedom Restoration Act (TRFRA), and we thus refer to federal case law construing the RLUIPA burdens of proof for our analysis of TRFRA burdens of proof."³⁴

VI. Prison Litigation Reform Act

Incorporated within CRIPA, the Prison Litigation Reform Act (PLRA) contains a variety of administrative and procedural limitations to prisoners' access to federal courts.³⁵ Intended to reduce frivolous prisoner lawsuits, PLRA has substantially cut the number of prisoner lawsuits,³⁶ subjecting RLUIPA claims to stricter legal standards. As a result, RLUIPA claims are often dismissed without judgment on the merits, and compensation is strictly limited even after advancing a successful lawsuit.³⁷ The latter is due to the fact that PLRA bars inmates from bringing suits "for mental or emotional injury suffered while in custody without a prior showing of physical injury."³⁸

³³ ALA. CONST. art. I § 3.01 (1999); ARIZ. REV. STAT. ANN. § 41-1493.01 (1999); CONN. GEN. STAT. ANN. § 52-571b (1999); FLA. STAT. ANN. § 761.03 (1998); IDAHO CODE § 73-402 (2000); 775 ILL. COMP. STAT. ANN. 35/15 (1998); MO. REV. STAT. § 1.302 (2003); N.M. STAT. ANN. § 28-22-3 (2000); 51 OKLA. STAT. § 251-258 (2000); R.I. GEN. LAWS § 42-80.1 (1998); S.C. CODE ANN. § 1-32-10 (1999); 5 TEX. CIV. PRAC. & REM. CODE ANN. § 110.0009(b) (1999).

³⁴ *Balawajder v. Texas Dep't of Criminal Justice Inst'l Div.*, 217 S.W.3d 20, 26 (Tex. 2006).

³⁵ 42 U.S.C. § 1997e (2000). PLRA is part of CRIPA; see appendix A.

³⁶ Prisoner lawsuits decreased 39 percent in the years following the passage of PLRA. See Eugene Novikov Testimony, *Stacking the Deck: Futility and the Exhaustion Provision of the Prisoner Litigation Reform Act*, 156 U. PA. L. REV. 817, 817 (2008) (citing John Scalia, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000*, Bureau of Justice Statistics: Special Report (Bureau of Justice Statistics, U.S. Dep't of Justice, Wash. D.C.), Jan. 2002, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>).

³⁷ John Boston, *The Prison Litigation Reform Act*, 40 (Sept. 14, 2004) (unpublished manuscript, available at <http://www.wnyc.net/pb/docs/plra2cir04.pdf> (last visited July 9, 2008); see also *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1152-1153 (2008).

³⁸ 42 U.S.C. § 1997e(e) (2000).

Overview of Chapters

Chapter two provides background on the religious composition of the prison population; the numbers, types, and nature of inmates' religious needs and grievances in each of the three types of correctional institutions (federal and state prisons, and county jails); and inmate religious grievances reported to the Commission itself. The perspectives of advocacy groups and prison officials also are discussed.

Chapter three evaluates components of DOJ that are responsible for enforcing the applicable federal laws. These include two units within the agency's Civil Rights Division—the Special Litigation Section and the Coordination and Review Section. Other DOJ components that the Commission studied include the Bureau of Prisons, which maintains federal correctional institutions, and the Office of Justice Programs, which must ensure that its funding recipients—for example, state departments of corrections—comply with nondiscrimination laws.

Chapter four offers an examination of trends in RLUIPA cases since the law's passage through 2006, indicating the frequency and characteristics of the cases and identifying recognizable trends in judicial approach and outcome.

Chapter five presents the Commission's findings and recommendations regarding prison accommodation of inmates' religious practices and efforts to prevent religious discrimination against prisoners.

CHAPTER 2: PRISONERS' FREE EXERCISE CLAIMS

The Commission issued interrogatories to 20 correctional institutions to gather information on alleged and actual religious discrimination against incarcerated persons. These institutions included nine federal prisons under the jurisdiction of the Bureau of Prisons (BOP),¹ nine prisons governed by state departments of corrections,² and two county jails under the authority of a sheriff's office.³ The Commission also issued interrogatories to 12 nonprofit organizations—eight advocacy groups and four faith-based organizations.⁴ Appendix B describes the Commission's methodology for selecting these entities. This chapter draws on responses the Commission received to its interrogatories, witness' statements from its February 8, 2008 briefing on "Religious Discrimination and Prisoners' Rights," and other sources. It focuses on inmate grievances alleging religious discrimination reported by correctional institutions and prisoner advocacy groups. These reports do not constitute

¹ The nine federal prisons are 1) Federal Correctional Institution Danbury, Danbury Connecticut (hereinafter FCI Danbury); 2) Federal Correctional Institution La Tuna, Anthony, Texas (hereinafter FCI La Tuna); 3) Federal Correctional Institution Schuylkill, Minersville, Pennsylvania (hereinafter FCI Schuylkill); (4) Northeast Ohio Correctional Center, Youngstown, Ohio (hereinafter Northeast Ohio CC); 5) United States Penitentiary Lewisburg, Lewisburg, Pennsylvania (hereinafter USP Lewisburg); 6) United States Penitentiary Lompoc, Lompoc, California (hereinafter USP Lompoc); 7) United States Penitentiary Marion, Marion, Illinois (hereinafter USP Marion); 8) United States Penitentiary Florence Administrative Maximum, Florence, Colorado (hereinafter USP Florence ADMAX); and 9) United States Penitentiary Terre Haute, Terre Haute, Indiana (hereinafter USP Terre Haute).

² The nine state prisons are 1) California Department of Corrections and Rehabilitation, California State Prison Solano, Vacaville, California (hereinafter Solano); 2) California Department of Corrections and Rehabilitation, California Correctional Institution, Tehachapi, California (hereinafter Tehachapi); 3) Delaware Department of Correction, Delores J. Baylor Women's Correctional Institution, New Castle, Delaware (hereinafter Delores J. Baylor); 4) Florida Department of Corrections, Union Correctional Institution, Raiford, Florida (hereinafter Union); 5) Florida Department of Corrections, Wakulla Correctional Institution, Crawfordville, Florida (hereinafter Wakulla); 6) Maine Department of Corrections, Maine State Prison, Warren, Maine (hereinafter Maine); 7) New Mexico Corrections Department, Lea County Correctional Facility, Hobbs, New Mexico (hereinafter Lea County); 8) New York State Department of Corrections, Fishkill Correctional Facility, Beacon, New York (hereinafter Fishkill); and 9) Texas Department of Criminal Justice, Stiles Unit, Beaumont, Texas (hereinafter Stiles Unit).

³ The two local jails are 1) Harris County Jail, Houston, Texas (hereinafter Harris County) and 2) Men's Central Jail, Los Angeles, California (hereinafter Los Angeles County).

⁴ The eight advocacy groups are 1) American Friends Service Committee (hereinafter AFSC); 2) Americans United for the Separation of Church and State (hereinafter Americans United); 3) Muslim Public Affairs Committee (hereinafter MPAC); 4) Pacific Justice Institute (hereinafter PJI); 5) Prison Legal News (hereinafter PLN); 6) Sikh American Legal Defense and Education Fund (hereinafter SALDEF); 7) The National Prison Project of the American Civil Liberties Union (hereinafter ACLU); and 8) The Becket Fund for Religious Liberty (hereinafter the Becket Fund). The four faith-based organizations are 1) Alpha for Prisons and Re-Entry (hereinafter ALPHA); 2) The Aleph Institute (hereinafter Aleph); 3) Muslim Chaplain Association (hereinafter MCA); and 4) InnerChange Freedom Initiative (hereinafter InnerChange).

conclusive proof of actual discrimination and should not be read as such. Instead, they provide a rough indicator of the possible magnitude of any problem that might exist. The Commission makes no claims that any of the quantitative or qualitative information provided by correctional facilities and nonprofit organizations is (or is not) meritorious or that any statement of fact is (or is not) accurate, only that it is what was reported.

This chapter consists of five sections: 1) a comparison of the distribution of religious affiliations among adults 18 years of age and older in noninstitutional settings with inmates in federal, state, and county correctional institutions; 2) a survey review of some correctional institution efforts to meet inmates' religious and spiritual needs; 3) an examination of the number of reported religious grievances filed as a percentage of all inmate grievances filed in the institutions surveyed and those reported directly to the Commission; 4) an examination of the nature of the reported grievances and views of advocacy groups and prison officials on religious accommodation; and 5) an examination of the Prison Litigation Reform Act's impact on the number of religious discrimination claims filed by inmates.

Religious Diversity of Incarcerated Persons

A recent survey, published by the Pew Forum on Religion and Public Life on the religious preferences of adults 18 years of age and older, confirmed the great diversity of religious affiliation in the United States.⁵ Table 2.1 shows the Pew survey data modified to reflect the classification scheme of religious traditions the Commission specially developed for this report (see appendix D).⁶ As the first column of table 2.1 demonstrates, a majority of respondents—some 78.4 percent—identified themselves as “Christian,” a category that embodies diverse Christian faiths. The other categories, including Muslim, Jewish, Native American, Buddhist, Hindu, Pagan, Unitarian, and Other, together make up about five percent. Atheists and agnostics represent four percent of the Pew national sample. Those who are unaffiliated, did not know or refused to report their religion constitute 12.9 percent of the sample.

⁵ The Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey—Religious Affiliation: Diverse and Dynamic* 10, 12 (February 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> [hereinafter Pew Survey] (last visited Sept. 19, 2008).

⁶ The actual categories listed in the Pew study are Christian (Protestant includes evangelical, mainline, historically Black churches), Catholic, Mormon, Jehovah's Witness, Orthodox, Other Christian; Other Religious (Jewish, Buddhist, Muslim, Hindu, Other World Religious, Other Faiths), unaffiliated, and Don't know/Refused. The Pew Survey, p. 10.

Table 2.1

Comparison of Religious Affiliations of United States Adult Population to Inmates in Federal Prisons, 2007

U.S. Adults, Age 18 and Older (not including institutionalized persons)		Inmates in All Federal Prisons	
Religion	Percent	Religion	Percent
Christian	78.4	Christian	66.2
Muslim	0.6	Muslim	9.3
Jewish	1.7	Jewish	1.9
Native Americans	0.1	Native Americans	3.8
Buddhist	0.7	Buddhist	1.0
Hindu	0.4	Hindu	0.1
Pagan	0.4	Pagan	1.4
Unitarians	0.3		
		Afro-Caribbean	2.8
		Sikh	~0.03
		Baha'i	~0.01
Other	0.5	Other	4.6
Atheist and Agnostic	4.0	Atheist	0.1
Unaffiliated or unknown	12.9	No preference or unknown	8.8
Total	100.0	Total	100.0

Note: Since Congress passed the Major Crimes Act in 1885 (18 U.S.C. § 1153), the federal government, rather than tribes, prosecutes murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. The percentage of Native Americans in federal prison is thus higher than it would be if their crimes were prosecuted in state or tribal court.

Sources: Compiled by the U.S. Commission on Civil Rights, regrouping religious categories from The Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey: Religious Affiliation: Diverse and Dynamic*, (February 2008), pp. 10, 12; E-mail from Chaplain Joe Pryor, Chaplaincy Administrator, Federal Bureau of Prisons, U.S. Department of Justice, to Dr. Robert Lerner, Assistant Staff Director for the Office of Civil Rights Evaluation, U.S. Commission on Civil Rights (July 16, 2008, 10:56 a.m. EDT) attachment: "Federal Bureau of Prisons, Inmate Religious Preference and Religious Program Participation" (on file with the Commission). Also see U.S. Department of Justice, Federal Bureau of Prisons, 2007 Annual Report of Religious Services, no date, p. 2, chart 2. Note that a more recent and comprehensive Pew Forum report contains the same figures as the February 2008 one. See the Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey—Religious Beliefs and Practices: Diverse and Politically Relevant*, June 2008, p. 110.

Caption: Among adults in the U.S. population aged 18 years and older, 78.4 professed to be members of some Christian faith. Among inmates in federal prisons, 66.2 percent professed to be members of some Christian faith. The proportions professing membership in other faiths are higher among inmates than in the U.S. adult population.

How do the patterns of religious distributions in the correctional facilities⁷ compare with those in the adult population of the United States as a whole? The second column of table 2.1 shows the religious preferences of inmates throughout the federal prison system based on summary data provided by BOP.⁸ Once again, members of the diverse denominations constituting the "Christian" group are represented in greater numbers than inmates of other

⁷ Table 2.1 presents the religious affiliations of adults in the U.S. population aged 18 and older and of inmates in all federal prisons.

⁸ See appendix D, *infra* (listing the religious categories the Bureau of Prisons used to report inmates' affiliations).

faiths, accounting for 66.2 percent of the federal prisoners represented. Notably, this figure is lower than the 78.4 percent who identified as Christian in the U.S. adult population. In addition, the proportion of those professing non-Christian faiths in prison was higher than those professing non-Christian faiths in the general population. For example, 9.3 percent of inmates who are Muslims compared with 0.6 percent of adults aged 18 and over nationally; Native Americans make up 3.8 percent of inmates, but only 0.1 percent of adults aged 18 and over nationally; and Pagans constitute 1.4 percent of inmates, but only 0.4 percent of adults aged 18 and over nationally. Those who are atheist, agnostic, unaffiliated, or who did not identify a religion comprise smaller portions of the prison population than such groups represent in the nation's adult population overall.

What of the distribution of religions in state prisons?⁹ Table 2.2 reveals that Christians are proportionately the largest religious group represented in the state prisons shown.¹⁰ The percentages of state inmates professing non-Christian faiths again tend to be higher than those among adults 18 years and older, and in some state facilities, are considerably higher. For example, 20.6 percent of the Fishkill Correctional Facility's inmates professing a faith said they were Muslims; and at the Maine State Prison, the Native American inmates and the Pagan inmates each account for 10 percent of inmates professing a religion.

In conclusion, data from federal and state prisons suggest that the percentage of those professing non-Christian faiths is higher in prisons than in the non-incarcerated adult population overall. However, the majority of those professing a religion in both populations identified themselves as Christians.

⁹ The two county jails included in this study do not track prisoners' religious affiliations.

¹⁰ States varied in terms of the religious categorization they used to report inmate religious affiliations. Some used fewer than a dozen categories, while others used more than 50. The number of religions reported by each state prison is as follows: Maine, eight; Fishkill and Lea County, nine each; Delores Baylor, 10; Stiles Unit, 58; Union, 53; and Wakulla, 52. See appendix B, table B.5.

Table 2.2
Religious Affiliation of Inmates Professing a Religion in State Prisons, 2007

	Stiles Unit	Lea County Correctional Facility	Maine State Prison	Fishkill Correctional Facility	Union Correctional Institution	Wakulla Correctional Institution
Religion	Percent Professing to Be					
Afro-Caribbean	0.0	0.0	0.0	4.0	0.5	0.1
Baha'i	0.0	0.0	0.0	0.0	0.0	0.1
Buddhist	1.8	0.0	5.0	1.0	0.8	0.3
Christian	76.7	93.4	67.0	68.1	70.8	86.5
Hindu	0.1	0.0	0.0	0.0	0.2	0.1
Jewish	2.2	0.0	3.0	4.8	10.8	2.7
Muslim	10.3	0.0	5.0	20.6	5.0	4.1
Native American	2.5	6.3	10.0	0.0	1.3	0.4
Pagan	1.6	0.3	10.0	1.0	0.8	2.4
Sikh	0.0	0.0	0.0	0.5	0.0	0.0
Taoist	0.0	0.0	0.0	0.0	0.1	0.0
Atheist/Agnostic	0.2	0.0	0.0	0.0	0.2	0.1
Other	0.3	0.0	0.0	0.0	0.2	0.3
Unknown	4.4	0.0	0.0	0.0	9.4	2.9
Not reported	0.0	0.0	0.0	0.0	0.0	0.1
Total*	100.1	100.0	100.0	100.1	100.0	100.1

Note: Although the Commission solicited data on the religious affiliations of inmates from nine state correctional institutions, it received such information from only seven. Of the responses received, six contained sufficient data to be analyzed. The two complexes in California—Solano and Tehachapi—did not provide data. The categories of religions states reported varied, but are presented here according to the Commission's classification scheme. See appendix D, table D.1. * Figures do not add to 100 percent due to rounding.

Sources: Stiles Unit, Supplemental Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10 and attachment titled, "Texas Department of Criminal Justice, Stiles Unit Religious Percentages," June 27, 2008; Lea County Correctional Facility, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10, March 31, 2008; Maine State Prison, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10, March 21, 2008; Fishkill Correctional Institution, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10, March 28, 2008; Union Correctional Institution, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10 and attachment titled, "Frequency of Religious Preference in Descending Order," July 8, 2008; Wakulla Correctional Institution, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10 and attachment titled, "Frequency of Religious Preferences in Descending Order," July 8, 2008.

Caption: Inmates professing to be Christian are proportionately the largest group for all the state prisons. The percentages of state inmates professing non-Christian faiths tend to be higher than those among adults 18 years and older, and in some state facilities considerably higher.

Meeting the Religious Needs of Incarcerated Persons

This section focuses on how correctional facilities utilize prison chaplaincies, faith-based organizations, and religious contractors and volunteers to meet inmates' spiritual needs and satisfy the requirements of the free exercise clause.

Chaplains, Religious Volunteers, and Faith-Based Organizations

In general, chaplains provide pastoral care and counseling to all inmates, regardless of the inmate's faith. They are responsible for managing religious programming and services, dietary programs and staff training on the religious rights of inmates. They also provide assistance to inmates requesting access to representatives of their own religions. In 2007, the Federal Bureau of Prisons employed 251 chaplains.¹¹ Of these, 73.9 percent were Protestant, 17.4 percent were Catholic, 0.8 percent were Orthodox Christian, and the remaining 7.9 percent were from non-Christian religions—Buddhism (0.4 percent), Judaism (2.1 percent), and Islam (5.4 percent).¹² Each of the federal prisons surveyed had a minimum of two full-time chaplains and some had up to four.¹³

The BOP utilizes contract religious leaders for faith groups who have no chaplain representative qualified to perform as clergy for the group.¹⁴ It relies heavily on such religious contractors and volunteers to meet the religious and spiritual needs of federal inmates professing non-Christian faiths or membership in smaller Christian denominations. The interrogatory responses returned by the federal prisons surveyed by the Commission confirm this practice, with the prisons engaging anywhere from 27 to 150 volunteers per facility.¹⁵ Two of the federal prisons surveyed—USP Lewisburg and FPI/FPC Schuylkill—

¹¹ U.S. Department of Justice, Bureau of Prisons, *2007 Annual Report of Religious Services*, 3, chart 3.

¹² *Id.*

¹³ Federal Correctional Institution Danbury (FCI Danbury), Response to U.S. Commission on Civil Rights' (USCCR) Interrogatories, Response to Interrogatory Request 7, June 6, 2008; Federal Correctional Institution La Tuna (FCI La Tuna), Response to USCCR Interrogatories, Response to Interrogatory Request 7, Aug. 8, 2008; Federal Correctional Institution Schuylkill (FCI Schuylkill), Response to USCCR Interrogatories, Response to Interrogatory Request 7, June 6, 2008; Northeast Ohio Correctional Center, Response to USCCR Interrogatories, Response to Interrogatory Request 7, June 6, 2008; United States Penitentiary Lewisburg (USP Lewisburg), Response to USCCR Interrogatories, Response to Interrogatory Request 7, June 6, 2008; United States Penitentiary Lompoc (USP Lompoc), Response to USCCR Interrogatories, Response to Interrogatory Request 7, June 6, 2008; United States Penitentiary Marion (USP Marion), Response to USCCR Interrogatories, Response to Interrogatory Request 7, June 6, 2008; United States Penitentiary Florence Administrative Maximum (USP Florence ADMAX), Response to USCCR Interrogatories, Response to Interrogatory Request 7, July 29, 2008; United States Penitentiary Terre Haute (USP Terre Haute), Response to USCCR Interrogatories, Response to Interrogatory Request 7, July 17, 2008.

¹⁴ US DOJ, Federal Bureau of Prisons, Florence, Colorado Federal Correctional Complex, Program Statement Supplement 5360.09A, *Religious Beliefs and Practices*, (Feb. 12, 2008) Section 11(D) at 6.

¹⁵ FCI Danbury, Response to USCCR Interrogatories, Response to Interrogatory Request 8; Interrogatories, FCI La Tuna, Response to USCCR Interrogatories, Response to Interrogatory Request 8; FCI Schuylkill, Response to USCCR Interrogatories, Response to Interrogatory Request 8; Northeast Ohio Correctional Center, Response to USCCR Interrogatories, Response to Interrogatory Request 8; USP Lewisburg, Response to USCCR Interrogatories, Response to Interrogatory Request 8; USP Lompoc, Response to USCCR Interrogatories,

expressed a general difficulty in locating chaplains, volunteers, and contractors of non-Christian faiths, particularly Islam, despite their best efforts.¹⁶

All of the state prisons surveyed engage the services of at least one full-time chaplain; in two cases (Wakulla and Maine), the prisons employ one part-time chaplain in addition to their full-time chaplain. Two prisons—Tehachapi and Solano—have five full-time chaplains who are affiliated with each of the major faith traditions represented in those prisons: Islam, Catholicism, Judaism, Protestantism, and Native American. At Fishkill, the prison employs three full-time and six part-time chaplains.¹⁷

The state prisons' interrogatory responses reveal that these facilities draw even more heavily than federal prisons on the service of religious volunteers,¹⁸ which include faith-based organizations and ministers of various faiths, among others. The facility with the least number of inmates—Maine—engages the services of over 100 volunteers. Wakulla prison in Florida, a “faith and character-based” complex, had some 795 volunteers over the course of one twelve-month period. Union, another Florida prison, which has a single faith-based dormitory,¹⁹ had 228 volunteers during the same period.

Volunteers at state prisons typically minister to inmates of non-Christian religions, as they typically do in federal prisons. In many cases, these religious volunteers perform functions

Response to Interrogatory Request 8; USP Marion, Response to USCCR Interrogatories, Response to Interrogatory Request 8; USP Florence ADMAX, Response to USCCR Interrogatories, Response to Interrogatory Request 8; USP Terre Haute, Response to USCCR Interrogatories, Response to Interrogatory Request 8. La Tuna had 27 volunteers and Danbury had 150 volunteers. All of the interrogatories listed the religions represented by their volunteers.

¹⁶ USP Lewisburg, Response to USCCR Interrogatories, Response to Interrogatory Requests 7–8; FCI Schuylkill, Response to USCCR Interrogatories, Response to Interrogatory Requests 7–8.

¹⁷ Fishkill Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 8, Mar. 28, 2008.

¹⁸ Wakulla had 795 volunteers, Union—228, Maine—100+, Baylor—241, Fishkill—120, Stiles—265, Lea—216, Solano—120 and Tehachapi—34 to 200 volunteers). See Fishkill Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 8; Delores J. Baylor Women's Correctional Institution, Response to USCCR Interrogatories, Response to Interrogatory Request 8, Apr. 9, 2008; Stiles Unit, Response to USCCR Interrogatories, Response to Interrogatory Request 8, Apr. 22, 2008; California Correctional Institution—Tehachapi (CCI—Tehachapi), Response to USCCR Interrogatories, Response to Interrogatory Request 8, May 21, 2008; Lea County Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 8, Mar. 31, 2008; Maine State Prison, Response to USCCR Interrogatories, Response to Interrogatory Request 8, Mar. 21, 2008; California State Prison—Solano, Response to USCCR Interrogatories, Response to Interrogatory Request 8, May 21, 2008; Union Correctional Institution, Response to USCCR Interrogatories, Response to Interrogatory Request 8, July 8, 2008; Wakulla Correctional Institution, Response to USCCR Interrogatories, Response to Interrogatory Request 8, July 8, 2008.

¹⁹ The Commission included Wakulla, a faith-based prison complex, in its sample to increase the variety of correctional institutions it studied. Union is not a faith-based complex, but does have a faith-based/Self-Improvement Dorm that is part of the larger institution. Only 96 of its 1,965 inmates (or about 5 percent), reside in this dorm. See Florida Department of Corrections, Faith-Based/Self-Improvement Dorms (FB/SIDs), pp. 1–2 <http://www.dc.state.fl.us/oth/faith/dorms.html> (last visited Sept. 15, 2008); see also appendix B for information on the individual prisons.

similar to chaplains.²⁰ The Fishkill facility reports that chaplains from the New York State Department of Correction Services may request faith-based organizations to assist with worship and prayer services, religious education classes, study groups, holy day observances, religious counseling, retreats, and/or other observances that respond to the particular mandates of the respective faith communities within the prison.²¹ This is generally true of the other institutions surveyed as well. With respect to the frequency of religious services offered, the Stiles Unit, for example, reported that it schedules weekly religious services for the “major” religious groups and weekly study times for “smaller” ones.²² Individual inmates may request religious services via an inmate request, which prison authorities (typically the chaplain), consider on a case-by-case basis.²³

Magnitude of Prisoners’ Religious Grievances

The following section discusses the magnitude and nature of inmates’ religious grievances as a subset of all inmate grievances filed. It also considers the perspective of prisoner advocacy and faith-based organizations on the nature of the free exercise problems that arise in the prison context.

To assess the magnitude of inmates’ religious grievances in relation to all grievances filed, the Commission examined data from multiple sources, including information provided by eight federal prisons, seven state prisons, and one county jail that responded to specific requests for this information from the Commission. It further reviewed complaints sent by inmates to its headquarters and regional offices. The data reviewed show that the extent of religious grievances is actually quite small when compared with the overall number of grievances filed in the prisons, with a substantial majority of religious grievances reported falling below four percent.

Religious Grievances Filed in Federal Prisons

The BOP provided longitudinal data²⁴ on grievances that inmates filed seeking administrative remedy²⁵ for eight federal prisons for 11 years, from fiscal years 1997 through 2007. The prisons for which data were provided are USP Florence ADMAX; FCI La Tuna;

²⁰ Fishkill Correctional Facility Response, Response to USCCR Interrogatories, Response to Interrogatory Request 8.

²¹ E-mail from Kristin Woodward, Secretary to Superintendent William J. Connolly, the Fishkill Correctional Facility, to Sock-Foon MacDougall, Social Scientist, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights (Apr. 11, 2008, 11:39 a.m. EDT) (on file with the commission).

²² Stiles Unit Response, Response to USCCR Interrogatories, Response to Interrogatory Requests 7–8.

²³ *Id.*

²⁴ In its interrogatories, the Commission requested correctional institutions to provide religious grievance data for fiscal years 1997–2007, or *for as many years as possible* in full recognition that some might not be able to readily locate historic data even though long established.

²⁵ U.S. Department of Justice, Federal Bureau of Prisons (BOP), Supplemental Response to USCCR Interrogatories, Response to Interrogatory Request 17, July 7, 2008.

USP Marion; USP Lewisburg; FCI Schuylkill; USP Terre Haute; USP Lompoc; and FCI Danbury.²⁶ Table 2.3 shows the numbers of years in which religious grievances constitute a specified proportion of all grievances filed for each federal prison and across the eight prisons when combined as a group. Table 2.3 shows that with regard to the grouped federal prisons, 63.6 percent²⁷ of the total number of years evidence religious grievances below three percent of all grievances filed, and 81.8 percent²⁸ below four percent. When each of the prisons is taken individually by fiscal year, religious grievances constitute a small proportion of all grievances filed for the majority of the prisons. Figure 2.1 also demonstrates that the proportion of religious grievances in relation to all grievances filed fluctuates within a very narrow range.²⁹

Table 2.3
Distribution of Religious Grievances as a Percentage of All Grievances Filed, Federal Prisons, Fiscal Years 1997–2007

Federal Prison	Number of Fiscal Years in Which Religious Grievances Filed are Between							Total number of years
	0.0–0.9%	1.0–1.9%	2.0–2.9%	3.0–3.9%	4.0–4.9%	5.0–5.9%	6.0–11.2%	
USP Florence ADMAX Facility	0	2	4	3	2	0	0	11
FCI La Tuna	1	4	2	2	1	0	1	11
USP Marion	0	1	5	2	0	1	2	11
USP Lewisburg	1	3	3	2	0	1	1	11
FCI Schuylkill	3	4	1	1	1	1	0	11
USP Terre Haute	2	1	4	2	0	2	0	11
USP Lompoc	4	2	4	0	0	0	1	11
FCI Danbury	1	4	0	4	1	0	1	11
Combined federal prisons	12	21	23	16	5	5	6	88

Note: With respect to the Northeast Correctional Institution (a privately managed prison of Corrections Corporation of America), BOP's electronic database did not find general grievance cases from fiscal years 1997 to 2007. It found two religious grievance cases, both filed in 2007. The appropriate percentage cannot be computed in the absence of the general grievance data accounting for its omission from table 2.3 above.

Sources: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008; U.S. Department of Justice, Federal Bureau of Prisons, Supplemental Response to U.S. Commission on Civil Rights' Interrogatories, Supplemental Response to Interrogatory Request 17, July 7, 2008.

Caption: When the prisons are taken as a group, the proportion of religious grievances in relation to all grievances filed is small, with a substantial majority less than four percent.

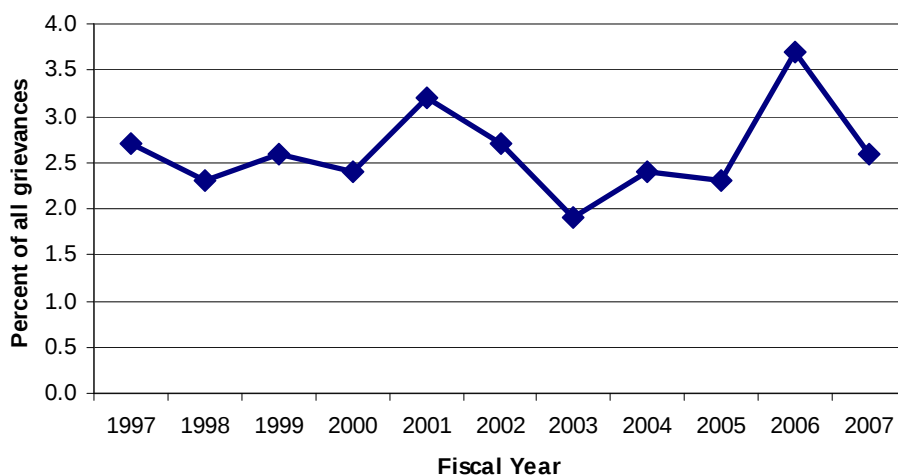
²⁶ Data were not available for the Northeast Ohio Correctional Center, which is privately managed by the Corrections Corporation of America.

²⁷ Sum of (12, 21, and 23) divided by 88.

²⁸ Sum of (12, 21, 23, and 16) divided by 88.

²⁹ The total number of grievances and religious grievances filed are in tables C.1a through C.1i in appendix C.

Figure 2.1
Religious Grievances as a Percentage of All Grievances Filed, Combined Federal Prisons,
Fiscal Years 1997–2007



Note: For the USP Florence ADMAX Facility, it ranged from 1.3 to 4.5 percent; for FCI La Tuna, from 0.0 to 11.2 percent; for USP Marion, from 1.4 to 8.7 percent; for USP Lewisburg, from 0.3 to 6.4 percent; for FCI Schuylkill, from 0.0 to 5.6 percent; for USP Terre Haute, from 0.7 to 5.9 percent; for the USP Lompoc, from 0.4 to 2.9 percent; for the FCI Danbury, from 0.9 to 7.0 percent during the same years—fiscal years 1997 through 2007.

Sources: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008; U.S. Department of Justice, Federal Bureau of Prisons, Supplemental Response to U.S. Commission on Civil Rights' Interrogatories, Supplemental Response to Interrogatory Request 17, July 7, 2008.

Caption: For the federal prisons as a group, the proportion of religious grievances in relation to all grievances filed ranged from 1.9 percent to 3.7 percent between fiscal years 1997 and 2007.

Religious Grievances Filed in State Prisons

Data regarding the numbers and percentages of religious grievances by available fiscal years in state prisons are found in appendix C. Unlike the data submitted by the BOP, which include information by fiscal year for each federal prison, data submitted by most of state prisons covered fewer and varied fiscal years. Most of the state prisons responding to the Commission's interrogatories were only able to provide grievance data for less than five fiscal years. Furthermore, some state prisons track only religious grievances seeking formal resolution, rather than also counting informal grievances; others report both, though some chronicle them separately and others together. Thus, the data reported by individual state prisons cover shorter time periods and are not always comparable to one another or to the federal prisons represented in table 2.3 and figure 2.1.

Religious grievances filed by state prisons are reported in appendix C.³⁰ Examination of the longitudinal data from seven state prisons³¹ shows that for each, the percentage of religious

³⁰ See *infra* appendix C, tables C.2a–C.2g.

³¹ Only seven of the nine state prisons selected for study were able to provide such data.

grievances in relation to all grievances filed (whether formal or informal),³² is small—almost all below three percent.³³ The trends exhibited generally fluctuate within a narrow range.

Religious Grievances Filed in County Jails

The Commission next examined the pattern of religious grievances in relation to all grievances filed in county jails. Of the two county jails included in the study, only the Los Angeles County Jail tracks religious grievances filed by inmates, specifically those seeking informal resolution. The proportion of religious grievances to the total number of grievances filed is again small, ranging from 0.4 percent in FY 2004 to 0.8 percent in FY 2007.³⁴

Religious Complaints Filed with the U.S. Commission on Civil Rights

The Commission's headquarters and regional offices collectively receive approximately 3,000 complaints each year from individuals alleging violation of their civil rights, a majority of whom are inmates. While the Commission has the authority to investigate complaints, it does not have enforcement authority. As a result, it typically handles complaints by referring complainants to the appropriate federal agency with responsibility for enforcement. The Commission forwards complaints from inmates alleging religious discrimination to the Special Litigation Section (SPL) or the Coordination and Review Section (COR) in the U.S. Department of Justice's Civil Rights Division. Between 2005 and 2007, the Commission received 80 complaints from inmates alleging religious discrimination—11 in 2005, 48 in 2006, and 21 in 2007. For each of those three years, the proportion of complaints alleging religious discrimination to all complaints was small—0.4 percent, 0.7 percent, and 1.6 percent, respectively.³⁵

Thus, religious grievance data from federal, state, and county prisons, along with Commission complaint data, show that religious grievances make up a very small proportion of grievances or complaints filed overall.

³² Informal grievance procedures are typical in most prisons. Usually, the process will require the prisoner to attempt to resolve his complaint directly with the section of the prison with which he has a problem. Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 Geo. J. on Poverty L. & Pol'y 249, 261 n. 67 (2004). The purpose of the informal process "is to attempt to resolve the complaint with the least expenditure of time and effort." *Id.* If the informal process does not provide a satisfactory result for the prisoner, he can then access the formal system which will usually require the prisoner to submit his grievance in writing to a designated individual in the prison's centralized staff and participate in an internal investigation. *Id.*

³³ See appendix C, tables C.2a–C.2g. Some correctional institutions only track religious grievances seeking informal resolutions, others, formal resolutions, still others track both. One of the two county jails included in the Commission's study does not track such information.

³⁴ See appendix C, table C.3. The total number of grievances and religious grievances filed is also in table C.3.

³⁵ Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Staff Document: "Complaints sent to the Commission on Civil Rights from inmates alleging religious discrimination," July 28, 2008, pp. 1–4 (on file with the commission).

Nature of Religious Grievances

In order to assess the general nature of inmates' free exercise grievances, the Commission drew on data from eight federal prisons and seven state prisons,³⁶ complaints it received from inmates alleging religious discrimination, examples reported during its briefing on "Religious Discrimination and Prisoners' Rights," and information provided by 12 nonprofit organizations. When taken together, this information reveals that there is a great deal of substantive overlap in terms of the types of religious grievances filed in federal and state prisons. Among the most common were grievances related to 1) limitations or prohibitions on religious programming and activities; 2) denial of access to religious items; 3) lack of access to chaplains of one's own faith; 4) grooming and head covering issues; and 5) lack of dietary accommodations.

Nature of Religious Grievances in Federal Prisons

BOP used the following four categories to report the nature of religious grievances filed by inmates in eight federal correctional facilities:³⁷

- access to religious programs except food, diet, or meals
- access to religious diets that are certified or non-flesh alternatives
- religious rituals
- delivery or preparation of religious diets that are certified or non-flesh alternatives

The number of grievance cases within each category by individual prison in a given year is quite small, making meaningful analysis futile. The Commission, therefore, decided to examine the types of religious grievances inmates filed in aggregated form. Data for each category of religious grievance are aggregated across fiscal years 1997–2007 for each of the federal prisons. Table 2.4 shows the result of the aggregation. Tables C.1b–C.1i in appendix C present detailed information on religious grievances filed by individual fiscal years.

³⁶ The two county jails included in the study do not track such information.

³⁷ Chaplain Joseph Pryor provided the Commission with a description of what types of complaints each category includes in a telephone conversation with Dr. Robert Lerner, USCCR, on Sept. 11, 2008.

Table 2.4
Nature of Religious Grievances in Federal Prisons, Fiscal Years 1997–2007 (aggregated)

Federal Prison	Access to religious program	Access to religious diet	Religious rituals	Delivery or Preparation of Religious Diet	Total
USP Florence ADMAX Facility					
Number of religious grievances	147	12	0	134	293
Percent granted	4.1	8.3	0.0	6.0	5.1%
Percent of total religious grievances	50.2	4.1	0.0	45.7	100.0%
FCI La Tuna					
Number of religious grievances	47	12	0	13	72
Percent granted	2.1	0.0	0.0	0.0	1.4%
Percent of total religious grievances	65.3	16.7	0.0	18.1	100.0%
USP Marion					
Number of religious grievances	86	21	0	48	155
Percent granted	5.8	0.0	0.0	8.3	5.8%
Percent of total religious grievances	55.5	13.5	0.0	31.0	100.0%
USP Lewisburg					
Number of religious grievances	61	8	0	57	126
Percent granted	9.8	12.5	0.0	10.5	10.3%
Percent of total religious grievances	48.4	6.3	0.0	45.2	100.0%
FCI Schuylkill					
Number of religious grievances	22	6	0	16	44
Percent granted	13.6	0.0	0.0	6.3	9.1%
Percent of total religious grievances	50.0	13.6	0.0	36.4	100.0%
USP Terre Haute					
Number of religious grievances	91	21	0	45	157
Percent granted	3.6	9.5	0.0	6.8	5.4%
Percent of total religious grievances	58.0	13.4	0.0	28.7	100.0%
USP Lompoc					
Number of religious grievances	44	10	0	6	60
Percent granted	11.4	10.0	0.0	33.3	13.3%
Percent of total religious grievances	73.3	16.7	0.0	10.0	100.0%
FCI Danbury					
Number of religious grievances	47	15	0	8	70
Percent granted	14.9	13.3	0.0	12.5	14.3%
Percent of total religious grievances	67.1	21.4	0.0	11.4	99.9%*
Combined federal prisons					
Number of religious grievances	545	105	0	327	977
Percent granted	6.6	6.7	0.0	7.6	7.0%
Percent of total religious grievances	55.5	10.8	0.0	33.6	99.9%*

* Total does not equal 100% due to rounding.

Sources: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008; U.S. Department of Justice, Federal Bureau of Prisons, Supplemental Response to U.S. Commission on Civil Rights' Interrogatories, Supplemental Response to Interrogatory Request 17, July 7, 2008.

Caption: The most frequently filed religious grievances fit into the group “access to religious programs.” For these federal prisons as a group, these make up 55.5 percent of all grievances.

Table 2.4 shows that the most frequently filed religious grievances fall into the category of “access to religious programs,” which is BOP’s most general grouping. According to the BOP, complaints in this area involved denial of access to particular religious programs, including worship services, scriptural study groups, educational programs, and social services classes run by religious service providers (such as parenting or anger management).³⁸ These grievances made up some 55.5 percent of all religious grievances filed across the eight federal prisons taken as a group (see row titled “% of total religious grievances”). Among the individual prisons, the proportion ranges from 48.4 percent of all religious grievances filed (USP Lewisburg) to 73.3 percent of those filed (USP Lompoc).

The second most frequently filed group of grievances are those relating to the “delivery/preparation of religious diet.” Complaints in this category refer to specific techniques of meal preparation that inmates find inadequate such as using utensils that have been improperly mixed with “impure” foods or when a prison does not have sufficient supplies of products or meals necessary for religiously appropriate eating.³⁹ Across the federal prisons combined, 33.6 percent of all religious grievances fell under this category. Among individual prisons, the proportion ranges from a low of 10.0 percent of all religious grievances filed (USP Lompoc) to a high of 45.7 percent of those filed (USP Florence–ADMAX). At USP Florence–ADMAX and USP Lewisburg, grievances fitting into this category and the “access to religious programs” category account for over 90 percent of all the religious grievances filed at those facilities.

The third most frequently filed types of grievances fall into the category of “access to religious diet,” which includes access to certified or non-flesh alternative religious diets. A BOP inmate can request a “common fare” religious diet that is designed to meet the needs of many religious groups simultaneously, such as halal or kosher.⁴⁰ For those for whom this is not satisfactory, a vegetarian alternative is available. Inmate complaints in this category usually stem from disagreement between the inmate and chaplain or prison official as to the accuracy or authenticity of the diet request, or when a prisoner violates his or her dietary restrictions and loses this privilege. Across the federal prisons combined, 10.8 percent of religious grievances fit into this category. By individual prisons, the proportion ranges from 4.1 percent of all religious grievances filed (USP Florence–ADMAX) to 16.7 percent of those filed (USP Lompoc).

In general, grievances defined by BOP as being related to “religious rituals” commonly involve limitations or restrictions on practices that are sacred to the particular religion with which the inmate is affiliated. Examples provided by BOP include, but are not limited to, the

³⁸ “Categorization of Religious Non-Accommodation or Discrimination Complaints at the Federal Bureau of Prisons.” This is a summary of a telephone conversation held between Chaplain Joseph Pryor, Federal Bureau of Prisons and Dr. Robert Lerner, U.S. Commission on Civil Rights on September 11, 2008.

³⁹ *Id.*

⁴⁰ *Id.*

following: for Jewish prisoners, lighting of Sabbath candles; for Protestant and Catholic prisoners, having wine instead of grape juice during Communion; and for various religions, the use of incense.⁴¹ Interestingly, table 2.4 shows that over the 11 fiscal years of BOP data analyzed by the Commission, there has not been a single instance of an inmate filing a grievance related to “religious rituals.”

BOP also provided helpful data regarding the proportion of religious grievances found valid to the number of religious grievances filed⁴² (see intersection of the row titled “% granted” and the column titled “Total”). On average, across the federal prisons combined, only 7.0 percent of religious grievances filed are found valid. If each federal prison is taken individually, this figure ranges from a low of 1.4 percent to a high of 14.3 percent, with half the prisons showing proportions above nine percent (but below 14.3 percent), and half below six percent.

Table 2.4 further shows that the proportion of religious grievances granted by the federal prisons combined varies little when considered by category of religious grievance (see the intersection of the row titled “% granted” and each religious grievance category). For example, the proportion of grievances granted to total religious grievances filed was 6.7 percent in both the “access to religious programs” and “access to religious diet” categories and 7.6 percent in the “delivery/preparation of religious diet” category. The fact that there is such a small variation in the percentages of grievances by category tends to indicate that there is very little likelihood of systemic problems in the way BOP handles any one of these three categories of religious accommodation, at least with respect to the prisons for which the Commission has data.

Nature of Religious Grievances in State Prisons

Table C.4 in appendix C presents the types of religious grievances filed in state correctional institutions. Most of the state prisons surveyed (four of seven) tended to collect grievance data in terms of both “informal” and “formal” grievances. Two state prisons—Maine and California Solano—collected only information regarding formal grievances, and one state prison—Fishkill—did not collect any grievance data at all, formal or informal.

Furthermore, the state prisons surveyed in this study did not utilize the same four categories as BOP with regard to the nature of religious grievances filed. In some cases, the grievance categories they tracked were broader than those tracked by BOP; in others more narrow. Data are aggregated in table C.4 across fiscal years and also across conceptually similar grievances as classified by the Commission for purposes of this study. Tables C.2a–C.2g in appendix C present detailed information on religious grievances according to the actual types recorded by each state prison. Four state correctional institutions provided information on the religions of

⁴¹ *Id.*

⁴² The Commission’s interrogatories did not seek this information from the correctional facilities surveyed because of the concern that grievances initiated in a given fiscal year, whether formal or informal, may not be resolved in that same period. However, the BOP was able to provide these data.

inmates reporting the grievances.⁴³ These data are represented in table C.5 in appendix C. Table C.5 reveals that, at these four state prisons, inmates affiliated with non-Christian religions such as Nature religions (i.e. Wicca), Islam, and Native American beliefs are responsible for the majority of religious grievances filed. At the Lea County Correctional Facility, Native Americans, in particular, are responsible for the majority of religious grievances filed, with 41 informal grievances and 70 formal grievances filed between fiscal years 2005 and 2007. Table C.4 shows that the vast majority of the grievances reported by Native American inmates at Lea County (66 of 70) deal with access to and other issues surrounding sweat lodges.

Inmate Complaints Alleging Religious Discrimination Reported to Commission

Between 2005 and 2007, the Commission received 80 complaints alleging religious discrimination: 73 from inmates incarcerated in state prisons, three from those in federal prisons, and four from those in local jails. A majority of the reported complaints originated in five states: Tennessee (13 percent); Oklahoma (13 percent); New York (11 percent); California (11 percent); and Florida (10 percent). The violations alleged in the complaints dealt primarily with religious grooming and dietary standards; access to religious items and literature; access to, and communication with, religious leaders; denial of the ability to celebrate certain religious holidays and attend services; and retaliation for having filed religious discrimination complaints, including harassment by officers, involuntary transfers to other facilities, and placement in solitary confinement.

Adherents to non-Christian religions accounted for the majority of those reporting problems, as was typical in federal and state facilities. The Commission received its largest percentage of complaints from Muslims, who accounted for 26.3 percent of all complaints made to the Commission. Members of the Asatru/Odinist (Pagan) faith accounted for 17.5 percent of those filing complaints, with members of Native American and Jewish faiths accounting for 10 and 8.8 percent of all complaints, respectively. Notably, the faith groups represented by these complainants overlap significantly with those of inmates in state facilities filing religious grievances.⁴⁴

Views of Nonprofits Regarding Religious Accommodation in Prisons

Unsurprisingly, prisoner advocacy organizations and prison officials view the challenges posed by religious accommodation from different perspectives, with the former generally favoring broad and thorough accommodation of inmates' religious requests and the latter weighing the safety and administrative burdens posed by those requests. The Commission

⁴³ Maine State Prison, Response to USCCR Interrogatories, Response to Interrogatory Request 17; Lea County Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 17; California State Prison–Solano, Response to USCCR Interrogatories, Response to Interrogatory Request 17; CCI–Tehachapi, Response to USCCR Interrogatories, Response to Interrogatory Request 17.

⁴⁴ Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Staff Document: “Complaints sent to the Commission on Civil Rights from inmates alleging religious discrimination,” July 28, 2008, pp. 1–4 (on file with the Commission).

had the opportunity to explore these perspectives during its February 8, 2008 briefing, where it heard from prison officials as well as prisoner advocacy groups and those engaged in ministering to the religious needs of inmates. It also benefited from the interrogatory responses it received from prisoner advocacy organizations and faith-based groups. These groups offered largely anecdotal accounts of alleged denials of prisoners' free exercise rights and, in a few instances, chronicled specific cases where actual findings of discrimination were made.

The examples of inmate grievances reported by the nonprofits in their interrogatory responses and by witnesses at the Commission's briefing typically involved one or more of the following allegations: 1) harassment or disrespect of inmates for subscribing to certain religions;⁴⁵ 2) impeding religious ceremonies and activities;⁴⁶ 3) denial of access to religious items;⁴⁷ 4) constraints on prayer;⁴⁸ 5) lack of access to chaplains of their own faith;⁴⁹ 6)

⁴⁵ See Testimony of Pat Nolan, U.S. Commission on Civil Rights briefing on Religious Discrimination and Prisoners' Rights, Washington, DC, Feb. 8, 2008, transcript (hereinafter cited as USCCR Religious Discrimination transcript) at 79 (offering an eyewitness account of a prison employee harassing a Jewish inmate by denigrating and refusing to accommodate his kosher meal request). See also Written Statement of Patrick McCollum, to the U.S. Commission on Civil Rights, Washington, DC, Feb. 8, 2008, p. 1 (reporting an incident in which a guard allegedly rejected a Wiccan inmate's repeated requests for a pass to attend services and a guard who refused to transport an inmate for chemotherapy treatment unless he removed his approved Wiccan pentacle medallion.).

⁴⁶ See, e.g., American Friends Service Committee–Native Gathering (AFSC–Native Gathering), Response to USCCR Interrogatories, Response to Interrogatory Request 4, Mar. 25, 2008 (alleging that prison authorities do not adhere to state protocols ensuring that Native Americans are able to perform religious ceremonies in correctional institutions; reporting that similar circumstances have caused many tribes to seek redress in state legislatures; and reporting state prison officials for denying a request for four weekly sweat lodges by a death row inmate in preparation for his execution.); see also Testimony of Pat Nolan, U.S. Commission on Civil Rights, briefing on Religious Discrimination and Prisoners' Rights, Washington, DC, Feb. 8, 2008, transcript (hereinafter cited as USCCR Religious Discrimination transcript, Feb. 8, 2008), pp. 78, 80–81 and pp. 81, 101 (relaying his personal knowledge of correctional officers disrupting religious activities by methods including calling for a "picture card call" (which requires all inmates to return to their cells to present their picture cards for inspection), during religious services, after which the services were not resumed. He also cited other disrupting actions including officers deliberately locating televisions or radios near religious services; randomly removing inmates from religious activities without explanation; and delaying or canceling religious services without explanation.).

⁴⁷ See, e.g., Submitted Statement of Lane Dilg, U.S. Commission on Civil Rights, Briefing on Religious Discrimination and Prisoners' Rights, Washington, DC, Feb. 8, 2008 (reporting a favorable settlement recently reached by the ACLU of Louisiana against the state Department of Corrections for denying a Mormon inmate access to Church of Jesus Christ of Latter Day Saints literature, including the *Book of Mormon* (*Sanders v. Cain*, No. 5333-928, La. 19th Dist.). Dilg also reported a favorable settlement between the ACLU of New Jersey and the N.J. Department of Corrections regarding Wiccan inmate's access to religious books and other items on the grounds that the department did not recognize the religion in *Pantusco v. Moore*, No. 03-182 (D.N.J. Jan. 14, 2003); see also American Civil Liberties Union (ACLU), Response to USCCR Interrogatories, Response to Interrogatory Request 5, Apr. 9, 2008 (reporting frequent complaints by Muslim inmates that prison authorities censor religious literature, including the Qur'an).

⁴⁸ See, e.g., Muslim Chaplain Association (MCA), Response to USCCR Interrogatories, Response to Interrogatory Request 2, Apr. 30, 2008 (alleging that Connecticut's correctional system impinges on Muslim prisoners' religious freedom by disallowing collective prayer services and denying permission for "open prayer," instead requiring Muslim prisoners to pray in front of their bunks).

grooming and head cover issues;⁵⁰ 7) lack of dietary accommodations;⁵¹ 8) forced choice between religiously mandatory observances;⁵² 9) disrespect toward spiritual leaders and chaplains;⁵³ and 10) coerced participation in religious programs.⁵⁴ Most of the organizations surveyed learned of the reported instances of alleged religious discrimination through complaints made in writing by inmates; through contact from inmates' family members;

⁴⁹ See, e.g., AFSC–Native Gathering, Response to USCCR Interrogatories, Concluding Comments, “Native Americans in U.S. Prisons” (reporting Native American inmates’ lack of access to individual spiritual counseling in times of crisis and lack of access to spiritual advisors of their own faith. According to AFSC–Native Gathering, when Native American prisoners are given access to a Native Spiritual leader, prison officials treat the spiritual advisor as a visitor, requiring him to counsel the inmates in visitation cubicles where they are separated by a partition and must speak via telephone. AFSC notes that Christian chaplains in similar situations are permitted to pray with inmates in their cells.); see also ACLU Response to USCCR Interrogatories, Response to Interrogatory Request 5 (reporting complaints by Muslim inmates about non-Muslim chaplains conducting Islamic services, a practice that Muslims consider a corruption of such services).

⁵⁰ See, e.g., ACLU, Response to USCCR Interrogatories, Response to Interrogatory Request 2 (reporting that, because of stringent Wyoming state prison policy which requires inmates to eat meals within 20 minutes of meal delivery, Muslim inmates are being forced to choose between meals or satisfying the daily prayer and fasting requirements. Jewish inmates are similarly affected. The ACLU has filed suit in the U.S. District Court for the District of Wyoming on behalf of the Muslim inmates in *Miller and Purdiman v. Murphy and Lampert*, Civ. No. 08CV 090).

⁵¹ See, e.g., Sikh American Legal Defense and Education Fund, Response to USCCR Interrogatories, Response to Interrogatory Request 7, Apr. 7, 2008 (reporting that SALDEF is working with the family of a Sikh incarcerated in Chuckawalla Valley State Prison in California. According to SALDEF, due to prison security concerns, the inmate is not permitted to keep his beard. SALDEF states that it has exhausted prison administrative remedies and will pursue relief under RLUIPA); see also ACLU, Response to USCCR Interrogatories, Response to Interrogatory Request 5 (alleging a member of the House of Yahweh incarcerated in an Alabama state facility was not permitted to wear a beard as required by his faith); *Id.*, Response to Interrogatory Request 7 (reporting its concern that prison officials in many facilities may have refused, without justification, to allow Muslim inmates, their visitors, temporary detainees, and prison guards to wear religious head coverings, despite the absence of a clear security threat).

⁵² See, e.g., The Becket Fund for Religious Liberty (Becket Fund), Response to USCCR Interrogatories, Response to Interrogatory Request 4, Mar. 19, 2008.

⁵³ See, e.g., Testimony of Pat Nolan and Imam Abu Qadir Al-Amin, U.S. Commission on Civil Rights briefing on Religious Discrimination and Prisoners’ Rights, Washington, DC, Feb. 8, 2008, transcript (hereinafter cited as USCCR Religious Discrimination transcript, Feb. 8, 2008), pp. 81, 101 (alleging circumstances in which correctional officers have been disrespectful of volunteers and clergy in front of inmates and claiming that inmates participating in religious programs have been subject to ridicule by guards).

⁵⁴ See Americans United for Separation of Church and State (Americans United), Response to USCCR Interrogatories, Response to Interrogatory Request 5, Mar. 24, 2008. See also ACLU, Response to USCCR Interrogatories, Response to Interrogatory Request 5. The ACLU participated in a coerced participation case, *Hanas v. Michigan*. A related case, *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683 (E.D. Mich. 2008), details how the plaintiff, a Catholic man convicted of a drug crime, was sentenced to complete a Pentecostal drug rehabilitation program or face jail time. The plaintiff alleged that the program, Inner City Christian Outreach (ICCO), confiscated his rosary and prayer book, told him that Catholicism is witchcraft, and systemically indoctrinated Hanas with Pentecostalism, forcing him to attend Pentecostal services. *Id.* at 690. Hanas quit the program because of the religious indoctrination and was sentenced to jail for not completing it. The court called the Establishment Clause violation in this case “flagrant” and entered summary judgment against ICCO with respect to the plaintiff’s Establishment Clause claim. *Id.* at 695. Furthermore, the confiscation of the rosary and the prayer book resulted in summary judgment for plaintiff on his Free Exercise claim as well. *Id.* at 694.

through inmates' contact with monitoring bodies conducting prison site visits; or through having been approached by inmates during their own visits to prisons while providing services or handling other cases.⁵⁵

Consistent with what the Commission found in the data it obtained from federal, state, and local prisons, information regarding complaints received by prisoner advocacy organizations showed that inmates of non-Christian faiths such as Muslims, Native Americans, Wiccans, and Sikhs were more likely to allege violations of their free exercise rights. Non-Christian faith leaders testified at a February 8, 2008 Commission hearing that these alleged violations may be due to a tendency of prison administrators and security staff to view all faith practices from the perspective of the dominant faith.⁵⁶ These witnesses asserted that where practices of other religions deviate or are not of sufficient similarity to those of the predominant faiths, they are less likely to be accommodated.⁵⁷ Compounding this difficulty is what one witness cited as the tendency of prison staff to view religious practices as “perks rather than necessities”⁵⁸ and what another acknowledged was an inherent skepticism among prison staff of religious groups and volunteers who want to minister to prisoners.⁵⁹ According to these witnesses, this skepticism, combined with prisons suffering from overcrowding, shrinking staff, and other resource shortages, have resulted in greater accommodation of the least demanding practices (in terms of resources required), and more frequent denials of those that are different or more demanding.⁶⁰ One witness also cited what he believed was an over-reliance by prisons on untrained and less supervised religious volunteers, rather than highly trained professional chaplains, to meet the spiritual needs of inmates as amplifying these

⁵⁵ See, e.g., Becket Fund, Response to USCCR Interrogatories, Response to Interrogatory Requests 5–6 (stating that it receives hundreds of complaint letters each year); Americans United, Response to USCCR Interrogatories, Response to Interrogatory Request 6 (stating that inmates contact them by letter or the rare phone call and that they are also contacted by family members on behalf of inmates); AFSC–Native Gathering, Response to USCCR Interrogatories, Response to Interrogatory Request 6 (stating that inmates often complain to members of the Maine State Prison Board of Visitors while on routine site visits); ACLU, Response to USCCR Interrogatories, Response to Interrogatory Request 6 (stating that they learn about possible violations through correspondence from inmates or their family members, as well as through prison visits in relation to other investigations and cases); Alpha for Prisons and Re-Entry, Response to USCCR Interrogatories, Response to Interrogatory Request 6, Apr. 15, 2008 (stating that Christian inmates have complained to them of discriminatory treatment by correctional officers while ALPHA provided services in the prison).

⁵⁶ Prepared Statement of Rev. Patrick McCollum, U.S. Commission on Civil Rights briefing on Religious Discrimination and Prisoners' Rights, Washington, DC, Feb. 8, 2008, transcript (hereinafter cited as Prepared Statement of Rev. McCollum), at 1–2. See Testimony of Chaplain Friedman, USCCR Religious Discrimination transcript, Feb. 8, 2008, pp. 115–116.

⁵⁷ See Testimony of Rev. McCollum, USCCR Religious Discrimination transcript, Feb. 8, 2008, p. 123. See also Testimony of Chaplain Friedman, USCCR Religious Discrimination transcript, Feb. 8, 2008, pp. 115–16.

⁵⁸ Prepared Statement of Chaplain Friedman at 1.

⁵⁹ Prepared Statement of Carolyn Atkins, Warden, Maryland Correctional Institute–Jessup (“Prison staff have always been critical of religious groups/volunteers who [want] to “minister” to prisoners. As a warden myself, I believe this happens because staff wonders why anyone would want to help the segment of society that could not conform to the rules of society....Some staff and administrators believe that, because of their kindness towards inmates, volunteers are highly susceptible to being compromised.”)

⁶⁰ Prepared Statement of Chaplain Friedman at 1.

problems because these volunteers tended to represent Christian faiths only with little interest in or familiarity with non-Christian faiths.⁶¹

Views of Prison Officials Regarding Accommodation of Inmates' Religion

Maintaining the security and safety of the prison, its employees and inmates is the “first objective of every correctional facility”⁶² and is frequently cited as the principal reason such facilities limit inmates’ free exercise rights.⁶³ In its February 8, 2008 briefing, the Commission heard testimony from federal and state prison officials, including the Chaplaincy Administrator for the Federal Bureau of Prisons and the Warden of the Maryland Correctional Institute at Jessup (MCI–Jessup) regarding free exercise of religion in prisons. Both acknowledged the beneficial effects of fostering prisoner free exercise.⁶⁴ For example, the former noted the religious underpinnings of the nation’s penal system and the ongoing role religion has played in the treatment and rehabilitation of prisoners,⁶⁵ while the latter emphasized the value to prisons of inmates engaged in religious practice in terms of good order and discipline.⁶⁶

However, accommodation of religion in prisons also poses significant security challenges. Warden Atkins testified to the abuse of religious accommodations by prisoners, and at times by contract, volunteer, or even staff clergy, with an agenda of radicalization and recruitment for radical groups.⁶⁷ She also cited hate groups’ and gangs’ invocation of free exercise rights to use religious services and meetings as fronts for illegal activities, including plotting assaults on staff and other inmates, disseminating inflammatory literature and letters as

⁶¹ *Id.* at 1 (describing some religious volunteers as “unqualified.”)

⁶² Prepared Statement of Warden Atkins at 1.

⁶³ Harris County Jail, Response to USCCR Interrogatories, Response to Interrogatory Request 23, Apr. 8, 2008; Los Angeles County Jails, Response to USCCR Interrogatories, Response to Interrogatory Request 23, May 6, 2008; Baylor Women’s Correctional Institution, Response to USCCR Interrogatories, Response to Interrogatory Request 24, Apr. 9, 2008; Lea County Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 24; Fishkill Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 24; Maine State Prison, Response to USCCR Interrogatories, Response to Interrogatory Request 24.

⁶⁴ Warden Atkins testimony, Commission Briefing Transcript at 46 (“[W]hen inmates do start practicing some type of religious belief or participate in [sic], their behavior and their thinking start to change a little bit.”).

⁶⁵ Testimony of Chaplain Joe Pryor, Chaplaincy Administrator, Federal Bureau of Prisons, Commission Briefing Transcript at 11–12.

⁶⁶ See Warden Atkins testimony, Commission Briefing Transcript at 24 (“What I learned throughout my career is that these individuals [prisoners] no matter what crimes they may have committed can be rehabilitated. The religious aspect can change a mindset and can make a prison a more nonviolent place to be”) and 26 (“individuals practicing a faith no matter what that faith may be are less violent, are more likely to participate in prison programs and hopefully throughout their incarceration are less likely to be involved in disciplinary matters.”).

⁶⁷ Prepared Statement of Warden Atkins at 2.

outreach and recruiting tools, and planning how to best traffic in contraband and otherwise undermine prison security.⁶⁸

A separate challenge to the accommodation of inmates' religious practice in prison, though one closely related to prison security interests, is the availability of the budgetary and staffing resources to facilitate inmates' religious practice, including adequate meeting time and space;⁶⁹ sufficient manpower to screen and process religious ministers and volunteers into the prisons for religious services;⁷⁰ the availability of volunteers to help facilitate religious services;⁷¹ and the availability of prison staff to supervise services to maintain order, protect the safety of volunteers and other inmates, and to guard against potential violence, gang activity or radicalization attempts.⁷²

Smaller faith groups may not be accommodated in the same way as larger ones, simply because the size of the religious group may necessitate different circumstances of accommodation. So, for example, a group of 50 inmates engaging in a religious service might be accommodated with a larger space in which to hold the service than a smaller group of five.⁷³ Warden Atkins noted the lack of any one-size-fits-all policy to inmates' requests for religious accommodation. The specific circumstances of an inmate's religious request will often determine a prison's response.⁷⁴

Warden Atkins also acknowledged the concern expressed by other witnesses that prison guards and other officials frequently regard inmates' religious commitment and practices with skepticism, particularly where non-Christian faiths are concerned, and how this negatively affects prison accommodation of their religious practices. She testified that visible, open communication between staff and religious volunteers, and staff visits to inmate

⁶⁸ *Id.* Her view was supported by testimony at the California State Advisory Committee (SAC) briefing on Religious Access and Accommodation in Facilities of Incarceration, (Mar. 23, 2007). At the SAC briefing, Sergeant Randy Zempel of the LA County Sheriff's Department testified that "gangs are adopting religion so that they can associate under the guise of those religions....And if [the religion is] mainstream, and it meets all of the other requirements, apparently of the state, there's not a lot that [the prison] can do, and this seems to be the driving factor for radicalization." *Id.* at 88.

⁶⁹ See Stiles Unit, Supplemental Response to USCCR Interrogatories, Response to Interrogatory Request 24, June 27, 2008.

⁷⁰ Prepared Statement of Warden Atkins at 2.

⁷¹ The unavailability of chaplains or volunteers, especially of minority faiths, can pose challenges for religious accommodation of minority faiths in prison and sometimes lead to wrongful denials, especially where chaplains of one faith are not interested in assisting inmates professing another faith of which they know little. Becket Fund, Response to USCCR Interrogatories, Response to Interrogatory Request 10. Prison administrators have noted the challenges they face in recruiting such volunteers. Atkins Testimony, Commission Briefing Transcript at 25 ("One of the issues we face is that it is very difficult to get volunteers from non-Christian religions to come into the facilities.").

⁷² Warden Atkins Testimony, Commission Briefing Transcript at 26–27.

⁷³ *Id.* at 27–28.

⁷⁴ California State Prison–Solano, Response to USCCR Interrogatories, Response to Interrogatory Request 24, May 21, 2008; CCI–Tehachapi, Response to USCCR Interrogatories, Response to Interrogatory Request 24, May 21, 2008.

religious services, help to create a “trust between management and the inmate population because it shows a vested interest in the inmates’ beliefs.”⁷⁵ She noted that a policy of wardens leading by example has a positive impact in alleviating staff skepticism toward religious accommodation.⁷⁶

National Security Considerations and their Impact on Prisoners’ Free Exercise

The United States is home to some two million prisoners, over 93 percent of which are housed in state and local prisons and jails.⁷⁷ The Federal Bureau of Investigation has identified prisons as fertile breeding grounds for extremist activity.⁷⁸ These concerns have been heightened by the high-profile arrests and prosecutions of terrorists and former inmates like Jose Padilla, who is suspected of having developed his Islamic extremist views while in jail in Broward County, Florida,⁷⁹ and Richard Reid, believed to have been converted to Islam and radicalized by an Imam while incarcerated in Great Britain.⁸⁰ Their magnitude is highlighted by other events, such as the discovery of a budding terrorist network within the California state prison system in 2005.⁸¹

In its February 8, 2008, briefing, the Commission examined the national security implications of prisoner radicalization and its impact, if any, on religious accommodation post-9/11. It heard from two experts on the subject, who defined radicalization similarly, as the process by which inmates adopt political or religious extremism, including “the willingness to use, support or facilitate violence, as a method to effect societal change.”⁸²

⁷⁵ Prepared Statement of Warden Atkins at 2.

⁷⁶ *Id.*

⁷⁷ Homeland Security Policy Institute and Critical Incident Analysis Group Prisoner Radicalization Task Force, *Out of the Shadows: Getting Ahead of Prisoner Radicalization* at 8 (2006) (last visited Sept. 28, 2008), <http://www.gwumc.edu/hspi/pubs/Out%20of%20the%20Shadows.pdf> citing Department of Justice, OJP, Bureau of Justice Statistics, *Prison Statistics* (Aug. 15, 2006), <http://www.ojp.usdoj.gov/bjs/prisons.htm> (hereinafter *Out of the Shadows*).

⁷⁸ “Prisons continue to be fertile grounds for extremists who exploit both a prisoner’s conversion to Islam while still in prison, as well as their socio-economic status and placement in the community upon their release.” *Current and Projected National Security Threats to the United States: Hearing Before the Select Comm. on Intelligence*, 109th Cong. 24-25 (2005) (statement of Robert Mueller, Director, Federal Bureau of Investigation).

⁷⁹ Padilla was arrested for planning to detonate a dirty bomb in the United States.

⁸⁰ Reid was later apprehended while attempting to detonate a bomb on a U.S. commercial flight in December 2001. *Out of the Shadows* at 2.

⁸¹ Prepared Statement of Frank Cilluffo, USCCR Feb. 8, 2008 briefing at 3 (hereinafter Cilluffo Prepared Statement). (In July 2005, state and local police alerted the FBI to a Sunni Islamic extremist group operating in state prisons called the Authentic Assembly of Islam. The group was involved in almost a dozen gas station robberies in Los Angeles with the goal of financing terrorist operations in the pursuit of the group’s goals. Its founder, Kevin Lamar, began recruiting fellow inmates in New Folsom State Prison to his organization. One of these went on to recruit outside the prison after being paroled. Several of the group’s members have since been convicted for conspiracy to commit terrorism). See also Andrew Murr, “Thwarting Terror,” *Newsweek* (Dec. 15, 2007), available at <http://www.newsweek.com/id/78189>.

⁸² Cilluffo Prepared Statement at 2.

Each emphasized the danger that “perversion of religious beliefs and practices”⁸³ poses to both national and prison security, but also expressed the potentially positive effects of religion⁸⁴ and the fair accommodation of prisoners’ free exercise rights on the prison environment.⁸⁵ In fact, one witness warned of the danger of unaddressed religious grievances, which he believed could be exploited by extremists to foment violence.⁸⁶ While emphasizing that radicalization “remains the exception among prisoners, rather than the rule,”⁸⁷ the witnesses identified radical Islam and right-wing extremism within prisons as potential threats to national security.

The witnesses attributed prisoners’ vulnerability to both religious and political radicalization to a number of factors including inmates’ relative youth, unemployment, social alienation, and their need for self-importance and physical security which is often satisfied by the adoption of some group identity.⁸⁸ Furthermore, the family histories of many prisoners suggest a social background where abandonment, violence, abuse and neglect are the norm, leading some inmates to see themselves as victims of societal slights that must be avenged.⁸⁹ Many inmates lack any exposure to religion, let alone a solid grounding in a particular faith, making them more susceptible to radical rhetoric—whether from fellow inmates, religious volunteers or literature—that capitalizes upon their disillusionment.⁹⁰ Finally, the remote location of most prisons makes it more difficult for prisoners to maintain contact with their families and communities and, as was discussed earlier in this chapter, frequently limits inmates’ access to qualified religious providers of their own faiths, especially in the case of non-Christian religions.⁹¹

As was discussed earlier in this chapter, both federal and state prison systems have expressed difficulty in recruiting chaplains from religions such as Islam. This recruitment “has been limited by the lack of recognized national religious organizations to administer the vetting

⁸³ Cilluffo Prepared Statement at 1. *See also* Prepared Statements of Gregory Saathoff, M.D. (hereinafter Saathoff Prepared Statement), USCCR Feb. 8, 2008 briefing at 4.

⁸⁴ *Out of the Shadows* at ii (“The task force recognizes the potentially positive impact of religion on inmates, and it should be noted that inmates have a constitutional right to practice their religion.”). The Chief of the Chaplaincy Services Branch shares the view that religion has positive effects in prisons, “[R]eligious services are essential to the security and orderly running of BOP institutions because [they provide] inmates with direction, guidance, and a sense of purpose, and helps them to be productive, disciplined, and compliant.” Off. of the Inspector Gen., *A Review of the Federal Bureau of Prisons’ Selection of Muslim Religious Service Providers* at 10 (2004) (hereinafter “OIG Report”).

⁸⁵ Cilluffo Testimony, Hearing Transcript at 34. *See also* Saathoff Prepared Statement at 1 (noting the “salutary effect” of RLUIPA as a means for raising and addressing grievances that, if left to fester, could otherwise contribute to prisoner radicalization). Testimony of Affad Shaikh, California SAC briefing transcript at 122.

⁸⁶ Saathoff Testimony at 33.

⁸⁷ *Out of the Shadows* at iv.

⁸⁸ Cilluffo Prepared Statement at 2; Saathoff Prepared Statement at 2. *See also* *Out of the Shadows* at 1.

⁸⁹ Saathoff Prepared Statement at 2–3.

⁹⁰ *Out of the Shadows* at 4. Saathoff Prepared Statement at 5.

⁹¹ Saathoff Prepared Statement at 2.

process.”⁹² As a result, prisons (particularly state and local prisons), are more inclined to rely on outside religious contractors, volunteers, and even other inmates at times to meet the inmates’ spiritual needs⁹³ and even at times on other inmates.⁹⁴ Dr. Saathoff warned that such scarcity could have significant national security consequences by 1) creating a void that is often filled by poorly qualified religious practitioners with a radical agenda; 2) providing an opportunity for external groups to coordinate entry of radical religious service providers to spread extremist, non-traditional interpretations of religions such as Islam with the goal of building a violent network; and 3) allowing prisoners to concoct “cut and paste” versions of religions that validate their often criminal agendas and create an outlet for their violent impulses.⁹⁵ When taken together with correctional institutions’ scarce resources, limited ability to directly supervise religious services,⁹⁶ lack of professional chaplains to supervise religious contractors and volunteers, and the relative permeability of prison walls,⁹⁷ these negative consequences become even more pronounced.

BOP has recently undertaken serious and coordinated efforts to improve its selection and supervision of Muslim religious service providers in response to the paucity of such religious providers;⁹⁸ however, most states still do not enforce a statewide, uniform policy for vetting such providers.⁹⁹ For example, in the California prison system, individual wardens set the vetting policies for each of the state’s 33 adult facilities.¹⁰⁰ Witnesses warned that the lack of a uniform policy and inadequate information sharing within state systems and among federal,

⁹² *Out of the Shadows* at 5.

⁹³ *Id.* See also discussion in chapter three, Section on Federal Bureau of Prisons.

⁹⁴ For example, a 2004 survey of 193 wardens in state correctional facilities revealed that half the institutions allowed the inmates themselves to act as spiritual leaders. George W. Knox, *The Problems of Gangs and Security Threat Groups in American Prisons Today: Recent Findings From the 2004 Prison Gang Survey*, National Gang Crime Research Center (2005).

⁹⁵ Saathoff Prepared Statement at 4–5.

⁹⁶ “A 2004 survey of 193 wardens of state correctional facilities showed that only half of religious services were physically supervised and just over half used any sort of audio or video monitoring capabilities.” *Out of the Shadows* at 5 (citing Knox, *supra* note 89).

⁹⁷ *Id.* at 6 (noting that a state prison system with 30,000 inmates may easily host 300,000 visitors and volunteers per year).

⁹⁸ “Religious services providers are now questioned about their beliefs regarding violence and other concepts related to radicalization. They are also subject to more rigorous background checks. Muslim chaplains are involved in the screening process as subject matter experts.” *Out of the Shadows* at 12.

⁹⁹ The Bureau has taken this action in response to an Office of Inspector General (OIG) investigation that found deficiencies in the BOP’s process of recruiting, selecting, screening and supervising Muslim religious service providers. The OIG investigation was conducted at the request of Senator Charles Schumer, based on concerns that the BOP relied solely on two Islamic groups—the Islamic Society of North America and the Graduate School of Islamic and Social Sciences—to endorse Muslim chaplains. Schumer noted that the groups were allegedly connected to terrorism and promoted Wahhabism—an extreme form of Islam. Senators Kyl and Feinstein expressed similar concerns prompting the OIG investigation. See Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Prisons’ Selection of Muslim Religious Service Providers* (April 2004); see also OIG, *Analysis of Response by the Federal Bureau of Prisons to Recommendations in the OIG’s April 2004 Report on the Selection of Muslim Religious Service Providers* (July 2004).

¹⁰⁰ *Out of the Shadows* at 8.

state and local correctional institutions complicates the identification and monitoring of radical religious service providers.¹⁰¹ They recommended better data collection by all prisons regarding inmates' religious preferences upon entering and exiting the prison and the development of a centrally accessible database of religious service providers.¹⁰²

How actively do federal, state, and local prisons factor national security considerations into their accommodation of inmates' religion? How do they do so? Based on briefing testimony from BOP's Chaplaincy Administrator and the interrogatory responses the Commission received from federal and state prisons, federal prisons appeared to acknowledge taking national security considerations into account more readily than their state counterparts. In fact, federal prisons acknowledge changing certain aspects of their security policies to account for the problem and possibility of prisoner radicalization. This finding is consistent with the Becket Fund's observation that national security concerns have factored more heavily in federal than state prisons' regulation of the religious activities of incarcerated persons.¹⁰³

Chaplain Pryor testified that over the past four to five year period, the BOP has taken several significant steps to limit the threat of radicalization, including increasing supervision within the federal system so that no inmate-led religious groups meet without 100 percent staff supervision; installing electronic monitoring devices in chapels; increasing training and scrutiny of religious volunteers and contractors; and scrutinizing the content of religious materials entering prisons and being presented to inmates.¹⁰⁴ His testimony is supported by individual federal prisons' responses to the Commission's interrogatories. For example, in at least five cases, BOP prisons admitted to stepping up efforts to supervise inmate-led religious programs (and in some circumstances those led by volunteers, contractors or other guests or speakers)¹⁰⁵ to "ensure that inmates are not inappropriately utilizing a religious forum to radicalize other inmates and incite violence or other inappropriate activities."¹⁰⁶ In at least one case (Danbury), the prison was in the process of installing a closed-circuit television system to enable its Religious Services Department to more closely supervise such religious programs.¹⁰⁷ In another facility (Lewisburg), the prison acknowledged having to reduce the number of inmate-led religious programs due to resource limitations on staff's ability to be physically present to supervise such programming.¹⁰⁸

¹⁰¹ Saathoff Prepared Statement at 1; *see also* Out of the Shadows at 8.

¹⁰² *Out of the Shadows* at iv, 15.

¹⁰³ Becket Fund, Response to USCCR Interrogatories, Response to Interrogatory Request 1.

¹⁰⁴ Testimony of Chaplain Joe Pryor, Briefing Transcript at 56–57.

¹⁰⁵ *See, for example*, the federal prisons at Schuylkill, Danbury, Terre Haute, Marion and Lewisburg. FCI Schuylkill, Response to USCCR Interrogatories, Response to Interrogatory Request 25; FCI Danbury, Response to USCCR Interrogatories, Response to Interrogatory Request 25; USP Terre Haute, Response to USCCR Interrogatories, Response to Interrogatory Request 25; USP Marion, Response to USCCR Interrogatories, Response to Interrogatory Request 25; USP Lewisburg, Response to USCCR Interrogatories, Response to Interrogatory Request 25.

¹⁰⁶ USP Lewisburg, Response to USCCR Interrogatories, Response to Interrogatory Request 25.

¹⁰⁷ FCI Danbury, Response to USCCR Interrogatories, Response to Interrogatory Request 25.

¹⁰⁸ *See id.* *See also*, FCI Schuylkill, Response to USCCR Interrogatories, Response to Interrogatory Request 25.

If services had to be reduced because of lack of manpower to supervise, the reductions were spread across all faith groups.¹⁰⁹ In two cases, federal prisons also acknowledged making their pre-9/11 practice of background and credentials checks of religious volunteers and contractors more broad and thorough.¹¹⁰ Two federal prisons acknowledged continuing or expanding their checks on incoming religious materials, in particular those available in religious libraries.¹¹¹

Americans United stresses that national security concerns should not be taken lightly, but cautions against overreactions such as BOP's Standardized Chapel Library Project. The Project sought to create lists of a small number of pre-approved religious books for each faith and remove all others from federal prison chapel libraries.¹¹² In September 2007, as a result of criticism from a wide range of religious and secular leaders, BOP temporarily suspended the Standardized Chapel Library Project, indicating that it would resshelf all of the books that were removed except those "deemed to incite violence or encourage extremism."¹¹³

By contrast, all the state prisons surveyed responded that national security conditions *have not been a factor in or have had no known impact on* how they regulate the religious activities of inmates, either before or after the attacks of 9/11.¹¹⁴ Notably, this view runs counter to those of the prisoner advocacy and faith-based organizations surveyed for this report, who almost unanimously agree that prison administrators at all levels—federal, state and local—are in fact restricting religious activities for reasons of homeland security post 9/11, in particular for Muslim inmates.¹¹⁵ Evidence from other sources shows that some state

¹⁰⁹ USP Lewisburg, Response to USCCR Interrogatories, Response to Interrogatory Request 25.

¹¹⁰ FCI Danbury, Response to USCCR Interrogatories, Response to Interrogatory Request 25; USP Terre Haute, Response to USCCR Interrogatories, Response to Interrogatory Request 25.

¹¹¹ FCI Danbury, Response to USCCR Interrogatories, Response to Interrogatory Request 25; USP Marion, Response to USCCR Interrogatories, Response to Interrogatory Request 25. *See also* testimony of Matthew C. Kramer, Warden, Folsom State Prison at CA SAC Briefing, briefing transcript at 38 (describing prison efforts to monitor religious materials coming into the prison system).

¹¹² Americans United, Response to USCCR Interrogatories, Response to Interrogatory Request 11; Americans Jurist Legal News and Research, "Paper Chase Newsburst" <http://jurist.law.pitt.edu/paperchase/2007/09/us-federal-prisons-return-religious.php> (last visited May 23, 2008).

¹¹³ Americans Jurist Legal News and Research, "Paper Chase Newsburst" <http://jurist.law.pitt.edu/paperchase/2007/09/us-federal-prisons-return-religious.php> (last visited May 23, 2008).

¹¹⁴ Harris County Jail, Response to USCCR Interrogatories, Response to Interrogatory Request 24; Los Angeles County Jails, Response to USCCR Interrogatories, Response to Interrogatory Request 24; Baylor Women's Correctional Institution, Response to USCCR Interrogatories, Response to Interrogatory Request 25; Lea County Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 25; Fishkill Correctional Facility, Response to USCCR Interrogatories, Response to Interrogatory Request 25; Maine State Prison, Response to USCCR Interrogatories, Response to Interrogatory Request 25; Union Correctional Institution, Response to USCCR Interrogatories, Response to Interrogatory Request 25; Wakulla Correctional Institution, Response to USCCR Interrogatories, Response to Interrogatory Request 25. The Solano State prison indicates that national security considerations are confidential. California State Prison-Solano, Response to USCCR Interrogatories, Response to Interrogatory Request 25.

¹¹⁵ *See, e.g.*, Prison Legal News, Response to USCCR Interrogatories, Response to Interrogatory Request 11, Apr. 21, 2008 (claiming that federal inmates suspected of being affiliated with terrorist-related groups or convicted of terrorism-related charges are not able to participate in congregate services or receive visits from

and local prisons have taken steps to combat prisoner radicalization, including the Arizona, California, and New York state departments of corrections.¹¹⁶

At the local level, the L.A. County Jails notes that since 9/11, it has maintained a close relationship with the Joint Terrorism Task Force Radicalization Work Group,¹¹⁷ a California working group of local, state, and federal agencies and part of an overall effort at intelligence monitoring of radical Islam.¹¹⁸

Prison Litigation Reform Act of 1996 and Burdens on Free Exercise

An examination of the failure or success of RLUIPA as a tool for righting religious exercise violations against inmates must necessarily include mention of the Prison Litigation Reform Act (PLRA).¹¹⁹ Intended to reduce frivolous prisoner lawsuits¹²⁰, PLRA places a variety of administrative and procedural requirements on prisoners' access to federal courts. RLUIPA by its own language explicitly states that "[n]othing in this chapter shall be construed to amend or appeal the Prison Litigation Reform Act of 1995."¹²¹ PLRA has reduced the number of prisoner law suits that make it to court,¹²² in part by subjecting RLUIPA claims to strict legal standards.¹²³

clergy because they are designated "high risk" status and are held in extremely restrictive settings, and stating that high-profile assertions that U.S. prisons are a breeding ground for Muslim extremism generated scrutiny of and hostility towards Muslim inmates and the clergy that minister to them); MCA, Response to USCCR Interrogatories, Response to Interrogatory Request 2 (claiming that state prison authorities in Connecticut inspect quantity and content of materials sent to Muslim inmates to determine if they are associated with Wahhabism and have banned certain commentaries or translations of the Qur'an that were acceptable pre-9/11; heightened scrutiny also extends to hiring and retaining Muslim chaplains and contractors); Americans United, Response to USCCR Interrogatories, Response to Interrogatory Request 11 (alleging a greater likelihood that inmates' access to Muslim literature would be restricted due to heightened fears over extremism).

¹¹⁶ See *Out of the Shadows* at 11–12.

¹¹⁷ Los Angeles County Jails, Response to USCCR Interrogatories, Response to Interrogatory Request 24, May 6, 2008.

¹¹⁸ E-mail from Robert O. Blanks, Sergeant, Custody Support Services, Los Angeles Sheriff's Office, to Sock-Foon MacDougall, Social Scientist, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights (May 23, 2008, 11:13 a.m. EDT) (on file with the commission).

¹¹⁹ 42 U.S.C. § 1997e (2000). PLRA is part of CRIPA; see appendix A.

¹²⁰ "Inmates have attempted to litigate such critical constitutional claims as a deprivation of shampoo and deodorant, the use of a photocopier, the right of male inmates to wear bras and panties, failure to get a second serving of ice cream, and 'conspiracy to commit genocide' by spreading AIDS among inmates." Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 Rutgers L.J. 361, 365-66 (1998).

¹²¹ 42 U.S.C. § 2000cc-2(e) (2000).

¹²² Prisoner lawsuits decreased 39 percent from 1995 (the year before implementation of PLRA), to 2000. John Scalia, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000*, Bureau of Justice Statistics: Special Report (Bureau of Justice Statistics, U.S. Dep't of Justice, Wash. D.C.), January 2002, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf> (last visited Sept. 12, 2008).

¹²³ See, e.g., *Strong v. Ozmint*, 2005 U.S. Dist. LEXIS 43982, at *16–21 (D. S.C. 2005) (dismissing plaintiff's RLUIPA claim without judgment on the merits for not exhausting the South Carolina Department of Corrections' grievance procedures, a process which includes specific and separate complaints for matters

Three notable provisions of PLRA are its bar on compensatory or punitive damages absent a showing of physical injury, its requirement that prisoners exhaust all administrative remedies prior to initiating litigation, and its limitations on the recovery of attorney's fees.

While RLUIPA authorizes courts to grant prisoners "appropriate relief,"¹²⁴ PLRA severely circumscribes access to monetary relief, providing that a prisoner may not bring a federal civil action "for mental or emotional injury suffered while in custody without a prior showing of physical injury."¹²⁵ For example, in *Smith v. Allen*,¹²⁶ the Eleventh Circuit indicated that, in a case involving a prisoner alleging violations of RLUIPA but no physical harm, "although we conclude, as a general matter, that RLUIPA's phrase 'appropriate relief' contemplates monetary as well as injunctive relief, in this case it is clear that [the prisoner's] monetary award, if any, will be limited to a grant of nominal damages in light of the limiting language of § 1997(e)."¹²⁷

The exhaustion requirement is perhaps the most effective provision for keeping frivolous lawsuits to a minimum. PLRA provides that "[n]o action shall be brought with respect to prison conditions...by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."¹²⁸ With this standard, PLRA "encourages inmates to file grievances promptly with prison officials before filing a lawsuit, thereby alerting corrections managers to problems that need to be addressed and allowing them to resolve disputes before they turn into Federal lawsuits."¹²⁹

Finally, PLRA places extensive limitations on attorney's fees. First, such fees will not be awarded except to the extent that "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights,"¹³⁰ and "the amount of the fee is proportionally

affecting an inmate, findings of internal prison disciplinary hearings, calculations of sentence-related credits, allegations of criminal activity, specific appeals targeted to specific administrators.); *Lindell v. Casperson*, 360 F. Supp. 2d 932, 949 (W.D. Wis. 2005) (granting summary judgment in favor of defendants against prisoner's RLUIPA claim for failing to file the appropriate grievance forms within five days of an incident).

¹²⁴ 42 U.S.C. § 2000cc-3(a) (2000).

¹²⁵ 42 U.S.C. § 1997 (e) (2000).

¹²⁶ *Smith v. Allen*, 502 F. 3d. 1255 (11th Cir. 2007).

¹²⁷ *Id.* at 1271.

¹²⁸ 42 U.S.C. § 1997 (a) (2000).

¹²⁹ Statement of Sarah Hart to the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives, p. 5 (Apr. 22, 2008). However, despite these benefits, there is a possible negative collateral consequence of PLRA: "the flexibility afforded prisons and prison officials by the PLRA's exhaustion provision, which mandates that prisoners exhaust all of their administrative remedies, including internal prison grievance processes, before they may file suit in federal court...would seem to give prisons free reign to stack the deck against inmates by resorting to any of the innumerable ways to stymie prisoners' efforts to navigate the administrative process." Eugene Novikov, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. Penn. L. Rev. 817, 818 (2008).

¹³⁰ 42 U.S.C. § 1997 (d)(1)(A) (2000).

related to the court ordered relief for the violation,”¹³¹ or “the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.”¹³² In cases in which monetary judgments are awarded, a portion of the award will be applied to satisfy the amount of the attorney’s fees awarded against the defendant.¹³³ PLRA also mandates that awards of attorney’s fees may not be based on “an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.”¹³⁴

Summary

This chapter examined quantitative and qualitative data from eight federal prisons, seven state prisons, two county jails, 12 nonprofit organizations, complaints from inmates alleging religious discrimination sent to the Commission’s headquarters and regional offices, the transcript of its briefing on “Religious Discrimination and Prisoners’ Rights” held in February 2008, and supplementary materials in an effort to understand allegations of religious discrimination against inmates in correctional institutions.

The Commission found that the percentage of prisoners professing minority faiths tends to be larger than the proportion of those faiths among non-incarcerated adults in the United States 18 years of age and older. It also found that the majority of professional chaplains in the prison system are Protestant, and federal and state prisons have indicated a difficulty in recruiting chaplains of other faiths, specifically chaplains of non-Christian faiths such as Islam and Wicca. As a result, both federal and state correctional institutions rely heavily on religious contractors, volunteers and faith-based organizations to meet inmates’ religious needs. Such reliance can have serious national security implications, particularly in an age of declining resources, budgets and overcrowding in correctional institutions.

Regardless of the source of the data, the proportion of religious grievances to all grievances inmates filed is consistently small, below four percent in most instances. The nature of the religious grievances as reported to the Commission shows substantive overlap with those reported in correctional institutions. Inmates professing non-Christian faiths are more likely than those of dominant faiths to make claims about free exercise limitations. The PLRA has been a key factor in maintaining manageable levels of prisoner litigation.

Both state and federal correctional institutions identify prison and inmate security and lack of resources as the key reasons for any burdens they may impose on inmates’ free exercise. The nonprofit organizations surveyed claimed that national security considerations have also affected prisoners’ free exercise rights. While federal prisons acknowledged taking national security into account, state correctional institutions said that national security considerations have not been a factor in the imposition of burdens on free exercise before or after the events of 9/11. For example, federal prisons admitted to increasing supervision of inmate-led

¹³¹ 42 U.S.C. § 1997 (d)(1)(B)(i) (2000).

¹³² 42 U.S.C. § 1997 (d)(1)(B)(ii) (2000).

¹³³ 42 U.S.C. § 1997 (d)(2) (2000).

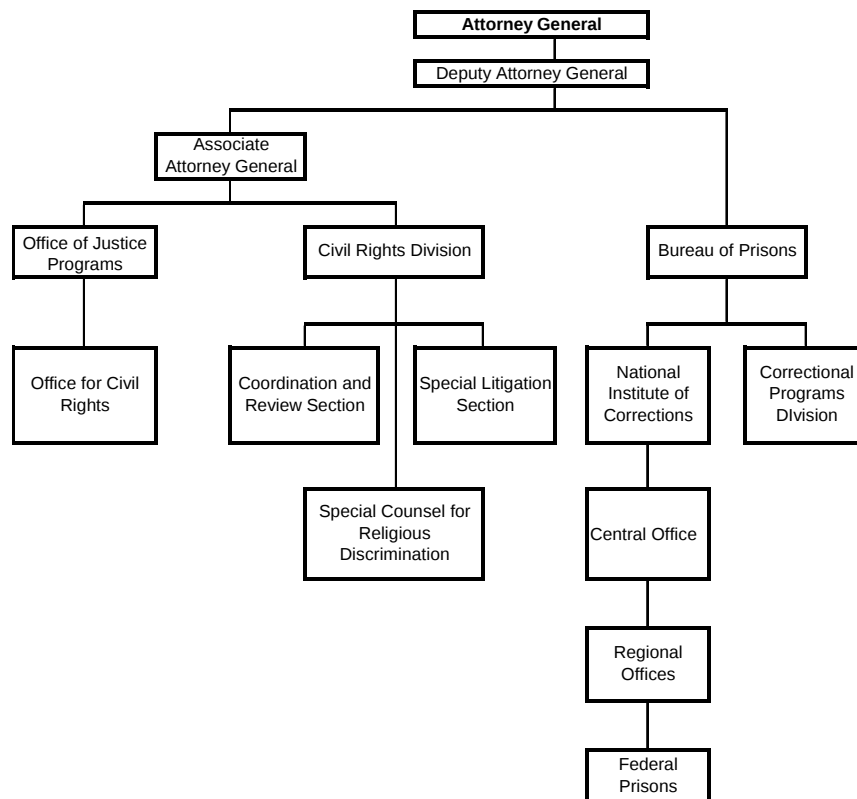
¹³⁴ 42 U.S.C. § 1997 (d)(3) (2000).

programs. Where resource limitations prevent such supervision, regularly scheduled services have been reduced. The prisons surveyed appear to have spread the burden of reduction in religious programming across all faith groups. Nonprofit groups surveyed uniformly agree that national security considerations have factored into religious accommodation of inmates at all levels—federal, state, and local.

CHAPTER 3: THE DEPARTMENT OF JUSTICE'S ENFORCEMENT OF PRISONERS' FREE EXERCISE RIGHTS

This chapter examines the Department of Justice's (DOJ) authority, role, responsibilities, and efforts in ensuring that prisoners do not face discrimination on the basis of religion. The Commission identified several DOJ components that have a role in enforcing inmates' free exercise rights, including two sections of the agency's Civil Rights Division (CRD), the Bureau of Prisons (BOP) and the Office of Justice Programs. Figure 3.1 is an organizational chart depicting the placement of these components within the Department of Justice.

Figure 3.1
U.S. Department of Justice's Organizational Chart Showing Enforcement Components



Sources: Compiled by the U.S. Commission on Civil Rights using U.S. Department of Justice, "U.S. Department of Justice Organization Chart," March 13, 2006, <http://www.usdoj.gov/dojorg.htm> (last visited November 8, 2007); U.S. Department of Justice, Office of Justice Programs, "Bureaus and Offices," <http://www.ojp.usdoj.gov/about/bureaus.htm> (last visited May 27, 2008), p. 1; U.S. Department of Justice, Civil Rights Division, "Civil Rights Division Activities and Programs (2006 Edition)"

<http://www.usdoj.gov/crt/activity.php> (last visited October 28, 2008); U.S. Department of Justice, Civil Rights Division, Report on Enforcement of Laws Protecting Religious Freedom—Fiscal Years 2001–2006, February 2007, p. 5; Eric W. Treene, Special Counsel for Religious Discrimination, Civil Rights Division, U.S. Department of Justice, August 26, 2008, letter to Mr. Martin Dannenfelser, staff director, U.S. Commission on Civil Rights, [affected agency response], p. 2; U.S. Department of Justice, Federal Bureau of Prisons, “Bureau of Prisons Organizational Chart,” <http://www.bop.gov/about/organization.jsp> (accessed July 25, 2007), p. 1.

Caption: A number of components of the Department of Justice, including the Civil Rights Division, the Bureau of Prisons, and the Office of Justice Programs, ensure that prisoners are not discriminated against on the basis of religion.

Department of Justice’s Civil Rights Division

DOJ’s Civil Rights Division was established in 1957 and is responsible for enforcing federal statutes prohibiting discrimination on the basis of race, sex, disability, religion, and national origin.¹ CRD’s responsibilities include enforcing laws against discrimination in voting, housing, employment, education, lending, public accommodations, and federally funded programs and services.² CRD is also charged with enforcing prohibitions of discrimination in the treatment of juvenile and adult detainees and residents of private institutions.³ The division’s Special Litigation Section (SPL) is responsible primarily for enforcing prisoners’ free exercise rights. Its Coordination and Review Section (COR) plays a supporting role in ensuring religious nondiscrimination for prisoners, although its authority is far more constrained and its efforts are restricted to state and local prisons that receive federal financial assistance. Each component is taken in turn.

Special Litigation Section

The Special Litigation Section enforces federal civil rights statutes in four major areas: conditions of institutional confinement; conduct of law enforcement agencies; access to

¹ The division was established pursuant to the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957).

² See, e.g., Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (1964); Voting Rights Act, 42 U.S.C. § 1973–1973aa-6 (2000); Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 515 (1974); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990). Note that the Commission has reviewed enforcement efforts of several sections of the Department of Justice’s Civil Rights Division in past reports. See, e.g., U.S. Commission on Civil Rights, *Becoming Less Separate? School Desegregation, Justice Department Enforcement, and the Pursuit of Unitary Status* (September 2007); U.S. Commission on Civil Rights, *Voting Rights Enforcement & Reauthorization: The Department of Justice’s Record of Enforcing the Temporary Voting Rights Act Provision* (May 2006); U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume II: An Evaluation of the Departments of Justice, Labor, and Transportation* (September 2002); U.S. Commission on Civil Rights, *Federal Efforts to Eradicate Employment Discrimination in State and Local Governments*, (September 2001); U.S. Commission on Civil Rights, *Helping State and Local Governments Comply with the ADA: An Assessment of How the United States Department of Justice Is Enforcing Title II, Subpart A, of the Americans with Disabilities Act* (September 1998); and U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (June 1996).

³ See, e.g., Civil Rights of Institutionalized Persons Act, Pub. L. 96-247, 94 Stat. 349 (codified at 42 U.S.C. § 1997, §§ 1997 to 1997j (1980)); Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 2071 (1994) (codified at 42 U.S.C. § 14141 (dealing specifically with incarcerated juveniles)).

reproductive health facilities and places of religious worship; and religious exercise of institutionalized persons.⁴ In the first of these areas, SPL protects the constitutional rights of persons confined in state or local prisons, jails, and juvenile correctional facilities.⁵ SPL's jurisdiction extends to similarly protect individuals who are mentally ill, developmentally disabled, or living in state- and locally operated nursing homes.⁶

In fulfilling its mission, SPL conducts enforcement activities throughout the United States and its territories. The Section is headed by a Section Chief who reports directly to the Office of the Assistant Attorney General for CRD.⁷ SPL, which is composed of a management team, attorneys, investigators, and support staff (secretaries, paralegals, contractors and interns/students), reviews complaints, conducts investigations, monitors and enforces court orders or settlements, litigates large and complex institutional reform cases, and writes amicus briefs on issues of national import.⁸ It is also responsible for preparing the Attorney General's annual submission to Congress on the department's activities pursuant to CRIPA.⁹ As part of its strategic planning, the section routinely reevaluates factors such as the number of complaints/referrals received, preliminary and formal investigations opened, findings letters issued, technical assistance provided, lawsuits filed, and favorable outcomes achieved (including settlements and other informal means of achieving compliance), in light of its resources, including budget and staffing levels and the complexity and size of its cases.¹⁰

Section's Role, Authority, and Responsibilities Regarding Religious Issues in Prisons

SPL derives its enforcement authority to protect the rights of institutionalized persons from a variety of statutory sources. For example, CRIPA authorizes the Attorney General to file suit against state and local governments seeking relief for persons confined in public institutions where conditions exist that deprive residents of their constitutional rights.¹¹ It has similar authority over juvenile detention facilities under the Violent Crime Control and Law Enforcement Act.¹² Under § 3 of RLUIPA, SPL is authorized to investigate alleged violations of the act and to file civil lawsuits seeking injunctive or declaratory relief in cases

⁴ U.S. Department of Justice, *Civil Rights Division Activities and Programs* (2006 Edition), Special Litigation Section at 19, <http://www.usdoj.gov/crt/activity.html#spl> (last visited Sept. 1, 2008).

⁵ U.S. Department of Justice, Special Litigation Section (SPL), Response to the U.S. Commission on Civil Rights' (USCCR) Interrogatories, Response to Interrogatory Request 1, Apr. 28, 2008.

⁶ *Civil Rights Division Activities and Programs* (2006 Edition) at 19, <http://www.usdoj.gov/crt/activity.html#spl> (last visited Sept. 1, 2008). SPL's enforcement authority with respect to institutionalized persons other than those in jails or prisons is broader. In addition to enforcing the constitutional rights of such persons, SPL also has jurisdiction to enforce their federal statutory rights.

⁷ SPL, Response to USCCR Interrogatories, Response to Interrogatory 1.

⁸ *Civil Rights Division Activities and Programs* (2006 Edition) at 20, <http://www.usdoj.gov/crt/activity.html#spl> (last visited Sept. 1, 2008).

⁹ 42 U.S.C. § 1997f (2000).

¹⁰ SPL, Response to USCCR Interrogatories, Response to Interrogatory 2.

¹¹ 42 U.S.C. § 1997a (2000).

¹² 42 U.S.C. § 14141a (2000).

where the alleged substantial burden on religious exercise occurs in a program receiving federal financial assistance or affects interstate commerce.¹³ Under Title III of the Civil Rights Act of 1964, the Attorney General is authorized to file a civil action on behalf of persons who have been deprived of equal protection of the laws on the basis of race, religion, or national origin by having been deprived of equal utilization of any public facility under the control or operation of the state.¹⁴

Table 3.1
Chronology of Significant Events Regarding Enforcement of Prisoners' Religious Rights

1980	Congress enacts CRIPA, which allows the Attorney General to seek declaratory or injunctive relief against state and local governments or their agents for deprivation of any institutionalized person's constitutionally protected rights, where the deprivation caused grievous harm and is part of a pattern or practice of resistance to the full enjoyment of rights. ¹⁵ The authority applies to institutions owned or operated by state and local governments, but not those in the Federal Bureau of Prisons system.
1993	Congress enacts RFRA, establishing a strict scrutiny standard for evaluating the validity of any law or regulation that substantially burdens religious exercise. ¹⁶
1997	The Supreme Court strikes RFRA's application as to the states in <i>City of Boerne v. Flores</i> , holding that the statute exceeded Congress' Enforcement Clause authority.
2001	Congress passes RLUIPA which provides that government shall not constrain the religious exercise of institutionalized persons absent a compelling government interest for the burden and utilizing the least restrictive means of accomplishing that interest. ¹⁷ The law gives the Special Litigation Section of Justice's Civil Rights Division authority to bring RLUIPA cases involving institutionalized persons, in state and local facilities. RFRA remains available in the federal prison context.

Source: Compiled by the U.S. Commission on Civil Rights.

Special Litigation Section's Enforcement Activities

Jurisdiction

Under most of the statutes SPL enforces, its authority is limited to situations that involve a pattern or practice of the deprivation of constitutional or statutory rights.¹⁸ However, under RLUIPA, SPL's jurisdiction is not limited similarly. Instead, SPL is broadly authorized to

¹³ 42 U.S.C. § 2000cc-1 (2000). See also U.S. Department of Justice, Civil Rights Division, *Protecting the Religious Freedom of All: Federal Laws Against Religious Discrimination*, [brochure], June 2005, p. 9.

¹⁴ 42 U.S.C. § 2000b (2000). See also *Civil Rights Division Activities and Programs* (2006 Edition), Special Litigation Section, at 19, <http://www.usdoj.gov/crt/activity.html#spl> (last visited Sept. 1, 2008).

¹⁵ 42 U.S.C. § 1997(a) and (b) (2000).

¹⁶ 42 U.S.C. § 2000bb *et seq.* (2000).

¹⁷ 42 U.S.C.S. § 2000cc-1 (2000).

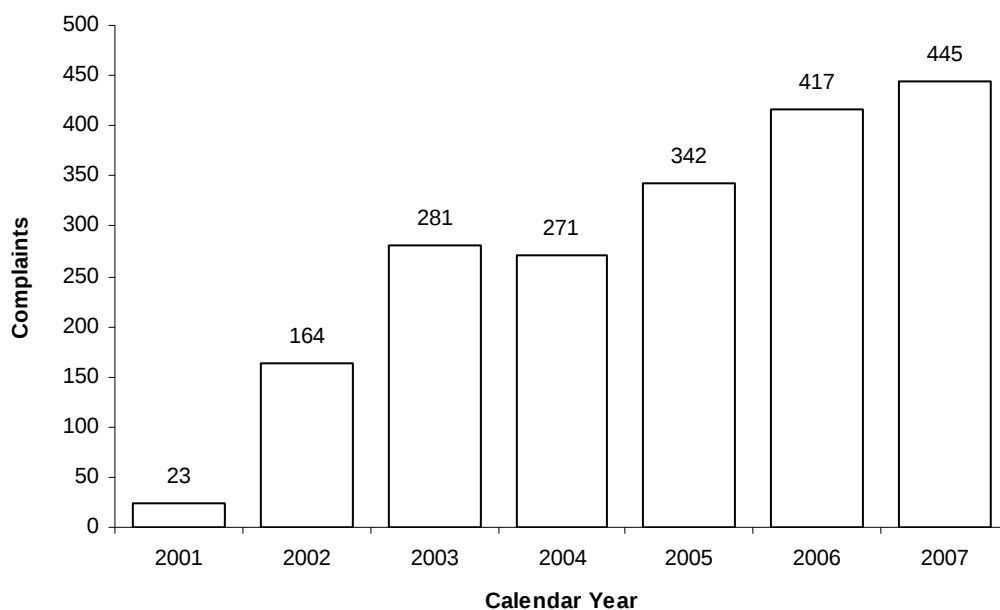
¹⁸ For example, 42 U.S.C. § 1997a (2000).

enforce compliance with RLUIPA, including its provisions on prisoner religious accommodation.¹⁹

SPL's Complaints Management System

SPL receives information and allegations regarding religious discrimination from a variety of sources including individuals, concerned citizens, advocacy groups, media reports, and other governmental agencies and entities. Since 2001, it has tracked these complaints using an Interactive Case Management System (ICM).²⁰ The ICM tracks cases filed in court, as well as other matters, such as formal and informal investigations.²¹ In 2001, SPL received 23 religious discrimination complaints, and by 2003 the number of complaints forwarded to or received by SPL had increased to 281 (see figure 3.2). After a slight decline in the number of religious discrimination complaints received by SPL between 2003 and 2004, the number of complaints continued to increase year by year to a high of 445 religious discrimination complaints in 2007 (see figure 3.2).

Figure 3.2
Religious Discrimination Complaints DOJ/SPL Received, 2001–2007



Note: These figures deal with religious discrimination complaints alleged under all relevant statutes that SPL enforces, not simply those under RLUIPA.

Source: U.S. Department of Justice, Special Litigation Section, Response to USCCR Interrogatories, Response to Interrogatory 15, April 28, 2008.

¹⁹ 42 U.S.C. § 2000cc (2)(f) (2000).

²⁰ SPL, Response to USCCR Interrogatories, Response to Interrogatory 18. SPL could not provide the Commission with any data on religious discrimination complaints it received between 1997 and 2000, before the implementation of its Interactive Case Management system.

²¹ *Id.*

Caption: In 2001, SPL received 23 religious discrimination complaints. Within the next several years, the number of religious complaints forwarded to SPL increased dramatically to a high of 445 in 2007, representing an almost 1850 percent increase between 2001 and 2007.

Incoming complaints are forwarded to one of the members of a team of attorneys and investigators who are responsible for coordinating SPL's response to religious discrimination.²² Pertinent details of the allegations are recorded in tracking databases. After a team reviews and evaluates the allegations, it will seek authorization to initiate an investigation where legally and factually appropriate.

Case Investigation and Resolution

For purposes of this study, SPL broadly defined what it considers an "investigation" to include all matters on which it performed significant further inquiry based on the allegations received.²³ A typical investigation includes an examination of the incidents that gave rise to the religious discrimination complaint and an evaluation of the facility in which the complaint arose, including its policies, procedures and routine practices with respect to religious accommodation.²⁴ It also includes reviews of written policies, site visits, interviews with facility staff, and interviews with inmates.²⁵

Because SPL's Interactive Case Management System was not implemented until 2000, SPL was unable to provide the number of its religious discrimination investigations between 1997 and 2000.²⁶ Between 2001 and 2006, however, SPL opened 30 investigations dealing with religious discrimination, including possible RLUIPA violations. That number represented just under half of the total of 67 CRIPA investigations opened by the section during that same time period.²⁷ Per year, the number of investigations ranged from a low of no investigations in 2006 to a high of 14 investigations in 2003 (see table 3.2). SPL investigates a small percentage of the total number of complaints it receives year by year. For example, SPL received 417 complaints in 2006, but did not open any for investigation (see figure 3.2 and table 3.2). In 2007, it received 445 complaints, but only 1.3 percent of those complaints were opened for investigation (see figure 3.2 and table 3.2).

²² *Id.*, Response to Interrogatory 16.

²³ *Id.*, Response to Interrogatory 19.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ U.S. Department of Justice (DOJ), Civil Rights Division, *Report on Enforcement of Federal Laws Protecting Religious Freedom: Fiscal Years 2001-2006 (2007)* at 31, <http://www.usdoj.gov/crt/religdisc/report/part2.pdf>.

Table 3.2
Opened and Closed Investigations DOJ/SPL Initiated, 2001 to 2007

Year	Investigations Opened	Investigations Opened as a Percentage of Total Complaints	Investigations Closed
2001	1	4.3	0
2002	10	6.1	0
2003	14	5.0	3
2004	3	1.1	3
2005	2	0.6	20
2006	0	0.0	1
2007	6	1.3	0

Source: U.S. Department of Justice's Response to the U.S. Commission on Civil Rights' Interrogatories, Special Litigation Section, April 28, 2008, pp. 9–13.

Caption: Of the 739 complaints SPL received between 2001 and 2004, it opened 28 investigations. In 2002, SPL opened 10 investigations—6.1 percent of the total complaints received. Between 2001 and 2007, it closed 27 investigations.

SPL will close an investigation for a variety of reasons, including:

- agreement by the jurisdiction to voluntary remedial action;
- insufficient evidence to support a claim, including failure of the complainant to provide additional information in support of the claim;
- witness's lack of credibility;
- allegation's lack of sufficiency in meeting constitutional or statutory requirements;
- referral of the matter to another government agency or section within DOJ;
- transfer or release of the inmate, which limits SPL's ability to obtain relief; and/or
- a court decision is issued on the merits of the claim.

According to SPL, between October 1999 and December 2007, it closed 27 cases initiated by individuals in jails, juvenile correction facilities, and prisons. Twenty-three of the twenty-seven cases were filed by prison inmates under RLUIPA; the remainder was pattern and practice cases filed by the Attorney General under CRIPA.²⁸ The majority of these cases were closed in 2005 (see table 3.2). While alleged First Amendment violations (either involving religion or speech) were at issue in all of the cases, a few cases also cited overcrowding, inmate violence, inadequate medical care, Medicaid regulations, and poor sanitation conditions as additional bases for their complaints.²⁹

Since 1997, SPL has issued only two findings letters pursuant to CRIPA dealing with institutionalized persons' religious rights. Both deal with youth in juvenile detention

²⁸ SPL, Response to USCCR Interrogatories, Response to Interrogatory Request 18 and Attachment 1.

²⁹ *Id.*

facilities.³⁰ The findings letter for the juvenile detention facilities in Raymond and Columbia, Mississippi was issued June 2003 and the findings letter for the juvenile detention facility in Alexander, Arkansas was issued in November 2002.³¹ In both cases, the juvenile detention facilities were found to have violated the juveniles' religious freedom by forcing them to engage in religious activities or face discipline, thereby violating the Establishment Clause.³²

In March 2003, SPL filed a complaint alleging that a juvenile detention center in Alexander, Arkansas, had engaged in a pattern or practice of violating its residents' religious rights under CRIPA. According to SPL, the case was filed in order to obtain a consent decree governing the remedial actions the facility was to undertake and not because of a lack of cooperation between SPL and the jurisdiction.³³ SPL entered into the consent decree with the State of Arkansas, Arkansas Division of Youth Services, and Arkansas Department of Human Services in March 2003.³⁴ It reports that it has been able to obtain remedial action by jurisdictions without having to resort to litigation in most cases.³⁵

In its settlement agreements, SPL typically requires facilities to 1) develop procedures and policies to remedy the alleged violation; 2) implement the procedures and policies effectively; 3) provide adequate training to staff, both new and experienced, regarding the policies and procedures; and 4) undertake ongoing monitoring to ensure that the new policies and procedures are being followed. Most settlements specify a time frame within which remedial action must be taken and require the facility to provide SPL with information regarding such implementation as well as unrestricted access to the facility, staff, inmates, or other institutionalized persons and records during the term of the settlement agreement.³⁶

In general, SPL monitors only an institution's implementation of remedial actions pursuant to a settlement agreement and will continue to do so as long as the agreement remains in force. Once a settlement agreement has been terminated, SPL has no authority to require further cooperation unless it has reasonable cause to believe that additional violations of

³⁰ *Id.*, Response to Interrogatory Request 20. See, e.g., Documents and Publications related to Investigative Findings on SPL's Web site, <http://www.usdoj.gov/crt/split/findsettle.htm#FindingsLetters> (last visited on Sept. 8, 2008).

³¹ SPL, Response to USCCR Interrogatories, Response to Interrogatory Request 20. Copies of each findings letter are available on SPL's Web site, http://www.usdoj.gov/crt/split/documents/oak_colu_miss_findinglet.pdf (Raymond and Columbia, Mississippi LOF); and <http://www.usdoj.gov/crt/split/documents/alexanderfindings.htm>. (Alexander, Arkansas LOF).

³² See U.S. Department of Justice, Civil Rights Division, Nov. 8, 2002, letter to the Honorable Mike Huckabee, Governor of Arkansas, State Capitol, Little Rock, AR 72201, Re: CRIPA Investigation of Alexander Youth Services Center, Alexander, Arkansas; U.S. Department of Justice, Civil Rights Division, June 19, 2003, letter to the Honorable Ronnie Musgrove, Governor of Mississippi, Office of the Governor, Jackson, MS 39205, Re: CRIPA Investigation of Oakley and Columbia Training Schools in Raymond and Columbia, Mississippi.

³³ SPL, Response to USCCR Interrogatories, Response to Interrogatory Request 21.

³⁴ *Id.*, Response to Interrogatory Request 22.

³⁵ *Id.*, Response to Interrogatory Request 21.

³⁶ *Id.*, Response to Interrogatory Request 22.

constitutional or federal statutory rights have occurred. At that time, SPL would initiate a new investigation.³⁷

SPL conducts compliance evaluations pursuant to settlement agreements or simple consent from a jurisdiction in which a complaint has been alleged without resorting to formal legal action.³⁸ However, it does not conduct compliance evaluations in circumstances where it does not have reasonable cause to believe, based on specific allegations and supporting facts, that a violation of constitutional or federal statutory rights has occurred pursuant to the statutes SPL enforces, including CRIPA, RLUIPA, and the Violent Crime Control and Law Enforcement Act.³⁹ Proactive compliance evaluations are thus outside its statutory mandate.

In monitoring compliance, SPL performs evaluations based on the specific facts of the case and the conditions set forth in the settlement agreement, consent decree, or similar documents.⁴⁰ SPL indicated that its compliance evaluations take on many forms, including formal and informal evaluations; on-site tours; interviews, document and systems review; and periodic review of documents and information sent to its offices. SPL does not maintain a formal means of tracking all forms of compliance evaluations and could not provide a precise response to the question of how many it conducts.⁴¹ However, SPL indicated that at a minimum, between 2001 and 2005, it conducted 11 on-site compliance tours on matters that included protection of religious rights (see figure 3.3). Between 2006 and 2007, it conducted eight such compliance tours (see figure 3.3).

³⁷ *Id.*, Response to Interrogatory Request 23.

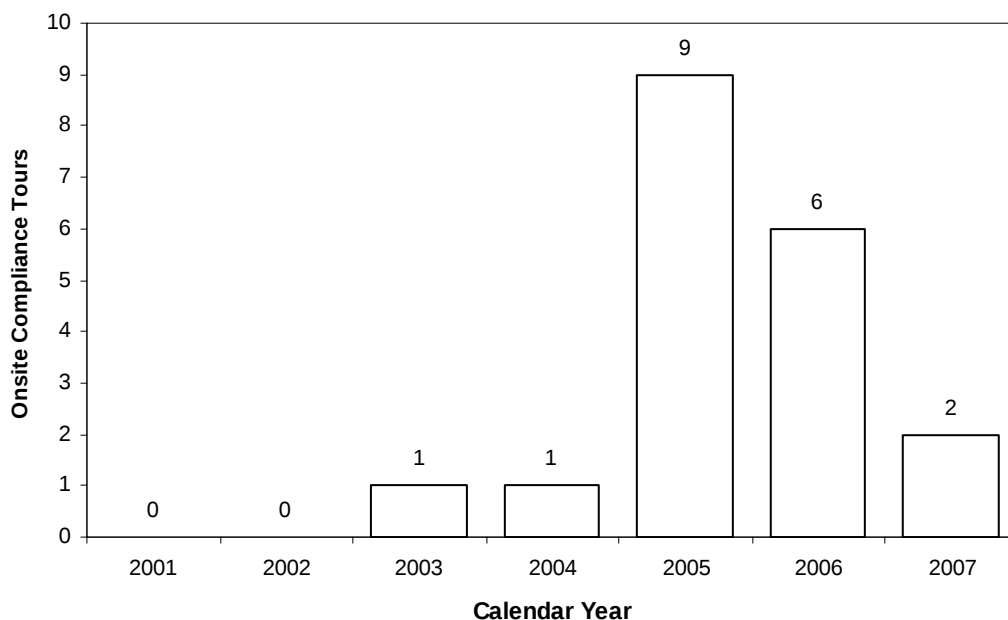
³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Figure 3.3
Onsite Compliance Tours DOJ/SLS Conducted, 2001 to 2007



Source: U.S. Department of Justice, Special Litigation Section, Response to USCCR Interrogatories, Interrogatory Request 23, April 28, 2008.

Caption: Between 2001 and 2007, SLS conducted 19 on-site compliance tours, and none in 2001 or 2002. The majority of the compliance tours, 15, were conducted between 2005 and 2006.

Technical Assistance, Regulations, and Other Guidance

SPL provides technical assistance to correctional institutions under CRIPA if it has reasonable cause to believe, based on allegations and supporting facts, that persons residing in or confined in the institution are subject to a pattern or practice of being denied their constitutional rights, privileges, or immunities. Any assistance provided to a correctional institution regarding the religious rights of its prisoners is specifically tailored to the allegations of the pertinent case and is provided on an ongoing basis as part of the process to resolve problems in a particular institution.⁴²

SPL does not have the statutory authority to require jails or prisons to post notices regarding who inmates should contact if they feel their religious rights have been violated; however, CRD publishes a description of the religious rights of prisoners entitled, “Protecting the Religious Freedom of All Americans: Federal Laws Against Religious Discrimination.”⁴³ SPL’s contact information is included in this pamphlet, which is sent to prisoners and prisoner advocacy organizations in response to their inquiries.⁴⁴

⁴² *Id.*, Response to Interrogatory Request 11.

⁴³ *Id.*, Response to Interrogatory Request 13. The pamphlet is available at <http://www.FirstFreedom.gov>.

⁴⁴ *Id.*, Response to Interrogatory Request 13.

SPL has not issued policy guidance in any of its enforcement areas, including religious discrimination, in the past 10 years.⁴⁵ From time to time, CRD has issued internal memoranda addressing how religious freedom cases should be pursued;⁴⁶ however, it is expressly precluded from promulgating regulations under CRIPA.⁴⁷

Other Efforts

To ensure that the laws protecting religious freedom are vigorously enforced, DOJ created a unique position within CRD in 2002—the Special Counsel for Religious Discrimination.⁴⁸ Among the Special Counsel’s responsibilities is oversight of DOJ’s First Freedom Project—a new initiative announced on February 20, 2007. The First Freedom Project is intended to highlight the expansion of DOJ’s efforts to enforce civil rights statutes protecting religious liberty, including laws barring discrimination based on religion in employment, public education, housing, credit, and access to public facilities and public accommodations; laws barring zoning authorities from discriminating against houses of worship and religious schools; laws protecting the religious rights of institutionalized persons; and criminal statutes such as the Church Arson Prevention Act, which made it a federal crime to attack persons or institutions based on their religion, or otherwise interfere with religious exercise.⁴⁹

The Project has facilitated communication and coordination with other sections and entities within DOJ that are responsible for protecting religious rights; for example, it convened a Religious Liberty Task Force, which consisted of representatives of various divisions and components within DOJ. CRD was represented on this task force by the Acting Assistant Attorney General and the Special Counsel for Religious Discrimination. Under the effort, DOJ has also increased outreach to religious organizations, civil rights organizations, and other groups and individuals concerned with religious liberty issues through meetings and distribution of informational literature.⁵⁰ For example, the First Freedom Project held a series of nine seminars between March 2007 and June 2008 in various cities throughout the country designed to educate the public, local government officials, private attorneys, and religious and community leaders about the jurisdiction of the Civil Rights Division in religious liberty

⁴⁵ *Id.*, Response to Interrogatory Request 6.

⁴⁶ *Id.*, Response to Interrogatory Request 8.

⁴⁷ *Id.*, Response to Interrogatory Request 6. See 42 U.S.C. § 1997i (2000).

⁴⁸ CRD, *Report on Enforcement of Laws Protecting Religious Freedom*, at 5. Attorney Eric W. Treene filled the position. The Roundtable on Religion & Social Welfare Policy, “An Interview with Eric W. Treene, Civil Rights Division, U.S. Department of Justice,” p. 1, http://www.religionandsocialpolicy.org/interviews/article_print.cfm?id=138 (last visited Aug. 5, 2008). Treene brought experience in working with pertinent court cases, such as *Cutter v. Wilkinson*, the Establishment Clause and RLUIPA actions from his previous employment at the Becket Fund, a nonprofit organization working to protect and further religious freedom via litigation, media outreach, and public education. See www.becketfund.org.

⁴⁹ See U.S. Department of Justice, The First Freedom Project, “DOJ Launches Initiative to Protect Religious Freedom: The First Freedom Project,” www.firstfreedom.gov or <http://www.usdoj.gov/crt/religdisc/firstfreedom.html> (last visited Oct. 23, 2007).

⁵⁰ SPL, Response to USCCR Interrogatories, Response to Interrogatory Request 27.

matters. The Special Counsel for Religious Discrimination presents those matters falling within SPL's purview at the seminars.⁵¹

SPL also maintains a First Freedom Project Web site to serve as a major source of outreach and education.⁵² Established early in 2007, the Web site is a recent addition to the agency's outreach efforts. In February 2004, CRD began issuing a monthly newsletter about its religious liberty and religious discrimination cases.⁵³ DOJ has a brochure, "Protecting the Religious Freedom of All," available since 2002 and updated in 2005, and two fact sheets: "A Guide to Religious Land Use Issues," and "Know Your Rights: Federal Laws Against Religious Discrimination."⁵⁴ Prisoner rights to religious accommodation are discussed in these materials.

Coordination and Review Section

Authority of the Coordination and Review Section to Enforce Religious Nondiscrimination in Prisons

The Coordination and Review Section (COR) is a small unit within CRD consisting of four managers: a section chief, two deputy chiefs, and a special legal counsel; seven staff attorneys supervised by the legal deputy chief; and seven equal opportunity specialists supervised by the program deputy chief. It is tasked with ensuring that federal agencies consistently and effectively enforce civil rights laws prohibiting discrimination in federally assisted programs and in the federal government's own programs and activities. To carry out this responsibility, the section operates a government-wide program of technical and legal assistance; training; interagency coordination; and regulatory, policy and program review.⁵⁵

COR derives its limited authority to enforce religious nondiscrimination in state and local prisons that receive federal financial assistance (it does not have jurisdiction over federal prisons), from a Memorandum of Understanding (MOU) with the Office of Justice Programs (OJP).⁵⁶ OJP is primarily responsible for ensuring that institutions that receive funding under

⁵¹ *Id.*, Response to Interrogatory Request 28.

⁵² See DOJ, The First Freedom Project, "DOJ Launches Initiative to Protect Religious Freedom: The First Freedom Project."

⁵³ See U.S. Department of Justice, Civil Rights Division, Religious Freedom in Focus, "Focus on RLUIPA," v. 1, February 2004, p. 3, http://www.usdoj.gov/crt/religdisc/newsletter/focus_1.htm (last visited Oct. 23, 2007).

⁵⁴ See U.S. Department of Justice, Civil Rights Division, Religious Freedom in Focus, "New Religious Freedom Publications Available from the Department of Justice," v. 12, June/July 2005, p. 4, http://www.usdoj.gov/crt/religdisc/newsletter/focus_12.htm (last visited Oct. 23, 2007); U.S. Department of Justice, Civil Rights Division, *Protecting the Religious Freedom of All: Federal Laws Against Religious Discrimination*, [brochure], June 2005, pp. 8–9.

⁵⁵ DOJ, *Civil Rights Division Activities and Programs* (2006 Edition), "Coordination and Review Section," p. 4, <http://www.usdoj.gov/crt/activity.html#spl> (last visited Oct. 17, 2007).

⁵⁶ U.S. Department of Justice, Coordination and Review Section (COR), Response to USCCR Interrogatories, Response to Interrogatory Requests 1–3, Apr. 28, 2008. Also see Inez Alfonzo-Lasso, Director, Office for Civil Rights, Office of Justice Programs and Merrily A. Friedlander, Chief, Coordination and Review Section, Civil

the Omnibus Crime Control and Safe Streets Act⁵⁷ do not discriminate in employment or in the provision of services based on race, color, religion, national origin, or sex. State and local departments of corrections are among the institutions that receive Safe Streets funds.⁵⁸

Under the terms of the MOU, COR agrees to assist OJP in investigating various complaints of discrimination in the provision of services in these and other institutions receiving Safe Streets funds.⁵⁹ The MOU sets forth the procedures for processing and resolving such complaints.⁶⁰ It prevents any overlap between the two components in the handling of discrimination charges.⁶¹ It also facilitates communications between OJP and CRD on matters of mutual concern, and identifies instances where the division may render assistance to OJP in the fulfillment of OJP's statutory obligation to enforce the Safe Streets Act's nondiscrimination provisions.⁶²

Enforcement Activities of the Coordination and Review Section

In order to ensure consistent and effective civil rights enforcement, COR engages in a wide variety of activities, including the development, review, and approval of regulations, policies, and enforcement standards and procedures. The Section also reviews plans and data submitted by all federal funding agencies describing their civil rights enforcement priorities, activities, and achievements. COR provides ongoing technical assistance to federal agencies and, upon request, assists agencies in investigations of particular complaints raising novel or complex issues.⁶³

As part of its outreach efforts, the Section maintains a Web site (www.usdoj.gov/cor), which provides comprehensive information about its areas of responsibility and contains copies of its widely used Title VI Legal Manual and Investigation Procedures Manual.⁶⁴

COR uses the ICM to enter complaints involving DOJ funding recipients, such as departments of corrections, police departments, sheriff departments, and courts, after

Rights Division, "Revised Memorandum of Understanding Between the Office of Justice Programs and the Civil Rights Division," June 25, 1997.

⁵⁷ Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c) (2000) (hereinafter "Safe Streets Act").

⁵⁸ COR, Response to USCCR Interrogatories, Response to Interrogatory Request 1; U.S. Department of Justice, Office of Justice Programs (OJP), Response to USCCR Document Requests, Response to Document Request 1, Apr. 28, 2008.

⁵⁹ COR does not handle any employment discrimination claims that may arise in those facilities. These are the sole responsibility of OJP.

⁶⁰ COR, Response to USCCR Interrogatories, Response to Interrogatory Requests 1 and 9.

⁶¹ *Id.*, Attachment 3, p. 2.

⁶² *Id.*

⁶³ DOJ, *Civil Rights Division Activities and Programs* (2006 Edition), "Coordination and Review Section," p. 4, <http://www.usdoj.gov/crt/activity.html#spl> (last visited Oct. 17, 2007).

⁶⁴ *Id.*

identifying a complaint as appropriate for preliminary review.⁶⁵ A complaint is entered into ICM only after it has been returned to COR from OJP for investigation pursuant to the MOU, unless COR already has an open investigation against the particular recipient, in which case it does not send the complaint to OJP, but simply opens it at COR.⁶⁶

Table 3.3 shows the number of investigations of religious discrimination complaints by fiscal year. According to COR, between fiscal years 2000 and 2008 (as of March 30, 2008), it has initiated investigations of 30 religious complaints against prisons or jails alleging violations of the nondiscrimination provisions of the Safe Streets Act.⁶⁷ In FY 2002, COR initiated 10 investigations; in FY 2006, one investigation; and no investigations in FY 2007.⁶⁸

Table 3.3
Investigations of Religious Discrimination Complaints DOJ/COR Initiated, Fiscal Years 2000–2007

Year	Total Investigations
2000	4
2001	5
2002	10
2003	4
2004	3
2005	3
2006	1
2007	0

Source: U.S. Department of Justice, Coordination and Review Section, Response to the U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 13, April 28, 2008.

Caption: Between fiscal years 2000 and 2007, COR initiated investigations of 30 religious discrimination complaints. More than half of all investigations were initiated during the early 2000s, with 10 investigations initiated in 2002. COR did not initiate any investigations in 2007.

Once COR decides to investigate a complaint of religious discrimination in violation of the Safe Streets Act, it notifies the federal funding recipient of its investigation and requests information in response to the allegations, including supporting documentation.⁶⁹ In its correspondence with the entity under investigation, COR explains its administrative procedure in an attached document, which expresses its preference for a voluntary compliance agreement without having to make a formal determination concerning the merits of the complaint. The attached document informs the recipient that COR will determine whether alternative dispute resolution (ADR) is appropriate. If the recipient does not wish to

⁶⁵ COR, Response to USCCR Interrogatories, Response to Interrogatory Request 16.

⁶⁶ *Id.*

⁶⁷ *Id.*, Response to Interrogatory Request 13. COR cautions that it cannot guarantee that the numbers of complaints are completely accurate because the descriptive information that is in the ICM depends on what information the case management specialist entered at the time the complaint was docketed.

⁶⁸ *Id.*

⁶⁹ *Id.*, Response to Interrogatory Request 14.

engage in ADR, or if it is not possible to achieve a voluntary resolution early in the investigation, COR will conduct a full investigation.⁷⁰ ADR is made available and offered throughout the investigation, should the funding recipient decide that it is interested in pursuing voluntary resolution.⁷¹

When an investigation is completed and COR makes a finding of noncompliance, it will attempt to come to some agreement with the federal funding recipient before issuing a Letter of Findings (LOF).⁷² If a remedy cannot be agreed upon, COR may initiate an enforcement action, such as an administrative hearing, to terminate DOJ's financial assistance to the programs and activities of the recipient, or may involve other means of enforcement authorized by law, including referral to a DOJ litigating section for court enforcement.⁷³ OJP decides whether to proceed by referral to the CRD or by administrative hearing. Although DOJ has the option of terminating financial assistance to a recipient as a result of noncompliance, no such action has been taken within the past 10 years.⁷⁴

Strategies for Conducting Compliance Reviews of Federal Recipients

Reviewers of CRD's performance during the late 1990s have questioned the consistency with which the Division's sections handle discrimination complaints.⁷⁵ In a 2000 report, the General Accounting Office (now the Government Accountability Office), found that CRD did not have written policies or procedures for selecting the matters it pursues as cases nor written documentation of internal processes for handling matters and cases.⁷⁶ Variation occurs in the procedures among different components of CRD, but the dominant sections undertake investigations that tend to be larger and more complex than referrals that allege a single act of discrimination against a person or persons.⁷⁷

COR indicated that compliance reviews are done proactively, and the Assistant Attorney General for OJP or his or her designee, makes the final decision as to where to initiate a compliance review.⁷⁸ In making recommendations to OJP on where a compliance review should be conducted, COR considers 1) issues frequently identified as problems faced by program beneficiaries; 2) geographical areas where COR believes beneficiaries are experiencing many problems or COR has not had a "presence" there for some time; 3) issues

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*, Response to Interrogatory Requests 14–15.

⁷⁵ U.S. General Accounting Office (now the Government Accountability Office), *Civil Rights Division, Selection of Cases and Reasons Matters Were Closed*, Report to the Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, GAO/GGD-00-192, September 2000, p. 2.

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 3.

⁷⁸ COR, Response to USCCR Interrogatories, Response to Interrogatory Request 19.

raised in a complaint or identified during a complaint investigation that could not be covered within the scope of the complaint investigation; and 4) problems identified to COR by community organizations, advocacy groups, or other DOJ divisions or federal agencies that are familiar with actual incidents and can support their concerns.⁷⁹

Since 1997, COR has conducted only one compliance review of a state department of corrections, and in that case it was investigating national origin, not religious discrimination.⁸⁰ Since 2000, COR has issued seven Letters of Findings specifically concerning religious discrimination.⁸¹ In the majority of the letters, COR found no evidence or insufficient evidence to support a violation of the Safe Streets Act.⁸²

Technical Assistance to State Corrections Departments

COR works with Safe Streets Act and other recipients to resolve problems. Part of that process may involve providing technical assistance to the state prison system or local jail named in the complaint. However, COR did not provide documents because it indicated that its ability to resolve complaints in a cooperative fashion would be compromised if it were to produce information regarding the technical assistance and other advice that it gives recipients on an individualized and informal basis.⁸³

Although COR may provide technical assistance as part of the resolution of a religious complaint, its jurisdiction over religious discrimination complaints is limited, and it does not have a formal technical assistance program that includes information training documents or other materials relating to the religious rights of prisoners and the religious organizations ministering to them.⁸⁴ During the 10-year period for which data were requested by the Commission, COR has not issued any policy guidance on religious discrimination.⁸⁵ It has no current plans to do so, given its limited role in assisting OJP in investigating complaints arising under possible violations of the Safe Streets Act's nondiscrimination provisions.⁸⁶

⁷⁹ *Id.*

⁸⁰ *Id.*, Response to Interrogatory Request 17. That investigation, which involves an alleged failure to provide reasonable access to limited English proficient inmates, is ongoing.

⁸¹ *Id.*, Response to Interrogatory Request 18.

⁸² *Id.*, Attachment 6.

⁸³ *Id.*, Response to Interrogatory Request 10.

⁸⁴ *Id.*, Response to Interrogatory Request 11.

⁸⁵ *Id.*, Response to Interrogatory Request 6.

⁸⁶ *Id.*, Response to Interrogatory Requests 1 and 7.

Office of Justice Programs and its Office for Civil Rights

The Office of Justice Programs' stated mission is "to increase public safety and improve the fair administration of justice across America through innovative leadership and programs."⁸⁷ OJP disseminates state-of-the-art knowledge and practices for crime-fighting strategies and provides grants for their implementation. While it does not directly engage in law enforcement or justice activities, it works in partnership with other national, state, and local public and private entities to identify the most pressing crime-related issues confronting the justice system and devise strategies for addressing such challenges.⁸⁸

Most importantly, OJP is charged with administering funding programs under the Safe Streets Act, as amended.⁸⁹ Among its funding recipients are state and local departments of corrections.⁹⁰ These recipients, like all other federal grantees, are required to sign an assurance of compliance with applicable statutorily imposed nondiscrimination requirements as a condition of their grants.⁹¹ OJP's Office for Civil Rights (OJP/OCR), in partnership with the Coordination and Review Section in COR, is the unit responsible for ensuring federal grantees' compliance with the nondiscrimination requirements of the Safe Streets Act.⁹²

Office of Justice Programs' Civil Rights Complaints Processing

Within its jurisdiction, OJP/OCR's enforcement activities include receiving and investigating complaints of religious discrimination filed against recipients of financial assistance from OJP and its components. The complaints may allege discrimination by state departments of corrections, state prisons, privately managed prisons, local jails and detention centers, and fellow inmates.⁹³

OJP/OCR provides only limited assistance to inmates filing religious discrimination complaints with DOJ. Its jurisdiction extends only to complaints that demonstrate the reasonable likelihood of a systemic problem, such as a pattern or practice of discrimination by a federal funding recipient.⁹⁴ OJP's fact sheet explains that "OCR attorneys represent the

⁸⁷ U.S. Department of Justice, Office of Justice Programs, "Mission and Vision," <http://www.osp.usdoj.gov/about/mission.htm> (last visited Sept. 17, 2008).

⁸⁸ U.S. Department of Justice, Office of Justice Programs, "About Us," <http://www.ojp.usdoj.gov/about/about.htm> (last visited May 27, 2008).

⁸⁹ 42 U.S.C. § 3789d (2000) and 28 C.F.R. § 42.201 *et seq.* (2008).

⁹⁰ COR, Response to USCCR Interrogatories, Response to Interrogatory Request 1 and Attachment 1.

⁹¹ OJP, Response to USCCR Interrogatories, Response to Interrogatory Requests 15–16. The OJP's assurance form names the Safe Streets Act and the Civil Rights Act of 1964 among other statutes imposing nondiscrimination requirements. *See id.*, Attachment D, "Standard Assurances." Program managers in OJP's grantmaking offices and bureaus review applicants' and recipients' assurances. OJP's Office for Civil Rights addresses any questions or concerns (from applicants, recipients, or others), that arise regarding any modifications or civil rights provision. *Id.*, Response to Interrogatory Request 3.

⁹² *Id.*, Response to Interrogatory Request 2.

⁹³ *Id.*, Response to Interrogatory Requests 1–3.

⁹⁴ *Id.*, Response to Interrogatory Request 14.

federal government and cannot represent or give legal advice to individuals” in how to deal with their specific case or problem.⁹⁵ If OJP/OCR accepts a submitted complaint for review, it will investigate the matter and work with the federal funding recipient to change its problematic policies. If a complaint submitted under the Safe Streets Act has remained open for at least 180 days, the victim may file an individual suit in court.⁹⁶ An inmate also has individual private rights of action under RLUIPA and the U.S. Constitution.⁹⁷

OJP/OCR’s Web page provides instructions on how to file a complaint. The office’s instructions state, for example, that an aggrieved individual or group can file a complaint with OCR if the party has been denied the benefits of, excluded from participation in, or subjected to discrimination in connection with any program or activity because of religion or other bases. OCR will investigate complaints of discrimination filed against recipients of financial assistance from OJP or any of its units. OCR’s goal, both in conducting compliance reviews and in processing complaints, is to obtain voluntary compliance from the recipient agency so that funding may commence or can continue. However, when an agency is recalcitrant or refuses to comply, OJP is obligated to make a determination of “noncompliance” that may result in suspension or termination of OJP funding.⁹⁸ Though this is a possible consequence of continued noncompliance, it is a tool utilized rarely.

To file a civil rights complaint with OCR, a complainant must submit a complaint verification form (CVF) with the dates, times, and places of specific actions taken against him/her or others, the identities of witnesses, and the identities of those alleged to have violated civil rights. The complainant must sign a release allowing OCR to collect evidence and provide the complainant’s name to the agency charged with discrimination unless confidentiality is requested. OCR instructions warn that, although the complainant’s identity can remain confidential, the effort to preserve privacy may impair OCR’s efforts to obtain evidence during the investigation. OCR determines whether the complaint has merit and falls within OCR’s jurisdiction to investigate.⁹⁹

Table 3.4 shows that each fiscal year from 2000 to 2007, the number of civil rights violation complaints OJP/OCR received ranged between 246 and 346. Complaints involving religious issues ranged from seven to 31, representing between 2.0 and 10.4 percent of all complaints received. The highest number was in FY 2002—the 31 complaints comprising 10.4 percent. Table 3.4 also displays the disposition of the complaints that OJP/OCR handled. In FY 2002, OJP/OCR referred 13 complaints to other DOJ components for processing, as is appropriate when another DOJ component has jurisdiction (such as in CRIPA- and RLUIPA-related matters, where SPL has jurisdiction). Some complaints are closed administratively when the

⁹⁵ U.S. Department of Justice, Office of Justice Programs, “FAQ on Filing Civil Rights Complaints—English,” <http://www.ojp.usdoj.gov/ocr/crcfaq.htm> (last visited Nov. 13, 2007), at 2.

⁹⁶ OJP, Response to USCCR Interrogatories, Response to Interrogatory Request 14.

⁹⁷ *Id.*

⁹⁸ U.S. Department of Justice, Office of Justice Programs (OJP), “Filing a Civil Rights Complaint with OCR [Office for Civil Rights],” at 1, <http://www.ojp.usdoj.gov/ocr/crc.htm> (last visited Nov. 7, 2007); *See also* OJP, Response to USCCR Interrogatories, Response to Interrogatory Request 1.

⁹⁹ OJP, “Filing a Civil Rights Complaint with OCR,” at 1.

complainant fails to state a *prima facie* case that discrimination has occurred, or where a complainant does not cooperate, withdraws the charge, has ongoing litigation on the same issues, or cannot be located.¹⁰⁰

Table 3.4

Complaints Processing Activities by the Office of Justice Programs' Office for Civil Rights, Fiscal Years 2000–2007

	Fiscal Year							
	2000	2001	2002	2003	2004	2005	2006	2007
All complaints received of civil rights violations	255	272	298	346	246	261	280	339
Complaints concerned with religious discrimination against prisoners	16	12	31	19	16	17	16	7
Religious complaints as a percentage of all complaints	6.3%	4.4%	10.4%	5.5%	6.5%	6.5%	5.7%	2.1%
Disposition of religious complaints:								
Referred to another DOJ component	1		13	2	1	3	1	
OCR reached a settlement with the correctional facility	1							
Issue resolved by OCR and institution			1					
OCR investigated and found no violation	2	2	4	1				
OCR investigation pending or open		1	1	2	2	2	3	3
Issue is moot				2	3	3	1	
OCR had no jurisdiction to investigate	7	2	4	6	1		2	
Matter closed for administrative reasons	5	7	8	6	9	9	9	4

Source: U.S. Department of Justice, Office of Justice Programs, Response to USCCR Interrogatories, Response to Interrogatory Requests 4–5, April 28, 2008.

Caption: Between fiscal years 2000 and 2007, OJP received numerous civil rights violation complaints. The number of complaints ranged from 255 in FY 2000 to 346 complaints in FY 2003 to 280 complaints in FY 2006. Only a small percentage of these complaints involved religious issues. In FY 2002, 10.4 percent of the complaints dealt with religious issues, and only 2.1 percent of the total complaints received in FY 2007 dealt with the same.

OJP/OCR officials state that, based on their investigations, they have required departments of corrections to change practices to permit the distribution of religious texts to inmates, to offer nonreligious alternatives to substance abuse programs, and to provide faith-appropriate locations for prisoners' worship.¹⁰¹

¹⁰⁰ OJP, Response to USCCR Interrogatories, Response to Interrogatory Request 5.

¹⁰¹ *Id.*, Response to Interrogatory Request 14.

Office of Justice Programs' Civil Rights Compliance Reviews

OJP/OCR also performs compliance reviews of its funding recipients. It does not engage in pre-award reviews, but does conduct post-award reviews either on-site or as desk audits. These reviews may focus on employment practices or delivery of services, and may look at religious discrimination claims within OJP/OCR's limited jurisdiction.¹⁰² In 2004, OJP/OCR proactively reviewed 126 recipients—either state administering agencies or departments of corrections—to ensure their grantees were complying with civil rights laws.¹⁰³

Table 3.5 shows the number of various types of compliance reviews OJP/OCR conducted for fiscal years 2000 to 2007. In fiscal years 2005 and 2006, the office carried out 20 on-site reviews, the most in any fiscal year. It performed few desk audits between fiscal years 2000 and 2007. Those that it did perform occurred in only three of those years—between fiscal years 2001 and 2003. Efforts to audit state administering agencies and state departments of corrections occurred in fiscal years 2004 and 2007 respectively.

Of the total number of compliance reviews conducted between fiscal years 2000 and 2007, only two examined state departments of corrections—the Tennessee Department of Correction in FY 2004, for which the investigation is still open; and the Rhode Island Department of Correction in FY 2007. None looked at jails or detention facilities of local governments. Only the Tennessee review examined inmates' religious issues.¹⁰⁴ OJP/OCR has not completed any compliance reviews during the past five years on state or privately managed prisons.¹⁰⁵

Table 3.5
Office of Justice Programs' Office for Civil Rights' Compliance Reviews, Fiscal Years 2000–2007

	Fiscal Year							
	2000	2001	2002	2003	2004	2005	2006	2007
Desk audits		2	4	1				
On-site reviews	2	4	2	11	13	20	20	3
Audits of state administering agencies and state departments of corrections					126			83

Note: The Office of Justice Programs' Office of Civil Rights also reviews equal employment opportunity plans, which are not represented in the table.

Source: U.S. Department of Justice, Office of Justice Programs, Response to USCCR Interrogatories, Response to Interrogatory Requests 1 and 7, April 28, 2008.

Caption: Between fiscal years 2000 and 2007, OJP conducted seven desk audits, 75 on-site reviews, and 209 audits of state administering agencies and state departments of corrections. Many

¹⁰² *Id.*, Response to Interrogatory Requests 1, 3, 6, and 7. U.S. Department of Justice, OJP, Response to USCCR Document Requests, Response to Document Request 7, Apr. 28, 2008.

¹⁰³ *Id.*, Response to Interrogatory Requests 3 and 7.

¹⁰⁴ *Id.*, Response to Interrogatory Request 7.

¹⁰⁵ *Id.*, Response to Interrogatory Requests 9–10; OJP, Response to USCCR Document Requests, Response to Document Requests 9–10.

of the desk audits were performed in FY 2002, more than two-thirds of all on-site reviews were performed between fiscal years 2003 and 2006, and more than half of all audits were initiated in FY 2004.

OCR/OJP also receives other compliance information. If a federal or state court or state administering agency (SAA) reviews federally funded subgrantees and contractors, holds a due process hearing, and issues a finding of discrimination on the basis of religion or other grounds, officials must submit a report to the appropriate DOJ civil rights compliance unit. OJP's Office for Civil Rights reviews these reports to determine whether any further action is necessary. Since December 2005, OJP/OCR staff received nine such findings. None was issued on the basis of religious discrimination.¹⁰⁶

Other Enforcement Activities within the Office of Justice Programs

In addition to investigating complaints and conducting compliance reviews, OJP/OCR uses several other tools for enhancing enforcement of nondiscrimination laws. It provides technical assistance to aid the compliance of its recipients; it collects data on them to better monitor any concerns about discrimination; and it compiles and forwards annual reports of its civil rights activities to CRD's Coordination and Review Section for additional oversight.¹⁰⁷

Table 3.6

Technical Assistance Offered by the Office of Justice Programs' Office for Civil Rights, Fiscal Years 2000–2007

	Fiscal Year							
	2000	2001	2002	2003	2004	2005	2006	2007
Number of Training or Technical Assistance Events	5 or more	7	4	6	17	13	13	7
Estimated number of attendees*	384	538	400	457	1,674	1,901	435	817

*Fiscal years 2000 to 2005 included one or more events without counts of the number of participants. Using the information from all years, the Commission calculated the average number of participants per event (77) and added the estimated amount to the year totals.

Source: Compiled by the U.S. Commission on Civil Rights using information from U.S. Department of Justice, Office of Justice Programs, Response to USCCR Interrogatories, Response to Interrogatory Request 9, April 28, 2008.

Caption: During the 2000s, OJP offered approximately 86 technical assistance events attended by roughly 6,600 participants. Only an FY 2004 training session of Rhode Island employees and the state's Department of Corrections targeted prison staff directly.

OJP/OCR offers technical assistance and training to its funding recipients, including on religious discrimination within OJP's jurisdiction.¹⁰⁸ OJP/OCR identified at least 86 events with roughly 6,600 participants where the office provided educational information during

¹⁰⁶ OJP, Response to Interrogatories, Response to Interrogatory Request 17; OJP, Response to USCCR Document Requests, Response to Document Requests 17–18.

¹⁰⁷ OJP, Response to USCCR Interrogatories, Response to Interrogatory Request 3.

¹⁰⁸ *Id.*

fiscal years 2000 to 2007 (see table 3.6). Only one of these events appears to have targeted prison staff directly: An FY 2004 training of Rhode Island employees including the state Department of Corrections. Forty-five participants attended this session.¹⁰⁹

DOJ officials state that all of OJP/OCR's training includes information on the prohibition of religious discrimination by Safe Streets Act funding recipients. Trainers draw on examples of religious discrimination in correctional settings to illustrate prohibited practices, and to present a nondiscriminatory approach to accommodating inmates' religions.¹¹⁰ A sample OJP/OCR slide show defines the scope of religious protection: Nondiscrimination provisions apply to all aspects of religious practice and belief and cover sincerely held moral or ethical tenets.¹¹¹

OJP/OCR collects data regarding its recipients' employment practices pursuant to its requirement that each of its grantees maintains an equal employment opportunity program. Given its limited and tangential enforcement role in preventing religious discrimination against inmates, it does not request statistics on the religious affiliations and practices of inmates at state and local departments of corrections, nor is it authorized to do so by its regulations.¹¹²

For more than a decade, OJP and its components have not conducted any needs assessments concerning prisons' compliance with statutes requiring the accommodation of inmates' religious needs.¹¹³ OJP's planning documents identify its responsibility to enforce religious nondiscrimination and record the small numbers of such complaints it has processed each year.¹¹⁴ OCR's activities with respect to prisons did not concern religion.¹¹⁵

To carry out its mission and functions, OJP/OCR has positions for 13 full-time equivalent staff with one current vacancy.¹¹⁶ To maximize the performance of its 13 full-time staff,

¹⁰⁹ *Id.*, Response to Interrogatory Request 9. OJP's Office for Civil Rights also provided technical assistance to a sheriff's office in Johnston County, North Carolina, in fiscal year 2004; and in various years to police departments in places such as Philadelphia, Pennsylvania, and Prince George's County, Maryland. *Id.*

¹¹⁰ *Id.*

¹¹¹ U.S. Department of Justice, OJP, Office for Civil Rights, "Office of Justice Programs," slide show, slide 6.

¹¹² OJP, Response to USCCR Interrogatories, Response to Interrogatory Requests 3 and 8; OJP, Response to USCCR Document Requests, Response to Document Request 11. *See also* 28 C.F.R. 42.301 *et seq.* (2008), which spells out the nature of data that OJP's Office for Civil Rights can collect.

¹¹³ OJP, Response to USCCR Interrogatories, Response to Interrogatory Request 5; OJP, Response to USCCR Document Requests, Response to Document Request 5.

¹¹⁴ *See, e.g.*, U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights, *Civil Rights Implementation Plan 2006, FY 2005 Data: Update*, pp. 1–3 and 17 (schedules 1, 2, and 8); U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights, *Civil Rights Implementation Plan 2005, FY 2004 Data: Update*, pp. 2–3 and 16 (schedules 1, 2, and 8); U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights, *Civil Rights Implementation Plan 2004: Update*, pp. 2, 4, and 17 (schedules 1, 2, and 8).

¹¹⁵ *See, e.g.*, U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights, *Civil Rights Implementation Plan FY 2004*, pp. 8–9 (schedule 4); U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights, *Civil Rights Implementation Plan 2002*, p. 4.

¹¹⁶ OJP, Response to USCCR Interrogatories, Response to Interrogatory Request 13.

OJP/OCR is currently revising a training manual for conducting complaints investigations. It does not have any manuals specific to correctional facilities.¹¹⁷

Federal Bureau of Prisons

The Federal Bureau of Prisons (BOP) was established within DOJ in 1930 “to provide more progressive and humane care for Federal inmates, to professionalize the prison service, and to ensure consistent and centralized administration of the 11 Federal prisons in operation at that time.”¹¹⁸ Presently, the bureau consists of 114 institutions, six regional offices, a central office, two staff training centers, and 28 community corrections offices, and is responsible for over 201,000 federal offenders.¹¹⁹ Approximately 85 percent of these offenders are confined in bureau-operated correctional facilities or detention centers. The remaining 15 percent are confined in state, local, or private facilities such as community corrections centers, detention centers, prisons, and juvenile facilities.¹²⁰

Bureau’s Role, Authority, and Responsibilities for Religious Issues in Federal Prisons

The central office’s Correctional Programs Division oversees religious services through its Religious Services Branch (RSB), which is charged with accommodating the free exercise of religion for inmates.¹²¹ The RSB must provide “pastoral care to all Federal inmates” and facilitate “opportunities to pursue individual religious beliefs and practices in accordance with law, Federal regulations, and Bureau of Prisons policy.”¹²² Moreover, the RSB’s mission charges the chaplain with the responsibility to provide “religious worship, education, counseling, spiritual direction, support and crisis intervention to accommodate the diverse religious needs of inmates.”¹²³ In carrying out their duties, chaplains must evaluate the

¹¹⁷ OJP, Response to USCCR Document Requests, Response to Document Request 3.

¹¹⁸ The Bureau of Prisons (BOP) was established pursuant to Pub. L. No. 71–218, 46 Stat. 325 (1930). See U.S. Department of Justice, Federal Bureau of Prisons, “About the Federal Bureau of Prisons,” at 1 (July 2007).

¹¹⁹ U.S. Department of Justice, Federal Bureau of Prisons, (BOP), “About the Bureau of Prisons,” <http://www.bop.gov/about/index.jsp> (last visited Sept. 14, 2008). A secondary source describes the federal correctional facilities as 21 penitentiaries, 68 correctional institutions, six independent prison camps, 12 detention centers, and six medical referral centers. See U.S. Department of State, *Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination*, April 2007, p. 62, paragraph 171, http://www.state.gov/g/drl/rls/cerd_report/83404.htm (last visited Oct. 30, 2007). In 1997, the National Capital Revitalization and Self-Government Improvement Act of 1997, transferred authority over offenders in the District of Columbia to BOP. Section 11231, Pub. L. No. 105-33, 111 Stat. 712.

¹²⁰ BOP, “About the Bureau of Prisons,” at 1.

¹²¹ U.S. Department of Justice, Federal Bureau of Prisons, “About Central Office,” p. 1, <http://www.bop.gov/about/co/programs/index.jsp> (last visited July 25, 2007); U.S. Department of Justice, Federal Bureau of Prisons, “About Central Office—Correctional Programs Division,” p. 1, <http://www.bop.gov/about/co/programs/index.jsp> (last visited June 10, 2008).

¹²² U.S. Department of Justice, Federal Bureau of Prisons (BOP), Response to USCCR Interrogatories, Response to Interrogatory Request 3, June 6, 2008.

¹²³ *Id.*, Response to Interrogatory Requests 3.

religious needs of the inmates in light of “the security, safety, and good order of the institution.”¹²⁴

The RSB ensures that its purpose is fulfilled by publishing policy documents and training materials related to the accommodation of inmate religious beliefs and practices; providing policy and guidance to staff; integrating its technical reference manual on religious practices into training; requiring chaplains and staff to complete training; supervising religious groups; and having religious volunteers and contractors sign an agreement to comply with federal rules.¹²⁵ Furthermore, chaplains are assisted in their duties by contract spiritual leaders and community volunteers.¹²⁶

BOP does not have a specific civil rights office, but it has an Office of Internal Affairs (OIA) tasked to investigate regulatory violations in program operations. The OIA staff investigates any individuals or entities suspected of having committed illegal or unethical acts, and reports its findings to the appropriate BOP authorities for related disciplinary or administrative actions, civil proceedings, or criminal prosecutions.¹²⁷ OIA forwards certain violations to the DOJ’s Office of Inspector General (OIG) for review. OIG decides whether to investigate the matter or send it back to BOP for an administrative investigation, and advises OIA accordingly. In turn, OIG may refer criminal matters, such as the physical or sexual abuse of an inmate, to DOJ’s CRD for possible prosecution.¹²⁸ BOP officials did not indicate whether OIA was currently investigating or had ever investigated or referred matters related to federal prisons’ compliance with religious nondiscrimination statutes.¹²⁹

BOP could not identify the amounts of funding and staffing devoted specifically to civil rights enforcement activities such as ensuring nondiscrimination on the basis of religion. BOP officials explained that providing equitable opportunities for the practice of religion is a fundamental tenet of the mission of the Chaplaincy Services. Thus, all Chaplaincy Services staff and contractors strive to meet this end.¹³⁰

¹²⁴ U.S. Department of Justice, Federal Bureau of Prisons, “Religious Programs,” p. 1, http://www.bop.gov/inmate_programs/religious.jsp (last visited Oct. 7, 2008).

¹²⁵ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 3.

¹²⁶ Written Statement of Chaplain Joe Pryor, Chaplaincy Administrator, Federal Bureau of Prisons to the U.S. Commission on Civil Rights, “The Accommodation of Religious Practice in a Correctional Environment,” p. 4 Feb. 1, 2008 (“[T]he Bureau enjoys the services of over 7,000 volunteers from fourteen different faith traditions and 209 contractors representing ten faith traditions.”)

¹²⁷ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 2; U.S. Department of Justice, BOP, Supplemental Response to USCCR Interrogatories, Response to Interrogatory Request 1, July 7, 2008.

¹²⁸ BOP, Supplemental Response to USCCR Interrogatories, Response to Interrogatory Request 1.

¹²⁹ *Id.*

¹³⁰ *Id.*

Bureau's Policy and Guidance on Religious Accommodation in Federal Prisons

BOP has developed written policy and guidance to ensure the religious rights of federal offenders in a correctional environment are protected.¹³¹ This policy is evidenced by BOP's regulations, written Program Statements, and written Technical Reference Manuals, with supplemental guidance issued by each facility.

While the core of this policy is codified in BOP's regulations on Religious Beliefs and Practices of Committed Offenders,¹³² the needed context is provided in a BOP Program Statement on Religious Beliefs and Practices.¹³³ Taken together, BOP provides guidance on the following topics: 1) religious opportunities and limitations of offenders; 2) religious designation of inmates; 3) the role of chaplains (and the Religious Issues Committee); 4) schedules and facilities for religious activities; 5) involvement of community volunteers and religious contractors in assisting inmates; 6) protection of inmates from religious discrimination; 7) religious property of inmates; 8) religious conflicts with work assignments; 9) observances of religious holidays; 10) pastoral visits; and 11) religious dietary practices of inmates.¹³⁴

BOP Chaplaincy Administrator, Joe Pryor, has indicated that BOP trains chaplains on this policy and the chaplains use the Program Statement as a guide to resolve issues relating to "religious accommodation through programs, religious use of wine, unauthorized religious practices, supervision of inmates, religious preferences, visits to special housing units, telephone calls, women and special needs offenders, community involvement of volunteers and contractors, religious property, religious head wear, and clothing."¹³⁵

In addition to the Program Statement, BOP has also issued a Technical Reference Guide for chaplains on Inmate Religious Beliefs and Practices.¹³⁶ This 343-page manual provides practical information on the theology, history, and customs of a number of religions to assist chaplains in ministering to inmates of different faiths.

¹³¹ Written Statement of Chaplain Joe Pryor at 4.

¹³² 28 C.F.R. §§548.10–548.20 (2008).

¹³³ BOP Program Statement on Religious Beliefs and Practices, No. P5360.09 (Dec. 31, 2004).

¹³⁴ *Id.* Other Program Statements which reference issues of religious concern include the statements on special foods, the employment of chaplains, non-discrimination towards inmates, pregnancy, and grooming. See BOP Program Statement on Special Food or Meals from Outside Sources Introduced into Institutions, No. 4761.04 (Apr. 22, 1996); BOP Program Statement on Food Service Manual, No. 4700.05 (June 12, 2006); BOP Program Statement on Chaplains' Employment, Responsibilities, and Endorsements, No. 3939.07 (Oct. 26, 2001); BOP Program Statement on Non-Discrimination Toward Inmates, No. 1040.04 (Jan. 29, 1999); BOP Program Statement on Birth Control, Pregnancy, Child Placement and Abortion, No. 6070.05 (Aug. 9, 1996); BOP Program Statement on Grooming, No. 5230.05 (Nov. 4, 1996).

¹³⁵ Written Statement of Chaplain Joe Pryor at 4.

¹³⁶ National Institute of Corrections (NIC), Bureau of Prisons, U.S. Department of Justice, *Technical Reference Manual of Religious Beliefs and Practices* (No. T3560.01), 2001. A more detailed description of this guide follows later in this chapter.

Lastly, each facility supplements BOP guidance with its own written guidance applying its unique mission to religious accommodation.¹³⁷

Bureau's System for Inmates to File Complaints about Religious Accommodations

BOP has a three-tiered administrative procedure for handling inmate grievances, including those dealing with free exercise concerns.¹³⁸ Generally, the procedure requires inmates to present their grievances to prison staff (usually the chaplain), for informal resolution before pursuing other avenues of resolution.¹³⁹ If the problem cannot be resolved at that level, or if the inmate is dissatisfied with the response, he may address his complaint to the warden by filing an administrative request for a religious accommodation.¹⁴⁰ If the inmate still does not receive a satisfactory response, he can file an appeal with the regional director;¹⁴¹ and finally the Director of National Inmate Appeals in the Office of the General Counsel.¹⁴² Under the Prison Litigation Reform Act, inmates are required to exhaust all administrative procedures for the resolution of their request before a court will consider any private rights of action they may file.¹⁴³

Requests through the Chaplain

BOP officials report that chaplains are routinely available to the inmate population. Prisoners may express religious needs to chaplains during meal times and the latter's weekly visitation rounds of special housing units, hospitals, and visiting rooms. Inmates may also approach religious leaders during scheduled office hours or arranged appointments.¹⁴⁴ In addition, the prison has several forms for inmates to use to request accommodation.

An "Inmate Request to Staff" is a general-purpose form prisoners may submit to chaplains to state questions or concerns, propose a solution, or request religious accommodation. BOP provides the document electronically and advises institutions to reproduce it locally so that it is readily available to all inmates.¹⁴⁵ Inmates also submit forms to the chaplain for permission to participate in the religious diet program and to request new or unfamiliar

¹³⁷ Written Statement of Chaplain Joe Pryor at 4.

¹³⁸ See 28 C.F.R. §§ 542.10-5452.20 (2008).

¹³⁹ 28 C.F.R. § 542.13 (2008).

¹⁴⁰ 28 C.F.R. § 542.14 (2008).

¹⁴¹ 28 C.F.R. § 542.15(a) (2008).

¹⁴² 28 C.F.R. § 542.15(a) (2008).

¹⁴³ 42 U.S.C. § 1997e (a) (2000).

¹⁴⁴ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 12.

¹⁴⁵ Kathleen Hawk Sawyer, Director, Federal Bureau of Prisons, U.S. Department of Justice, Change Notice 5511.07, Aug. 14, 1998; U.S. Department of Justice, Federal Bureau of Prisons, "Inmate Request to Staff," BP-A148.055, September 1998.

religious components or accommodations. The chaplain determines the best accommodation of dietary needs.¹⁴⁶

The chaplain will ask an inmate to complete a “New or Unfamiliar Religious Components Questionnaire” to obtain additional information regarding a requested new practice and will forward the form for review to the appropriate advisory officials, whether located within the facility, a regional unit, or BOP’s Central Office. All levels, including the Central Office’s Religious Issues Committee (RIC), advise the prison warden on whether the accommodation is appropriate, and leave it to him or her to implement the new practice.¹⁴⁷

RIC’s review process is well established, having begun in 1994. BOP officials did not report how many requests the Central Office Committee reviewed annually or how many it recommended granting. Furthermore, BOP officials stated that the organization does not track whether or not institutions implement the practices according to RIC’s recommendations. Inmates dissatisfied with the response to any request submitted to the chaplain may initiate an administrative remedy process. However, because BOP lacks a tracking system, it cannot determine whether a warden’s failure to implement RIC’s recommended practices has led to matters in the administrative remedy program.¹⁴⁸

Administrative Remedy Request Program

BOP has an administrative remedy request procedure through which inmates can file complaints or grievances about the nonaccommodation of their religious needs or religious discrimination. The inmate submits a “Request For Administrative Remedy” form and, according to its instructions, retains a receipt signed by the staff member who accepts the document. If the prisoner believes that the complaint is so sensitive that he or she will suffer adverse effects for submitting it to the institution, he or she may submit it to the regional director directly. The inmate receives the institution’s written response, signed by the warden or regional director, on the original form.¹⁴⁹

Using similar forms and retaining a receipt for each submission, an inmate may appeal the response to a request. He or she must direct the first level of appeal to the regional director and submit it within 20 days of receiving the initial response. If the response to that appeal is still unsatisfactory, the inmate has 30 days to submit another appeal to the general counsel in

¹⁴⁶ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 12. *See also* BOP Policy Statement No. P5360.09, p. 18.

¹⁴⁷ BOP, Response to USCCR Interrogatories, Response to Interrogatory Requests 12–15. *See also* U.S. Department of Justice, Federal Bureau of Prisons, “New or Unfamiliar Religious Components questionnaire,” BP-S822.053, October 2004.

¹⁴⁸ BOP, Response to USCCR Interrogatories, Response to Interrogatory Requests 12–14.

¹⁴⁹ *Id.*, Response to Interrogatory Request 12. *See* U.S. Department of Justice, Federal Bureau of Prisons (BOP), *Request for Administrative Remedy*, BP-DIR-9, April 1982.

the central office (i.e., BOP headquarters, which provides administrative oversight and support to bureau facilities).¹⁵⁰

BOP officials report that many administrative remedy requests are resolved at the institution or regional level. When requests reach the central office administrative level, the staff investigates and resolves them, communicating to the inmate that the request is granted or denied, or providing information only.¹⁵¹ BOP officials report that staff at all levels of the agency review inmate requests for administrative remedies, or for new and unfamiliar religious requests, to ensure compliance with policy and to protect against discrimination.¹⁵²

In 2004, the central office staff began tracking the administrative remedy requests received and investigated on religious issues by the nature of the complaint.¹⁵³ The tables below show the number of administrative remedy requests on the issue of religious accommodation for FY 1997 to the first half of FY 2008. The Commission tabulated figures for the earlier years (FY 2003 and before), from brief descriptions of individual cases that BOP provided. The central office tracking system does not record decisions on individual requests.¹⁵⁴

Table 3.7 shows that the annual number of administrative remedy requests reaching the central office through the appeals process is increasing—from six in FY 1997 to 140 in FY 2007. The majority of requests fall under “Religious accommodation.”

¹⁵⁰ See U.S. Department of Justice, Federal Bureau of Prisons (BOP), *Regional Administrative Remedy Appeal*, BP-DIR-10, April 1982; U.S. Department of Justice, Federal Bureau of Prisons (BOP), *Central Office Administrative Remedy Appeal*, BP-DIR-11, April 1982; U.S. Department of Justice, Federal Bureau of Prisons, “About the Bureau of Prisons,” p. 1, <http://www.bop.gov/about/index.jsp> (last visited July 25, 2008).

¹⁵¹ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 10.

¹⁵² BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 15.

¹⁵³ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 10.

¹⁵⁴ *Id.* and attachment 11.

Table 3.7

Bureau of Prisons' Administrative Remedy Requests Received and Investigated in the Central Office, Fiscal Years 1997–2008

Type of request	Fiscal year												Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Half of 2008	
Religious accommodation	3	7	11	no information provided	no information provided	25	47	50	41	71	82	34	371
Religious personal property	1	4	6			11	21	14	18	13	12	12	112
Religious diet	2	4	5			14	6	16	12	13	28	12	112
Ceremonial meals		2	1			2	7	4	1	7	10	4	38
Clergy visits								1	1				2
Library											6	15	21
Religious fasts								1	2			2	5
Work proscription						1	1	2	1	1		1	7
Enrollment in the Life Connections Program										1	2	3	6
Other						2	3						5
Unknown			1										1
Number of requests	6	17	24			55	85	88	76	106	140	83	680

Note: Three administrative requests in FYs 2002 and 2003 involved more than one type of accommodation, but are listed only once. The additional requests named in these complaints are Religious accommodation—2; Religious property—1, and Ceremonial meals—1. One had three types of requests.

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to USCCR Interrogatories, Response to Interrogatory Request 10 and Attachment 11 (fiscal years 2004 through 2008 Administrative Remedies—BP-11's and "Religious BP-11's Record" for earlier years), June 6, 2008.

Caption: The annual number of administrative remedy requests forwarded to the Bureau of Prisons increased from six in FY 1997 to 140 in FY 2007. For each of those years, the majority of the requests were for general "religious accommodation" where BOP records do not further specify the nature of the request. The number of requests for religious accommodation increased from three in FY 1997 to 82 in FY 2007.

Table 3.8 shows the religious tradition of inmates who appealed administrative remedy requests to the central office by fiscal year for approximately a decade. It uses the religious groupings explained in appendix D, table D.1. Muslims submitted the most requests for administrative remedies regarding religious accommodation—287 of 680.¹⁵⁵ Jewish inmates submitted 75 requests. Christians (Protestants, Catholics, Pentecostals, Seventh Day Adventists, Jehovah's Witnesses, Members of the Church of Latter-day Saints, and members of the Church of Christ), filed 85 grievances to the central office. Native Americans filed 62 requests; Pagans (who may be Asatru, Wiccan, Thelema, or Satanist), filed 57. Adherents of Afro-Caribbean traditions, such as Rastafaria and Yoruba-Santeria, submitted 42 requests.

¹⁵⁵ This category includes members of the Nation of Islam and the Moorish Science Temple of America.

Table 3.8
Bureau of Prisons' Administrative Remedy Requests for Religious Accommodation Received and Investigated in the Central Office by Religion, Fiscal Years 1997–2008

Religion	Fiscal Year												Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Half of 2008	
Afro-Caribbean			1	no information provided	no information provided	8	4	4	5	3	5	12	42
Buddhist							3		1		1	3	8
Christian			3			7	10	9	7	11	23	15	85
Hindu							3					2	5
Jewish	2	3	3			7	6	12	8	7	12	15	75
Muslim	3	8	13			16	34	38	37	50	66	22	287
Native American	1	2				4	12	8	6	15	11	3	62
Other						1		7	7	15	12	3	45
Pagan						10	9	10	5	5	10	8	57
Sikh			1										1
Unknown/Unspecified		4	3			2	4						13
Total	6	17	24			55	85	88	76	106	140	83	680

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to USCCR Interrogatories, Response to Interrogatory Request 10 and Attachment 11 (Fiscal Years 2004 through 2008 Administrative Remedies—BP-11's and "Religious BP-11's Record" for earlier years), June 6, 2008.

Caption: Between fiscal years 1997 and 2008, Muslims were far more likely than any other religious group to appeal administrative remedy requests to BOP headquarters. During this period, Muslims made 287 requests, Christians made 85 requests and Native Americans made 62 requests.

BOP issued a revised policy on religious beliefs and practices on December 31, 2004. This policy set in place recommendations of an April 2004 review by DOJ's OIG regarding radicalization and terrorism. It provides that prison officials shall refuse to authorize meetings of "any religious group whose doctrine, rituals, or practices espouse domestic and/or foreign terrorism, or advocates any type of violence."¹⁵⁶ BOP officials do not attribute any trend in the central office administrative remedy requests (such as the drop from 88 to 76 matters from fiscal years 2004 to 2005), to the introduction of this late 2004 policy. BOP officials attribute increases in requests for administrative remedies to the fact that the institutional population grew by nine percent. The BOP system had 152,518 inmates in FY 2004 and 166,918 by the end of FY 2007. BOP claims the growth in the number of inmates explains the increase in grievances.¹⁵⁷

BOP officials report that their administrative remedy request program is effective because 1) the agency issues policy documents with procedures on communications between staff and

¹⁵⁶ BOP Policy Statement No. P5360.09, p. 1.

¹⁵⁷ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 17. Bureau of Prisons officials further argue that weekly participation of inmates in religious programming is unchanged after they implemented their December 2004 policy. However, the figures they present are for fiscal years 2005 to 2007—i.e., after the policy changed—and leave the reader uninformed about whether religious attendance was more, less, or the same before BOP implemented the policy. *Id.*

inmates;¹⁵⁸ 2) the remedy process is readily available to inmates to have their grievances heard and reviewed at multiple levels; and 3) unit teams hold open houses and chaplains are available to attempt informal resolutions to issues.¹⁵⁹ In an effort to hold staff accountable for processing reported complaints, BOP requires prison staff to provide inmates a properly signed receipt for each administrative remedy request or appeal.¹⁶⁰

Outreach to Prisoners on their Religious Rights

According to BOP officials, inmates receive an admission and orientation handbook when they are introduced into prison. The handbook explains inmates' rights and responsibilities, program opportunities, the agency's disciplinary process, and basic prison operations. Officials say that both federal inmates and the general public have access to the bureau's policy statements that outline the religious services program and the agency's attempt to provide inmates of all faith groups with reasonable and equitable opportunities to pursue their religious beliefs and practices.¹⁶¹

Bureau's Training on Religious Accommodation and Discrimination

BOP uses various means to develop and train bureau staff. One facility, the National Corrections Academy, located in Aurora, Colorado, houses the Management and Specialty Training Center (MSTC) that provides much of the bureau's training on religious accommodation. MSTC offers specialized training to help staff acquire and maintain subject-matter expertise in their functional areas.¹⁶² Much of MSTC's specialized education is for chaplains. BOP also offers training to prison employees who are not necessarily religious leaders and to correctional staff outside the bureau through MSTC curricula, as well as other training courses and venues and technical materials.¹⁶³

Training for Chaplains

MSTC provides bureau chaplains two types of training opportunities on religious accommodations, referred to as "New Chaplains Training" and "Advanced Chaplain Training." New chaplain training is available annually. Once chaplains complete it, they must take four additional advanced classes on religious accommodation throughout their

¹⁵⁸ U.S. Department of Justice, Federal Bureau of Prisons, *Administrative Remedy Program*, Program Statement P1330.16. Dec. 31, 2007 (hereinafter cited as BOP Program Statement P1330.16). For instructions on inmates' lesser formal requests to staff, see Kathleen Hawk Sawyer, Director, Federal Bureau of Prisons, U.S. Department of Justice, *Request to Staff, Inmate*, Program Statement, 5511.07, Aug. 14, 1998.

¹⁵⁹ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 16.

¹⁶⁰ BOP, *Request for Administrative Remedy*, BP-DIR-9, BOP, *Regional Administrative Remedy Appeal*, BP-DIR-10, BOP, *Central Office Administrative Remedy Appeal*, BP-DIR-11; BOP Program Statement P1330.16.

¹⁶¹ BOP Policy Statement No. P5360.09.

¹⁶² U.S. Department of Justice, Bureau of Prisons, "About Staff Training Centers," p. 1, <http://www.bop.gov/about/train/index.jsp> (last visited July 24, 2008).

¹⁶³ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20.

careers. The advanced classes focus on the accommodation of beliefs and practices of lesser known but well established religious traditions.¹⁶⁴

MSTC develops BOP training modules for new chaplains. One module covers BOP's policy statement on religious beliefs and practices, explaining applicable laws and policies, the available technical reference manual, requirements for the provision of opportunities for religious practices, the use of contractors and volunteers, and so on. A second two-hour presentation aids participants with maintaining their own religious identity in an environment where they must provide accommodations to inmates of diverse faiths. Finally, a 30-minute lesson plan explains inmate requests, appropriate chaplain responses, and the administrative remedy process.¹⁶⁵ MSTC also offers advanced courses that focus on the history of several religions, and accommodation of specific religious rituals in the corrections environment.¹⁶⁶ BOP training documents include a blueprint for an outdoor multi-faith worship space that meets the needs of Native Americans and other nature-based traditions;¹⁶⁷ and a history and description of the practices of Santeria, a Yoruba-related religion found in Central and South America and the Caribbean.¹⁶⁸

BOP officials report that their new chaplain training curriculum on inmate beliefs and practices "offers components on religious discrimination."¹⁶⁹ The materials discuss religious accommodations at length; however, sections or discussions pertaining to religious

¹⁶⁴ *Id.*

¹⁶⁵ National Corrections Academy, Management and Specialty Training Center, *New Chaplains Training*, "Policy: Inmate Beliefs and Practices—Program Statement," instructor guide, February 2006; National Corrections Academy, Management and Specialty Training Center, *New Chaplains Training*, "Professional Chaplaincy in a Correctional Environment," instructor guide, February 2006; National Corrections Academy, Management and Specialty Training Center, *New Chaplains Training*, "Responding to Inmate Request and Administrative Remedies," instructor guide, April 2007.

¹⁶⁶ National Corrections Academy, Management and Specialty Training Center, *Inmate Beliefs and Practices*, "Religious Accommodation—Considerations from a Correctional Perspective; Buddhism, Judaism and Religious Accommodation," instructor guide and slide show, January 2007; National Corrections Academy, Management and Specialty Training Center, *Inmate Beliefs and Practices*, "Native American Spirituality—An Introduction," instructor guide, January 2008; Manuel Cordero and Jerry Bailey, Management and Specialty Training Center, National Corrections Academy, *Inmate Beliefs and Practices*, "Moorish Science Temple of America (Islam)," instructor guide, June 2005; Manuel Cordero and Jerry Bailey, Management and Specialty Training Center, National Corrections Academy, *Inmate Beliefs and Practices*, "Nation of Islam," instructor guide, June 2005; National Corrections Academy, Management and Specialty Training Center, *Inmate Beliefs and Practices*, "Wudu," instructor notes, July 8, 2005; Manuel Cordero, Management and Specialty Training Center, National Corrections Academy, *Inmate Beliefs and Practices*, "Ramadan," instructor guide, July 2005; and National Corrections Academy, Management and Specialty Training Center, *Inmate Beliefs and Practices*, "Salat," instructor guide, July 8, 2005; National Corrections Academy, Management and Specialty Training Center, *Inmate Beliefs and Practices*, "The place of women in Islam," instructor notes, July 2005; National Corrections Academy, Management and Specialty Training Center, *Inmate Beliefs and Practices*, "Death and Dying Issues in Islam," instructor guide, June 15, 2005.

¹⁶⁷ Chaplaincy Services, Federal Bureau of Prisons, U.S. Department of Justice, *Planning for the Outdoor Worship Area*.

¹⁶⁸ See BOP, Response to USCCR Interrogatories, attachments 16 and 29.

¹⁶⁹ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20.

discrimination (e.g., the need to prevent staff or other inmates from harassing prisoners because of their religious beliefs, or explanations of the requirements for equitable opportunities across diverse faiths), were not apparent.¹⁷⁰

MSTC invites staff from correctional agencies other than BOP to attend its educational sessions on religious accommodation and has reached some with its training despite its budgetary constraints. Over the years, 13 chaplains from the Department of Homeland Security's Immigration Detention Centers and state departments of corrections have participated in the training.¹⁷¹

Training for Prison Staff

BOP requires all staff to participate in annual training. In addition, BOP's Religious Services Branch provides some training through distance learning and offers presentations (e.g., to employees of state departments of corrections).¹⁷²

The annual refresher training for prison staff includes a session on "Accommodation and Emerging Religious Issues," typically taught by the chaplain.¹⁷³ The content, provided in a one-hour format, changes from year to year.¹⁷⁴ A 2003 instructor guide for religious accommodations covers medical issues (e.g., religious beliefs about abortion and autopsies), the use of wine, outdoor worship areas, and electrical musical instruments.¹⁷⁵ In 2004, training concerned religious headwear and attire of visitors, and religious diets.¹⁷⁶ The 2005

¹⁷⁰ See, e.g., BOP, Response to USCCR Document Requests, Response to Document Request 14.

¹⁷¹ *Id.*

¹⁷² BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20; BOP, Response to USCCR Document Requests, Response to Document Request 14.

¹⁷³ See Chaplaincy Services, Central Office, Bureau of Prisons, U.S. Department of Justice, *Inmate Beliefs and Practices—Annual Refresher Training 2003*, "Accommodating Religious Beliefs and Practices," instructor guide, August 2002, p. 1; Chaplaincy Services, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2004*, "Emerging Religious Issues and Concerns," instructor guide, December 2003, p. 1; Training and Staff Development Branch, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2005*, "Islam in the Correctional Environment," instructor notes, no date, p. 1; Training and Staff Development Branch, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training FY 2006*, "Inmate Beliefs & Practices—Conflict With Correctional Practices," instructor notes, no date, p. 1; Chaplaincy Services, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2007*, "Inmate Beliefs and Practice—Religious Preferences," instructor guide, April 2006, p. 1; Religious Services Branch, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2008*, "Emerging Religious Issues—Chaplaincy in Changing Times," instructor notes, p. 1. Also see, DOJ Interrogatories, Bureau of Prisons, Document Request, pp. 5–6, item 14.

¹⁷⁴ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20; BOP, Response to USCCR Document Requests, Response to Document Request 14.

¹⁷⁵ National Corrections Academy, Management and Specialty Training Center, *Inmate Beliefs and Practice—Annual Refresher Training 2003*, "Accommodating Religious Beliefs and Practices," instructor guide, August 2002.

¹⁷⁶ Chaplaincy Services, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2004*, "Emerging Religious Issues and Concerns," instructor guide, December 2003, p. 1.

training focused on Islam in the correctional environment;¹⁷⁷ 2006 on personal religious property and the use of ceremonial wine, tobacco, and incense;¹⁷⁸ 2007 on the database system recording inmates' religious preferences to enhance the administration of accommodations;¹⁷⁹ and 2008 on changes in policy regarding the supervision of inmates during religious services, the headquarters' review of chapel library books, and the introduction of a new faith-based program.¹⁸⁰

The Religious Services Branch of the Central Office provides distance learning through Web-based programs, addressing issues such as religious accommodation. BOP officials report that chaplains, prison unit managers, and food service and commissary staff have taken such training.¹⁸¹ The central office branch also responds to requests for training from state departments of corrections and other law enforcement groups. For example, the branch staff recently gave presentations to chaplains of correctional departments in Kentucky (in 2008), and Wisconsin (in 2006), and to BOP captains at a 2004 national conference.¹⁸²

¹⁷⁷ Training and Staff Development Branch, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2005*, "Islam in the Correctional Environment," instructor notes, p. 1.

¹⁷⁸ Training and Staff Development Branch, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training FY 2006*, "Inmate Beliefs & Practices—Conflict With Correctional Practices," instructor notes, p. 1.

¹⁷⁹ Chaplaincy Services, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2007*, "Inmate Beliefs and Practice—Religious Preferences," instructor guide, April 2006, p. 1.

¹⁸⁰ Religious Services Branch, Central Office, Bureau of Prisons, U.S. Department of Justice, *Annual Training 2008*, "Emerging Religious Issues—Chaplaincy in Changing Times," instructor notes, p. 1.

¹⁸¹ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20; BOP, Response to USCCR Document Requests, Response to Document Request 14. Although the response of BOP officials claims that on-line tutorials are available, the materials they provided are instructor guides for in-person training. One, for example, asks participants to bring a packaged snack item for a demonstration during the lesson, Chaplaincy Services, Central Office, Bureau of Prisons, U.S. Department of Justice, *CENTRA Training*, "Religious Accommodation and the Commissary," instructor guide, January 2004, p. 1. Also see National Corrections Academy, Management and Specialty Training Center, *CENTRA Religious Preference*, "CENTRA Training—Religious Preferences, Chaplain Training," instructor guide, April 2006.

¹⁸² BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20; BOP, Response to USCCR Document Requests, Response to Document Request 14. See also Susan Van Baalen, Chaplain, Federal Bureau of Prisons, U.S. Department of Justice, "Religious Pluralism in a Correctional Setting," slide presentation, Kentucky Correctional Chaplain Education Day, LaGrange, KY, Jan. 15, 2008; Susan Van Baalen and Bruce Fenner, Chaplaincy Services, Federal Bureau of Prisons, U.S. Department of Justice, "The Changing Landscape of Correctional Chaplaincy—The Implications of RLUIPA and Religious Radicalization," slide presentation, Wisconsin Correctional Chaplains Conference, 2006; Training and Staff Development Branch, Central Office, Bureau of Prisons, U.S. Department of Justice, *National Captains Conference—2004*, "Islam in the Correctional Environment," instructor notes, 2004.

Available Technical Materials

To broaden its chaplains' knowledge of the beliefs and practices of lesser known religions, BOP has issued the *Technical Reference Manual on Religious Beliefs and Practices*,¹⁸³ which it makes available to agency staff, state departments of corrections, and the public.¹⁸⁴

The manual is a guide to best correctional practice in the accommodation of diverse religious beliefs. It itemizes religious practices, whether daily, weekly, occasional, or special for holy days; personal and congregate religious items; requirements for membership; dietary standards; medical prohibitions; burial rituals; and writings, history and theology. The manual treats each of the 17 religions shown in table 3.9 below.¹⁸⁵

Table 3.9
Religions Described in the Bureau of Prisons' Technical Reference Manual

Baha'i
Buddhism
Eastern Rite Catholicism
Hinduism
Islam
Jehovah's Witnesses
Judaism
Moorish Science Temple of America
Nation of Islam
Native American
Odinism
Orthodox Christianity
Protestant Christianity
Rastafari
Roman Catholicism
Sikh Dharma
Wicca

Source: National Institute of Corrections, Bureau of Prisons, U.S. Department of Justice, *Technical Reference Manual of Religious Beliefs and Practices* (No. T3560.01), 2001.

Caption: BOP's *Technical Reference Manual on Religious Beliefs and Practices* describes best correctional practice in the accommodation of religious practices for 17 religions, including but not limited to Baha'i, Protestant Christianity, Roman Catholicism, Wicca, Judaism, Sikh Dharma, and Native American.

¹⁸³ National Institute of Corrections, Bureau of Prisons, U.S. Department of Justice, *Technical Reference Manual of Religious Beliefs and Practices*, 2001.

¹⁸⁴ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20.

¹⁸⁵ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20; BOP, Response to USCCR Document Requests, Response to Document Request 14; *Technical Reference Manual of Religious Beliefs and Practices* (No. T3560.01), 2001.

BOP first implemented the use of this manual in 2001. The National Institute of Corrections offers the manual to all correctional agencies through its Web site (www.nicic.org). Indeed, several states, including Kentucky, Colorado, Connecticut, California, and Pennsylvania, have adapted the BOP manual for use in their religious accommodation of inmates.¹⁸⁶

In addition to the technical manual, BOP has made available to staff and other correctional agencies a DVD entitled “Islam in the Correctional Environment.”¹⁸⁷

Summary

Responsibility for enforcement of religious nondiscrimination is spread among several Department of Justice components. Within the Civil Rights Division (CRD), the Special Litigation Section (SPL) and the Coordination and Review Section (COR) are responsible for the enforcement of federal statutes prohibiting discrimination on the basis of race, sex, disability, religion, and national origin. SPL is charged with enforcing RLUIPA against state institutions that do not provide prisoners reasonable accommodation of their religious needs, and with enforcing CRIPA and Title III of the Civil Rights Act (42 U.S.C. § 14141), which prohibit discrimination in other institutionalized contexts including prisons and juvenile detention centers. SPL’s authority under CRIPA and Title III are limited to situations that involve a pattern or practice of depriving individuals of their constitutional or statutory rights. The number of religious complaints SPL received between 2001 and 2007 is relatively small, although the number of complaints it received between 2005 and 2007 increased from 342 to 445, respectively. SPL investigates a small percentage of the total number of complaints it receives. Between 2001 and 2007, SPL opened 36 complaints for investigation and closed 27. Complaints are closed for many reasons, including a jurisdiction agreeing to voluntary remedial action, witnesses’ lack of credibility, and the transfer or release of an inmate, which limits SPL’s ability to obtain relief. Although SPL does not maintain a formal means of tracking all forms of compliance evaluations, between 2001 and 2007 it conducted 19 on-site compliance tours on matters that included protection of religious rights. SPL does not provide technical assistance proactively nor has it issued any policy guidance on religious discrimination in the past 10 years. Both the Assistant Attorney General for Civil Rights and the Special Counsel for Religious Discrimination serve on DOJ’s Religious Liberty Task Force that is intended to ensure effective communication within the various components of DOJ on matters affecting religious liberty.

COR’s enforcement of federal laws that protect the religious rights of persons in prisons is limited to enforcing the nondiscrimination provisions of the Safe Streets Act, which prohibits discrimination on several bases, including religion, by recipients of federal financial assistance through an MOU with OJP. Under the MOU between CRD and OJP, COR staff assists OJP in investigating discrimination complaints against Safe Streets Act funding recipients. Between fiscal years 2000 and 2007, COR initiated investigation of 30 religious

¹⁸⁶ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20; BOP, Response to USCCR Document Requests, Response to Document Request 14.

¹⁸⁷ BOP, Response to USCCR Interrogatories, Response to Interrogatory Request 20; BOP, Response to USCCR Document Requests, Response to Document Request 14.

discrimination complaints against prisons and jails. It uses alternative dispute resolution to seek voluntary compliance without making formal determinations concerning the merits of a complaint. Compliance reviews are done proactively and COR makes recommendations to OJP for such reviews. Since 1997, COR has conducted one compliance review of a state prison, but on the basis of a complaint alleging national origin discrimination, not religious discrimination. Since 2000, COR has issued seven Letters of Findings (LOFs) regarding religious discrimination; however, in the majority of cases, it found no violation of the religious nondiscrimination provisions of the Safe Streets Act. Although COR provides technical assistance as part of the resolution of a religious complaint, it does not have a formal technical assistance program and it has not issued policy and/or guidance on religious accommodation and discrimination.

OJP has an Office for Civil Rights whose policy and mission is to ensure that recipients of federal financial assistance do not engage in prohibited discrimination. OJP/OCR enforcement authority derives from the nondiscrimination provisions of the Safe Streets Act. Working together with CRD/COR, it investigates complaints and conducts compliance reviews, although the number of religious complaints as a percentage of all complaints received is minuscule. In conducting compliance reviews, OJP/OCR performs desk audits, on-site reviews, and audits of state administering agencies and state departments of corrections. According to OJP/OCR, as a result of its investigations, departments of corrections have changed practices to permit the distribution of religious texts to inmates and to provide faith-appropriate locations for prisoners' worship.

The Federal Bureau of Prisons' (BOP) Correctional Programs Division oversees religious services. BOP does not have a civil rights office and does not have any specific amounts of funding or staffing devoted solely to civil rights enforcement. BOP has regulations governing religious programs that describe prison officials' obligations to protect the religious beliefs and practices of inmates. Religious activities must be open to all inmates. To ask for accommodations of their religious needs or file complaints based on religious discrimination, inmates can either express their needs to the chaplain, or file an administrative request and an appeal if they are dissatisfied with the outcome. Between fiscal years 1997 and the first half of 2008, inmates forwarded 680 administrative requests, with 371 of the requests seeking religious accommodations. Of the inmates who requested administrative remedy, roughly two-thirds were Muslim, Jewish, and Christian. Pagan, Native American, and Afro-Caribbean inmates also filed a fair number of administrative remedy requests.

BOP provides an admission and orientation handbook when individuals are introduced into prison. The inmates and general public have access to BOP's policy statement that outlines the religious services program and the agency's attempt to provide inmates of all faiths with reasonable and equitable opportunities to practice their religion. BOP uses the National Corrections Academy as one means to develop and train its staff on religious accommodation. Much of the specialized training is for chaplains; however, BOP also offers training to prison employees and to correctional staff outside the bureau. All BOP staff are required to participate in annual training.

CHAPTER 4: JUDICIAL RESPONSE: ANALYSIS OF CASES ALLEGING RELIGIOUS DISCRIMINATION IN PRISON

The changing face of religion in prison litigation: an examination of legal treatment of religious discrimination claims over time

Chapter one of this report examined the legal foundation of prisoners' religious rights. Today, inmates may bring suit under RLUIPA for curtailment of their right to practice their religion in prison. The Department of Justice (DOJ) also has authority to initiate litigation under RLUIPA to enforce prisoners' religious rights.

This chapter provides an overview of the character and outcomes of RLUIPA litigation from 2001 to 2006, and identifies trends revealed by analyzing individual cases.¹

Religious Land Use and Institutionalized Persons Act

RLUIPA protects prisoners by prohibiting the imposition of a substantial burden on the religious exercise of institutionalized persons unless the government can demonstrate it furthers a compelling government interest by the least restrictive means possible.²

Analysis of Cases

Using the Lexis legal research site's combined federal and state case search feature, a separate search query list was compiled for the years 2001–2006.³ After screening every case in the query to ensure pertinence, relevant federal cases were selected for inclusion in the study.⁴ Each case was summarized noting the underlying facts of each allegation, DOJ involvement, and final disposition of each case.⁵

¹ This chapter addresses only the types of complaints lodged under RLUIPA, and does not endeavor to examine other statutory or constitutional claims based on religious discrimination or other allegations.

² 42 U.S.C. 2000cc

³ The Religious Land Use and Institutionalized Persons Act was signed into law on September 22, 2000. The Lexis search did not produce any case law involving RLUIPA until 2001. The search terms for each year were "RLUIPA and not zoning."

⁴ Selected cases included those that discussed the merits of the RLUIPA claim, those that never reached the merits, those where the Prison Litigation Reform Act may have barred a plaintiff from suing, and those where a court chose not to liberally construe a plaintiff's claim to include a claim under RLUIPA. It was important to

The analysis revealed:

- The number of reported RLUIPA cases⁶ has increased steadily each year since passage of the statute in 2000, although the total number is still extremely small when compared to the total number of prisoners in state prisons.⁷
- Prisoners prevailed entirely in only six percent of the reported cases; defendants prevailed in 64 percent of cases; seven percent saw a mixed result; and 23 percent were ongoing where their Lexis paper trail ends.⁸
- Four federal courts of appeals have had only one entirely successful plaintiff in a reported RLUIPA case; four other federal circuits have none.

identify any possible patterns that may have arisen between type of religious discrimination claim and the manner in which a federal judge treated a prisoner-plaintiff's complaint.

⁵ Where subsequent history emerged for a case, all opinions were compiled together. Every case was checked for validity and the Shepard's Report is attached to each case in the binder. The case law that was examined will almost certainly be under-inclusive because only opinions that could be accessed on Lexis were collected.

Information collected included:

- year litigation was initiated
- the location (state and judicial circuit) in which the case took place
- whether the plaintiff was *pro se* (plaintiffs were listed as *pro se* only where no plaintiff in a given lawsuit was identified as having an attorney at any stage in the litigation)
- whether the United States was a party (via DOJ initiation or intervention)
- the gender of the plaintiff
- the religion of the plaintiff (the original data collection noted the specific religion of the prisoners; religions were later organized into broader categories for ease of analysis)
- the basis of the plaintiff's complaint, nature of the religious request, or practice that was allegedly impinged (characterized as one or more of the following: dietary, grooming, accessories, dress, literature, practice—for example, ability to participate in group worship—or forced participation)
- the defendant's proffered reason for denial of the prisoner's request/complaint (characterized as one or more of the following: safety/prison security, health, administrative burden, cost, complaint moot [either due to the release or relocation of the prisoner or a change in prison policy], or the argument that RLUIPA is unconstitutional)
- the outcome of the case (characterized as plaintiff was successful: all requested relief granted; defendants successful: no relief granted, mixed result with partial relief granted, mixed result with no relief granted; or case ongoing).

⁶ For purposes of this analysis, "reported RLUIPA cases" refers to all the cases for which a decision appeared in the Lexis database, regardless of whether it was labeled as "reported decision" or "unreported decision" in that database.

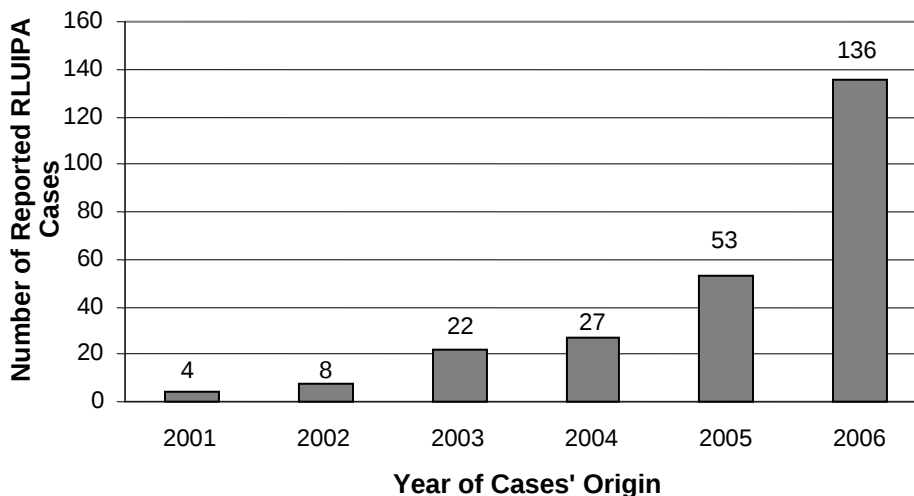
⁷ The Commission found 250 RLUIPA cases and as of Sept. 30, 2006, the adult male population in state prisons was 1,114,506. *The American Correctional Association 2007 Directory: Adult and Juvenile Correctional Departments, Institutions, Agencies, and Probation and Parole Authorities*, Sixty-Eighth Edition, pages 52–53.

⁸ These figures may systematically understate the likelihood that a plaintiff will prevail either in whole or in part. A defendant is most likely to file a motion to dismiss, motion for summary judgment or other dispositive motion in a case in which it has a reasonable chance to prevail. If it does prevail, and the court's decision is reported to Lexis (and such decisions frequently are), it will be recorded in this tally as a victory for defendants. If the plaintiff succeeds in opposing the motion, the case will be recorded as ongoing, since the plaintiff must still face trial in order to be entitled to a remedy. If the case later settles (resulting in a partial victory for plaintiff) or if it goes to trial and results in either a victory for the plaintiff or the defendant, it is unlikely to enter the tally, since such events usually do not result in legal opinions that can be reported to Lexis. Similarly, cases that are never subject to dispositive motions may end in settlement or trial and will usually fly under the Lexis radar, even though they may well result in plaintiff victories or partial victories.

- Among reported RLUIPA cases, courts found no violation of the statute a majority of the time.
- No particular religion appeared to have a higher success rate than others.
- The overwhelming majority of plaintiffs were male, and Muslims initiated the largest number of RLUIPA cases, followed by Jews, Native Americans, Christians, and Afro-Caribbeans.
- The most common claims in the reported cases involved, in order of prevalence, all alleged denials of practice (such as lack of access to a religion-specific chaplain), dietary complaints (such as the provision of pork-free meals), and grooming complaints (generally regarding beards or hair length).
- Sixty-six percent of reported cases involved only one area of complaint, such as grooming or dietary, while 34 percent involve multiple areas.
- Prisoner plaintiffs appeared *pro se* (on their own behalf), in over 75 percent of the reported cases.
- The United States appeared primarily to defend the constitutionality of the statute.

The following figures and tables illustrate these and other findings.

Figure 4.1
Reported RLUIPA Cases in Federal Court by Year of Origin



Source: Compiled by the U.S. Commission on Civil Rights.

Caption: The number of reported RLUIPA cases has increased each year, from four federal cases initiated in 2001 to 136 cases initiated in 2006.

Although the statute was initially little-used, figure 4.1 demonstrates that the number of reported RLUIPA cases brought by prisoners has increased each year.

Table 4.1
Reported RLUIPA Cases in Federal Court by Plaintiff's Religious Tradition and Year of Origin

Religion	Year of Cases' Origin						Totals
	2001	2002	2003	2004	2005	2006	
Afro-Caribbean		1	3	2	4	15	25
Atheist				1	1		2
Baha'i							0
Buddhist				1		2	3
Christian		1		3	7	16	27
Hindu			1			1	2
Jewish	1	2	3	6	9	19	40
Muslim	2	3	7	7	14	41	74
Native American			4	4	7	14	29
Other				1	2	5	8
Pagan	1		3	1	3	7	15
Sikh					1	1	2
Taoist				1		1	2
Unknown/Unspecified		1	1		5	14	21
Totals	4	8	22	27	53	136	250

Chi-square = 37.6 (60 d.f.), nonsignificant.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: As with the number of reported RLUIPA cases generally, the number of cases initiated by prisoners of specific religious beliefs has increased annually. For example, the number of cases involving Jewish prisoners numbered one in 2001, two in 2002, three in 2003, six in 2004, nine in 2005, and 19 in 2006. No particular religious tradition deviates from this pattern.

Table 4.1 shows that Muslims are the most common plaintiffs, bringing 74 of the 250 cases analyzed. Jewish, Native American, Christian, and Afro-Caribbean plaintiffs round out the top five groups, with 40, 29, 27, and 25 cases respectively.

Table D.1 shows how the Commission grouped religions, and tables in appendix D give the number of adherents to each religion according to these groupings. For example, a few Shi'ites, Sunnis, and members of the Moorish Science Temple of America are among the Muslims represented in table 4.1. In addition, Catholics, Seventh Day Adventists, Mormons, and Jehovah's Witnesses are designated as Christians.

Table 4.2**Reported RLUIPA Cases in Federal Court by Plaintiff's Gender and Year of Origin**

Plaintiff's Gender	2001	2002	2003	2004	2005	2006	Total
Class Action–unspecified						3	3
Female						1	1
Male	3	8	22	27	53	131	244
Organization						1	1
Unknown	1						1
Total	4	8	22	27	53	136	250

Chi-square = 66.0 (20 d.f.), $p < .01$.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Reported RLUIPA plaintiffs are almost universally male. Of the 250 cases examined, 244 involved male litigants. One case was initiated by an organization, one by a female, and three cases involved prisoners whose gender was unclear from the published decisions.

Even after one takes into consideration the fact that males make up approximately 93 percent of the prison population, prisoners bringing lawsuits under RLUIPA have been overwhelmingly male.

Table 4.3**Frequency of Reported RLUIPA Cases in Federal Court by State**

Eight States Each with Ten or More Cases	Ten States Each with Four to Nine Cases	Thirteen States Each with Only Two or Three Cases	Eleven States Each with Only One Case	Nine States with No RLUIPA Cases
California	Arizona	Alabama	Iowa	Alaska
Illinois	Colorado	Arkansas	Maryland	Hawaii
Michigan	Florida	Connecticut	Massachusetts	Kansas
New York	Georgia	Delaware	Minnesota	Maine
Pennsylvania	Indiana	District of Columbia	Montana	Nebraska
Texas	Missouri	Idaho	New Jersey	Nevada
Virginia	Ohio	Kentucky	North Dakota	New Mexico
Wisconsin	Oklahoma	Louisiana	Oregon	Vermont
	South Carolina	Mississippi	Rhode Island	Wyoming
	Washington	New Hampshire	Utah	
		North Carolina	West Virginia	
		South Dakota		
		Tennessee		

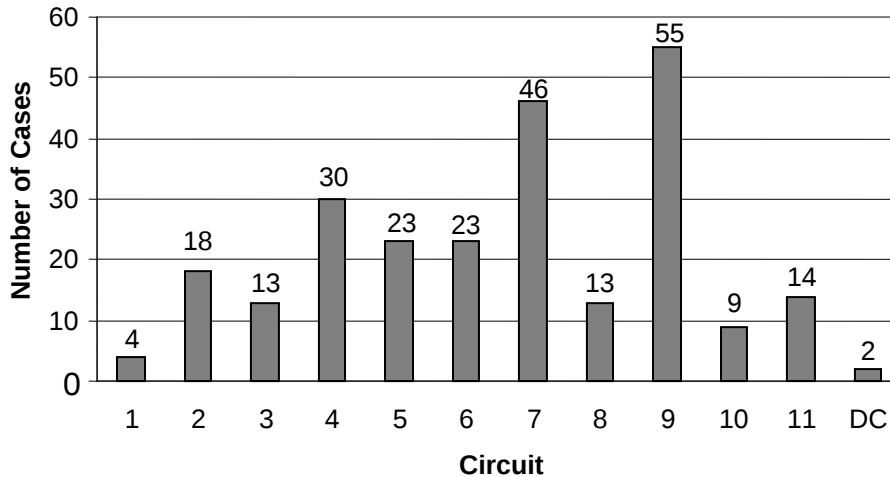
Source: Compiled by the U.S. Commission on Civil Rights.

Caption: The number of reported RLUIPA cases varies by state. On the high end, eight states (California, Wisconsin, Virginia, Texas, New York, Illinois, Michigan, and Pennsylvania) have had 10 or more such cases initiated between 2001 and 2006. In contrast, nine states (Alaska, Hawaii, Kansas, Maine, Nebraska, Nevada, New Mexico, Vermont, and Wyoming) saw no such litigation initiated between 2001 and 2006.

The number of such cases, broken down by state and year, appears in appendix D, table D.3.

Federal Circuits

Figure 4.2
Reported RLUIPA Cases in Federal Court by Circuit



Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Federal circuits have jurisdictional boundaries containing contiguous states. Of the 12 federal circuits, the Ninth Circuit has had the highest number of reported RLUIPA cases, with 55 cases filed between 2001 and 2005. The Seventh Circuit has had the next highest number of cases with 46. The smallest number during the relevant time period was two in the D.C. Circuit.

Figure 4.2 reveals that the Ninth Circuit has seen the largest number of reported cases. The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. The Seventh and Fourth Circuits follow with the second and third largest number respectively. The states represented in federal circuits are listed in appendix D, table D.6.

Table 4.4
Reported RLUIPA Cases in Federal Court by Religion and Circuit

Religion	Judicial Circuit											DC	Total Cases
	1	2	3	4	5	6	7	8	9	10	11		
Afro-Caribbean	1	2	3	9	1		4		5				25
Atheist							2						2
Baha'i													0
Buddhist			1			2							3
Christian	1	2	3	1	3	4	4	2	6	1			27
Hindu							1		1				2
Jewish	1	1	1	6	4	3	5	4	7	2	5	1	40
Muslim		12	5	10	6	4	15	2	13	4	2	1	74
Native American	1				4	1	6	4	9	1	3		29
Other		1			1	1		1	3		1		8
Pagan					1	5	7		1		1		15
Sikh						1			1				2
Taoist							2						2
Unknown/Unspecified				4	3	2			9	1	2		21
Total Cases	4	18	13	30	23	23	46	13	55	9	14	2	250

Chi square = 158.9 (132 d.f.), nonsignificant.

Source: Compiled by the U.S. Commission on Civil Rights. See appendix D for the faith-based groups included in each tradition.

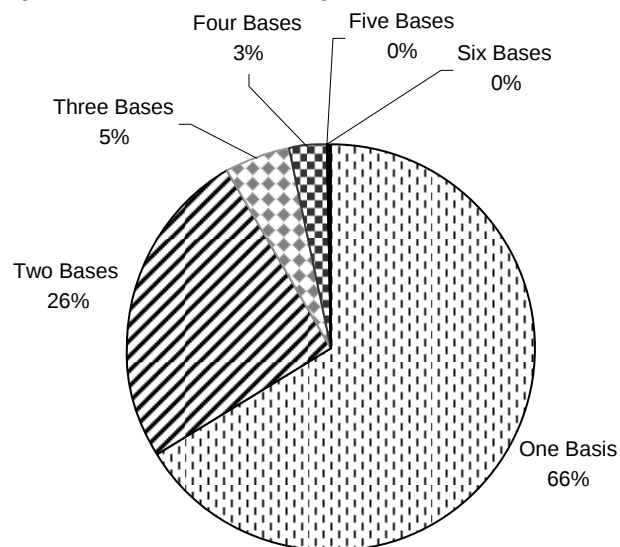
Caption: No clear trend or concentration emerges in examining reported cases filed by prisoners of specific religions by circuit. Jewish prisoners are the only group represented in every circuit.

As reflected in table 4.4, there does not appear to be any clear trend or concentration in the number of claims raised by specific religions in the various circuits.

Bases of Complaint

Figure 4.3 reflects the fact that, while the majority of RLUIPA cases examined (66 percent), were based on only one area of complaint (e.g. diet, grooming, literature), 25 percent of cases involved two bases of complaint, five percent involved three bases, and three percent involved four bases.

Figure 4.3
Federal Reported RLUIPA Cases by their Number of Bases



Source: Compiled by the U.S. Commission on Civil Rights.

Caption: The majority of the RLUIPA cases (66 percent) in the survey are based on one area of complaint (e.g., diet, grooming, literature). Twenty-six percent of cases were founded on two bases of complaint, five percent on three bases, and three percent on four bases.

Table 4.5 would seem to indicate that no single religion evidences a tendency to initiate litigation on a higher number of bases than others.

Table 4.5
Number of Bases of Reported RLUIPA Cases in Federal Court by Religion

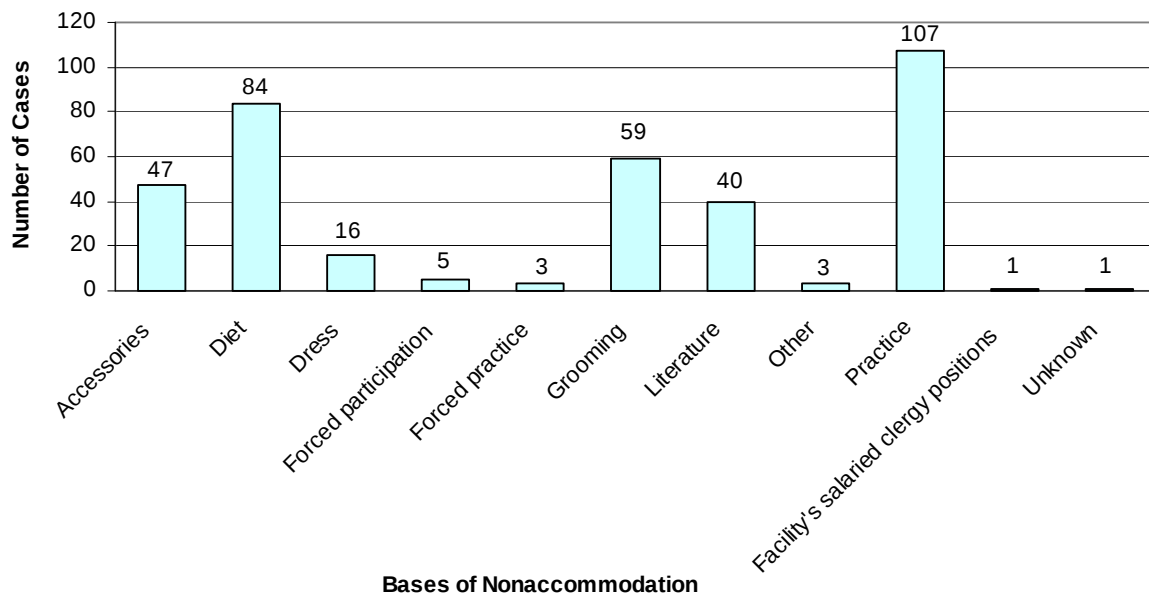
Religion	Number of Bases of Nonaccommodation						Totals
	1	2	3	4	5	6	
Afro-Caribbean	19	5		1			25
Atheist	1		1				2
Baha'i							0
Buddhist	3						3
Christian	23	3	1				27
Hindu	2						2
Jewish	28	7	3	1		1	40
Muslim	45	24	3	2			74
Native American	10	16	1	2			29
Other	3	3	1	1			8
Pagan	8	4	3				15
Sikh	1	1					2
Taoist	2						2
Unknown/Unspecified	20	1					21
Totals	165	64	13	7	0	1	250

Chi-square = 64.2 (48 d.f.), nonsignificant.

Source: Compiled by the U.S. Commission on Civil Rights. See appendix D for the faith-based groups included in each tradition.

Caption: Native Americans, Pagans, and Muslims are more likely than most other faith groups to bring litigation on more than one basis.

Figure 4.4
Reported Bases of Federal RLUIPA Cases



Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Practice (e.g., being denied the ability to engage in group worship, or have access to a chaplain of one's own faith), is the number one basis of complaint in the 250 RLUIPA cases

examined, with 107 cases including this complaint. The second most common basis is diet, appearing in 84 cases; and the third most common is grooming, appearing in 59 cases.

Figure 4.4 reflects that practice (e.g., access to a chaplain, ability to participate in group worship), is the most common area of complaint, followed by diet and grooming. The “practice” category contains complaints similar to those reported as part of BOP’s “access to religious programs” category discussed in chapter two.

Table 4.6
Reported RLUIPA Cases in Federal Court by Type and Number of Bases

Basis	Number of Bases per Case						Percent of All Bases
	1	2	3	4	5	6	
Accessories	6.7%	39.7%	42.9%	57.1%	0.0%	100.0%	12.8%
Diet	26.7%	42.9%	42.9%	85.7%	0.0%	100.0%	23.0%
Dress	0.6%	9.5%	42.9%	28.6%	0.0%	100.0%	4.4%
Forced participation	1.2%	1.6%	7.1%	14.3%	0.0%	0.0%	1.4%
Forced practice	1.2%	1.6%	0.0%	0.0%	0.0%	0.0%	0.8%
Grooming	24.8%	17.5%	14.3%	57.1%	0.0%	100.0%	16.1%
Literature	10.3%	17.5%	50.0%	57.1%	0.0%	100.0%	10.9%
Other	1.2%	1.6%	0.0%	0.0%	0.0%	0.0%	0.8%
Practice	26.1%	71.4%	78.6%	100.0%	0.0%	100.0%	29.2%
Facility's salaried clergy positions	0.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.3%
Unknown	0.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.3%
Total Bases	165	128	39	28	0	6	366
Total Cases	165	63	14	7	0	1	250

Sources: Compiled by the U.S. Commission on Civil Rights.

Caption: Where there is one basis of complaint, practice appears 26.1 percent of the time, diet 26.7 percent of the time, and grooming 24.8 percent of the time. When the number of bases rises to four, practice is a basis in all cases (100 percent).

When cases were filed on only one basis, the complaints were closely divided among diet (26.7 percent), practice (26.1 percent), grooming (24.8 percent), and any of the remaining types (22.4 percent by sum). Of cases filed with two bases, 71.4 percent involved practice. Diet (42.9 percent) and accessories (39.7 percent) were frequently at issue either among the remaining cases or secondary bases.

When multiple bases of complaint appeared in the cases the Commission studied, 29.2 percent concerned practice; 23.0 percent were on diet; 16.1 percent on grooming, 12.8 percent on accessories; and 10.9 percent on literature. (See the right-most column of table 4.6).

Table 4.7
Type and Number of Bases of Reported RLUIPA Cases in Federal Court by Plaintiff's Religion

Religion	Basis of Nonaccommodation											Total Bases
	Accessories	Diet	Dress	Forced participation	Forced practice	Grooming	Literature	Other	Practice	Facility's salaried clergy positions	Unknown	
Afro-Caribbean	1	6				21	3		2			33
Atheist	1			1			1		1			4
Baha'i												0
Buddhist		3										3
Christian	5	2		1	1	2	6		15			32
Hindu		2										2
Jewish	4	28	7			7	2		13			61
Muslim	11	26	2	3	1	11	12	1	43			110
Native American	17	2	5			9			20			53
Other	2	4			1	1	4		4			16
Pagan	5	2	2				8		7	1		25
Sikh		1				1	1					3
Taoist							2					2
Unknown/Unspecified	1	8				7	1	2	2		1	22
Total Bases	47	84	16	5	3	59	40	3	107	1	1	366

Chi-square = 294.2 (d.f. 130), $p < .01$.

Source: Compiled by the U.S. Commission on Civil Rights. See appendix D for the faith-based groups included in each tradition.

Caption: Plaintiffs from certain religions tend to initiate litigation on the same or similar bases. For example, prisoners from Afro-Caribbean religions most often (21 out of 33 cases), base their lawsuits on matters related to grooming. Diet emerges as a common basis for Jewish (28 out of 61 cases) and Muslim (26 out of 110 cases) prisoners.

Table 4.7 highlights the types of complaints brought by prisoners of particular religions. For example, grooming complaints (commonly related to facial hair or hair length), are most often raised by inmates from Afro-Caribbean religions. Dietary complaints are most often brought by Jewish prisoners, followed closely by Muslim prisoners. The most prevalent type of complaint, barriers to practice, appears across many religious, but is raised most often by Muslim prisoners.

United States Participation in Litigation and the Representation Status of Litigants

Table 4.8

Reported RLUIPA Cases in Federal Court by Department of Justice Involvement and Year of Origin

Case Characteristic	Year of Origin						Total Cases
	2001	2002	2003	2004	2005	2006	
Is the U.S. a Party?							
No	2	7	16	19	50	128	222
Yes	2	1	6	8	3	8	28
Total Cases	4	8	22	27	53	136	250

Chi-square = 26.5 (5 d.f.), $p < .01$.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: The United States is a party in only 28 out of 250 RLUIPA cases examined.

Table 4.9

Reported RLUIPA Cases in Federal Court by Whether the Plaintiff is *Pro Se* and Year of Origin

Case Characteristic	Year of Origin						Total Cases
	2001	2002	2003	2004	2005	2006	
Is the plaintiff <i>Pro Se</i>?							
Unknown			1				1
No	3	5	12	9	8	18	55
Yes	1	3	9	18	45	118	194
Total Cases	4	8	22	27	53	136	250

Chi-square = 48.7 (10 d.f.), $p < .01$.

Source: Compiled by the U.S. Commission on Civil Rights.

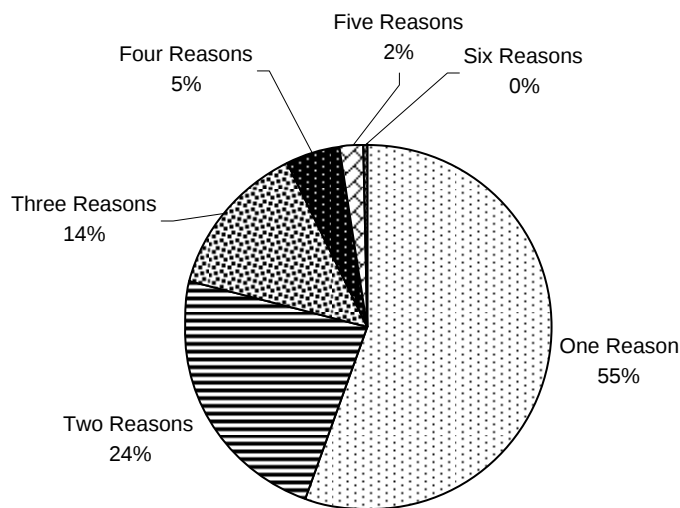
Caption: Prisoner plaintiffs most often appear *pro se*, having no legal representation in 194 out of 250 cases.

Tables 4.8 and 4.9 indicate that prisoners usually initiate RLUIPA litigation themselves. The United States appears rarely except as an intervenor to defend the constitutionality of RLUIPA. In a few instances, the United States appears in a defensive positive role, when an inmate plaintiff names a federal agency, prison, or actor as a defendant. However, as RLUIPA is intended for state prisoners rather than those in federal facilities, these RLUIPA claims are generally dismissed.

Reason for Denial of Prisoner Request/Complaint

Figure 4.5 reflects that in 55 percent of cases, prisons cite a single reason for the denial of a prisoner's request or complaint; in 24 percent of the cases two reasons are given; in 14 percent, three reasons; in five percent, four reasons; and in two percent, five reasons were cited.

Figure 4.5
Federal Reported RLUIPA Cases by the Number of Reasons Asserted in Defense by the Defendant



Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Prisons cite one reason for their denial of the prisoners' religious requests/complaints in 55 percent of cases. Two reasons are cited in 24 percent of cases; three reasons in 14 percent of cases; four reasons in five percent of cases; and five reasons in two percent of cases.

Table 4.10
Reported RLUIPA Cases in Federal Court with Type of Reasons by Number of Reasons

Reasons	Number of Reasons per Case						Percent of All Cases
	1	2	3	4	5	6	
RLUIPA is unconstitutional	2.9%	5.1%	2.9%	41.7%	40.0%	0.0%	3.4%
Safety/prison security	23.2%	62.7%	85.7%	91.7%	80.0%	100.0%	26.1%
Administrative burden	2.9%	28.8%	80.0%	83.3%	80.0%	100.0%	14.5%
Cost	0.7%	16.9%	51.4%	50.0%	80.0%	0.0%	8.9%
Health	0.7%	18.6%	11.4%	25.0%	20.0%	0.0%	4.5%
Prisoner request moot	13.0%	15.3%	20.0%	33.3%	60.0%	100.0%	9.5%
Request not genuine or religious in nature	4.3%	22.0%	17.1%	41.7%	60.0%	100.0%	7.7%
Other	2.9%	11.9%	8.6%	0.0%	20.0%	100.0%	3.6%
Procedural failure	9.4%	15.3%	20.0%	33.3%	60.0%	100.0%	8.4%
Not reached	26.1%	3.4%	2.9%	0.0%	0.0%	0.0%	8.9%
Unknown	13.8%	0.0%	0.0%	0.0%	0.0%	0.0%	4.3%
Total Reasons	138	118	105	48	25	6	440
Total Cases	138	59	35	12	5	1	250

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Safety/prison security is overwhelmingly the most common reason prisons cite for denying a prisoner's religious request/complaint, appearing in 23.2 percent of cases as the single reason for denial, in 62.7 percent of those with two reasons for denial, in 85.7 percent of cases with three reasons for denial, and in 91.7 percent of cases with four reasons for denial. Administrative burden is commonly cited in cases with two (28.8 percent) or more (80.0 percent or greater) reasons for

denying an accommodation. It is rarely cited as the only justification for denying a request (2.9 percent of cases with a single reason for denial).

Of the multiple reasons for denials of accommodation in the cases the Commission studied, 26.1 percent name safety or prison security; 14.5 percent claimed administrative burden; 8.9 percent point to cost and 4.5 percent cite health (see the right most column of table 4.10).

The constitutionality of RLUIPA is rarely challenged in cases where only one reason is advanced for denial. Only 2.9 percent of cases with a single reason for denial raised the issue of RLUIPA's constitutionality. However, 40 percent or more of cases with four or five reasons raise the constitutional issue. Similarly, the administrative burden of a request is seldom the only justification for denial. Only 2.9 percent of cases with a single reason for denial are justified by the prison citing administrative burdens. However, the administrative burden justification arises in 28.8 percent of cases with two bases for denial; and 80 percent or more of the cases with three or more reasons for denial. The cost associated with a request is likewise seldom the only justification for denial. Only 2.9 percent of cases with a single reason for denial are justified by cost or budgetary limitations.

Table 4.11
Reported RLUIPA Cases in Federal Court by Reason for Denial and Bases

Reason for Denial of Accommodation	Bases of Nonaccommodation											Total Bases x Reason	Total Reasons
	Accessories	Diet	Dress	Forced participation	Forced practice	Grooming	Literature	Other	Practice	Facility's salaried clergy positions	Unknown		
RLUIPA is unconstitutional	3	7	4			3	3		5			25	15
Safety/prison security	27	28	8	1	1	36	20		55			176	115
Administrative burden	16	34	6	1	1	7	9	1	34			109	64
Cost	6	27	3	1		4	4		18			63	39
Health	3	7	1			15	1		4			31	20
Prisoner request moot	6	11	3			17	6		14			57	42
Request not genuine or religious in nature	6	20	2		1	5	5		9			48	34
Other	3	8			1	1	4		6		1	24	16
Procedural failure	5	23	4	2		5	8	1	16			64	37
Not reached	7	11	1	1		5	7	1	21	1		55	39
Unknown	7	6	2	2	1	3	3		7			31	19
Total Reasons x Basis	89	182	34	8	5	101	70	3	189	1	1	683	440
Total Bases	47	84	16	5	3	59	40	3	107	1	1	366	

Chi-square = 182.8 (110 d.f.), $p < .01$.

Note: The 250 cases from table 4.10 are included in this table for every reason and basis for denial. Thus, a case with six reasons and five bases appears 30 times. See table D.8.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Breaking out the prisons' cited reasons for denial by the bases of prisoners' complaints reveals that safety/prison security is the most commonly cited reason for denial in cases involving accessories, dress, grooming, literature, and practice. Administrative burden is most commonly raised in complaints involving diet.

As table 4.11 shows, safety/prison security is the most prevalent reason for prisons denying complaints by prisoners over barriers to practice, religious accessories, dress, and literature. Administrative burden is the most prevalent reason for denial of dietary requests. Table 4.12 demonstrates that this has not changed over the years, even as the number of RLUIPA cases has increased.

Table 4.12
Type and Number of Reasons for Denial in Reported RLUIPA Cases in Federal Court by Year of Origin

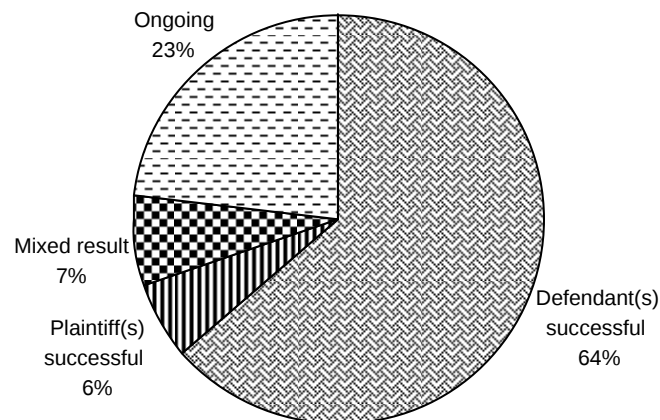
Reasons	Year of Origin						Total Reasons
	2001	2002	2003	2004	2005	2006	
RLUIPA is unconstitutional	2	1	5	5	1	1	15
Safety/prison security	2	5	15	18	32	43	115
Administrative burden		4	11	12	11	26	64
Cost		2	7	7	4	19	39
Health			2	3	4	11	20
Prisoner request moot	2	1	4	2	10	23	42
<i>policy changed</i>		1				6	7
<i>prisoner no longer at facility</i>						3	3
<i>request moot, unspecified</i>	2		4	2	10	14	32
Request invalid or not religious in nature			7	3	9	15	34
Other					6	10	16
Procedural failure			3	5	11	18	37
Not reached						39	39
<i>ongoing</i>						17	17
<i>summary judgment</i>						21	21
<i>not reached, unspecified</i>						1	1
Unknown			2	3	3	11	19
Total Reasons	6	13	56	58	91	216	440

Chi-square = 122.7 (60 d.f.), $p < .01$.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: As the number of RLUIPA cases increased, safety/prison security remained the most common reason cited for denial of prisoners' requests/complaints each year.

Figure 4.6
Federal Reported RLUIPA Cases by their Disposition



Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Defendants were successful in 64 percent of the 250 RLUIPA cases examined from 2001 through 2006. Plaintiffs were successful in only six percent of cases. The remaining cases saw a mixed result (seven percent) or were ongoing at the conclusion of the survey (23 percent).

As reflected in figure 4.6, defendants in RLUIPA cases are more likely to be successful, prevailing in 64 percent of the cases examined. Plaintiffs prevailed in only six percent of the cases. The remaining cases saw a mixed result (seven percent) or were ongoing at the conclusion of the survey (23 percent).

Table 4.13
Reported RLUIPA Cases in Federal Court by Disposition and Circuit

Disposition	Judicial Circuit												Total Cases
	1	2	3	4	5	6	7	8	9	10	11	DC	
Defendant(s) successful	1	9	7	25	19	12	29	5	39	5	8	1	160
Plaintiff(s) successful	1	3	1				4	3	2	1	1		16
<i>all requested relief granted</i>	1	3	1				4	3	1	1	1		15
<i>remedies pending</i>									1				1
Mixed result		1		2	1	1	3	2	4		1		15
<i>no relief granted</i>								1					1
<i>some relief granted</i>		1		2	1	1	3	1	4		1		14
Ongoing	2	5	5	3	3	10	10	3	10	3	4	1	59
Total Cases	4	18	13	30	23	23	46	13	55	9	14	2	250

Chi-square (of the disposition by circuit) = 40.1 (33 d.f.), nonsignificant; Chi-square (of the relief by circuit) = 47.2 (55 d.f.), nonsignificant.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Several judicial circuits have had only one successful plaintiff, including the First, Third, Tenth, and Eleventh Circuits. The Fourth, Fifth, Sixth, and DC Circuits have had no entirely successful plaintiffs, although they have had cases where mixed relief was granted.

Several judicial circuits have had only one successful plaintiff, including the First, Third, Tenth, and Eleventh Circuits. The Fourth, Fifth, Sixth, and DC Circuits have had no entirely successful plaintiffs, although they have had cases where mixed relief was granted.

Table 4.14
Reported RLUIPA Cases in Federal Court by Disposition and Type of Bases

Disposition	Bases of Nonaccommodation											Total Bases	Total Cases
	Accessories	Dietary	Dress	Forced participation	Forced practice	Grooming	Literature	Other	Practice	Facility's salaried clergy positions	Unknown		
Defendant(s) successful	25	55	9	3	2	42	24	3	64	1	1	229	160
Plaintiff(s) successful	3	7	1		1	2	1		5			20	16
<i>all requested relief granted</i>	3	7	1		1	2			5			19	15
<i>remedies pending</i>							1					1	1
Mixed result	4	4				5	4		6			23	15
<i>no relief granted</i>	1											1	1
<i>some relief granted</i>	3	4				5	4		6			22	14
Ongoing	15	18	6	2		10	11		32			94	59
Total Bases	47	84	16	5	3	59	40	3	107	1	1	366	250

Chi-square (of the disposition by bases) = 21.4 (30 d.f.), nonsignificant; Chi-square (of the relief by bases) = 154.8 (50 d.f.), $p < .01$.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Examining outcomes by bases of the prisoners' complaints, dietary complaints have met the most success in the courts, with seven fully successful plaintiffs.

Examining outcomes by bases of the prisoners' complaints, dietary complaints have met the most success in the courts, with seven fully successful plaintiffs.

Table 4.15
Reported RLUIPA Cases in Federal Court by Disposition and Plaintiff's Religion

Disposition	Religious Tradition														Total Cases
	Afro-Caribbean	Atheist	Baha'i	Buddhist	Christian	Hindu	Jewish	Muslim	Native American	Other	Pagan	Sikh	Taoist	Unknown/ Unspecified	
Defendant(s) successful	18	1		2	18	1	25	42	19	5	9	1	2	17	160
Plaintiff(s) successful	1			1	2		5	5	1		1				16
<i>all requested relief granted</i>	1			1	1		5	5	1		1				15
<i>remedies pending</i>					1										1
Mixed result	2	1				1	2	5	2			1		1	15
<i>no relief granted</i>									1						1
<i>some relief granted</i>	2	1				1	2	5	1			1		1	14
Ongoing	4				7		8	22	7	3	5			3	59
Total Cases	25	2	0	3	27	2	40	74	29	8	15	2	2	21	250

Chi-square (of the disposition by religious tradition) = 41.0 (36 d.f.), nonsignificant; Chi-square (of the relief by religious tradition) = 60.6 (60 d.f.), non significant.

See appendix D, tables D.1 and D.2 for which faith groups fall under each tradition.

Source: Compiled by the U.S. Commission on Civil Rights. See appendix D for the faith-based groups included in each tradition.

Caption: Muslim and Jewish prisoners have had the highest number of successful RLUIPA cases, with five each, but they have also brought the largest number of cases (74 and 40, respectively).

Muslim and Jewish prisoners have had the highest number of successful RLUIPA cases, with five each, but they have also brought the largest number of cases (74 and 40, respectively). There does not appear to be any clear trend as to the success rate of any particular religion.

Table 4.16
Type of Reason for Denial of Reported RLUIPA Cases in Federal Court by Disposition

Reasons	Defendant(s) successful	Plaintiff(s) successful		Mixed result		Ongoing	Total Reasons
	No relief granted	All requested relief granted	Remedies pending	No relief granted	Some relief granted		
RLUIPA is unconstitutional	7	2			2	4	15
Safety/prison security	73	8	1	1	11	21	115
Administrative burden	41	8			5	10	64
Cost	25	6			1	7	39
Health	17					3	20
Prisoner request moot	31	1	1		3	6	42
Request invalid or not religious in nature	18	3			3	10	34
Other	8			1	1	6	16
Procedural failure	26	1	1			9	37
Not reached	22					17	39
Unknown	11	2				6	19
Total Reasons	279	31	3	2	26	99	440
Total Cases	160	15	1	1	14	59	250

Chi-square (of the proffered reason by relief) = 77.4 (60 d.f.), nonsignificant.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Again, safety/prison security emerges as the most successful defense raised by prisons, with no relief granted in 73 of the 250 cases. The administrative burden defense was successful for prisons in 41 cases, yielding no relief for plaintiffs.

As set forth in table 4.16, prisons are generally successful when they are able to raise a defense based on safety/prison security or can demonstrate an administrative burden.

Conclusion

The extremely small number of successful RLUIPA cases, when compared to the overall state prison population, indicates that religious discrimination against prisoners as defined by RLUIPA is not a serious or substantial problem. The court decisions also show that no one religion is more or less successful in pursuing RLUIPA litigation. Some other trends:

- The number of RLUIPA cases has grown annually, rising from only four cases in 2001 to 27 cases in 2004, and 136 cases in 2006.
- Most of these cases are brought by prisoners acting in a *pro se* capacity.
- Very few female prisoners bring claims that result in RLUIPA litigation.
- Prisons are most often successful in defending RLUIPA cases, prevailing in 64 percent of the cases examined. Prisoners prevailed only in six percent of the cases examined, an indication that the vast majority of complaints claiming a violation of

RLUIPA are considered to be without merit by the courts or that authorities have a valid reason for not accommodating a particular demand.

CHAPTER 5: COMMISSION'S FINDINGS AND RECOMMENDATIONS

Findings

1. Conflicts over the exercise of religious liberty in prisons are inherently difficult, even intractable at times. While incarcerated persons maintain the right to exercise their religion, their ability to do so is tempered by the unique health, safety, and administrative concerns of state and federal correctional institutions. The First Amendment, state Religious Freedom Restoration Acts, the Civil Rights of Institutionalized Persons Act (CRIPA), the Prisoner Litigation Reform Act (PLRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA) (or the Religious Freedom Restoration Act (RFRA) where federal prisoners are concerned), together address the religious rights and remedies of prisoners and the interests of prison officials and the American people in maintaining order and ensuring safety.
[Commissioners Thernstrom, Gaziano, Heriot, Kirsanow & Taylor voted in favor; Commissioner Yaki abstained; Commissioners Reynolds & Melendez were not present.]
2. Some two million persons are incarcerated in the United States, with 93 percent of those located in state and local correctional facilities. The percentage of prisoners professing non-Christian faiths tends to be larger than their proportions within the non-incarcerated adult population in the United States aged 18 and older. Federal and state prisons have encountered difficulty in recruiting chaplains for these faiths—particularly adherents of Islam. Therefore, prisons rely heavily on religious contractors, volunteers, and faith-based organizations to meet inmates' religious needs. State prisons draw even more heavily on the service of religious contractors and volunteers than do federal prisons, but have less uniform vetting procedures for them. The shortage of chaplains and the reliance on contractors and volunteers have ramifications for both inmates' religious accommodation and national security.
[Commissioners Thernstrom, Gaziano, Heriot, Kirsanow & Taylor voted in favor; Commissioner Yaki abstained; Commissioners Reynolds & Melendez were not present.]
3. Religious grievances make up a very small proportion of all grievances filed in prisons, regardless of jurisdiction (federal, state or local). They make up a similarly small proportion of complaints filed with the U.S. Commission on Civil Rights. The types of religious grievances reported by federal and state prisons are similar. The Federal Bureau of Prisons (BOP) does not collect information on grievances in federal prisons related to religious items/literature and religious grooming/head cover.

These two categories are among the most common bases for RLUIPA litigation by state prisoners.

[Commissioners Thernstrom, Gaziano, Heriot, Kirsanow & Taylor voted in favor; Commissioner Yaki abstained; Commissioners Reynolds & Melendez were not present.]

4. Male inmates practicing Muslim, Jewish, and Native American faiths, acting *pro se*, initiated the largest number of RLUIPA cases studied by the Commission.

[Commissioners Thernstrom, Gaziano, Heriot, Kirsanow & Taylor voted in favor; Commissioner Yaki abstained; Commissioners Reynolds & Melendez were not present.]

5. Both state and federal correctional institutions identify prison and inmate security and lack of resources as the key reasons for any burdens they may impose on inmates' free exercise. Federal prisons admit to increasing supervision of inmate-led programs and vetting of religious volunteers and materials entering the prisons subsequent to 9/11. Where resource limitations prevent supervision, regularly scheduled services have been reduced. The federal prisons surveyed appear to have spread the burden of reduction in religious programming across all faith groups.

[Commissioners Thernstrom, Gaziano, Heriot, Kirsanow & Taylor voted in favor; Commissioner Yaki abstained; Commissioners Reynolds & Melendez were not present.]

6. There has been a dramatic increase in the number of religious discrimination complaints received by the Justice Department's Special Litigation Section (SPL) since RLUIPA's passage. In 2001, SPL received only 23 complaints. By 2006, that number had increased to 417 complaints. SPL selected for investigation a very small percentage of the complaints during this period.

[Commissioners Thernstrom, Gaziano, Heriot, Kirsanow & Taylor voted in favor; Commissioner Yaki abstained; Commissioners Reynolds & Melendez were not present.]

7. The number of reported RLUIPA cases has grown annually, increasing from only four cases in 2001 to 27 cases in 2004, and 135 cases in 2006. Nevertheless, judging from the witness testimony, as well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time. The total number of reported RLUIPA cases, when compared to the total number of prisoners in state correctional facilities, is small—less than 0.014 percent over the course of six years. The Prison Litigation Reform Act (PLRA) has been a likely factor in creating the level of prisoner free exercise litigation that we find.

[Commissioners Reynolds, Thernstrom, Gaziano, Heriot & Kirsanow voted in favor; Commissioners Melendez, Taylor, & Yaki were not present.]

8. The reported RLUIPA cases studied by the Commission seem to show that no one religion is more or less successful in pursuing litigation.

[Commissioners Reynolds, Thernstrom, Gaziano, Heriot & Kirsanow voted in favor; Commissioners Melendez, Taylor & Yaki were not present.]

Recommendations

1. Prison officials need to pay particular attention to ensuring that inmates of non-Christian faiths are not having their free exercise rights unduly burdened. To the extent that resource limitations impact prisons' ability to accommodate prisoners' religious requests, such burdens should be spread across all faith groups in a fair and reasonable manner.

[Commissioners Reynolds, Thernstrom, Gaziano, Heriot & Kirsanow voted in favor; Commissioners Melendez, Taylor & Yaki were not present.]

2. Radicalization of inmates in both state and federal prisons poses a serious concern to fellow prisoners, prison officials, and others in the general population. Prison authorities should take national security considerations into account—carefully, even-handedly, and without relying on ethnic or religious stereotypes—in reviewing all requests for religious accommodation. They should also factor these considerations into their vetting of religious contractors and volunteers.

[Commissioners Reynolds, Thernstrom, Gaziano, Heriot & Kirsanow voted in favor; Commissioners Melendez, Taylor & Yaki were not present.]

3. State prisons would benefit from looking at policies federal prisons have adopted in trying to balance national security concerns with prisoners' free exercise rights. To that end, better communication and knowledge-sharing among state, federal, and local correctional institutions would enhance each jurisdiction's efforts.

[Commissioners Reynolds, Thernstrom, Gaziano, Heriot & Kirsanow voted in favor; Commissioners Melendez, Taylor & Yaki were not present.]

4. The PLRA has probably helped maintain the balance we see today between prisoners' rights and the interests of prison officials and the courts, in minimizing the number of frivolous lawsuits. We see no reason to provide religious liberty claims with a special exemption from PLRA provisions relating to exhaustion and the limitations on monetary awards absent physical injury and attorneys' fees.

[Commissioners Reynolds, Thernstrom, Gaziano, Heriot & Kirsanow voted in favor; Commissioners Melendez, Taylor & Yaki were not present.]

5. Prison ministry and prisoners' rights advocacy organizations should undertake efforts to enhance the availability of professional legal representation, perhaps through facilitating *pro bono* arrangements with attorneys at local firms, for prisoners who believe their religious rights have been infringed.

[Commissioners Reynolds, Thernstrom, Gaziano, Heriot & Kirsanow voted in favor; Commissioners Melendez, Taylor & Yaki were not present.]

STATEMENTS OF COMMISSIONERS

Abigail Thernstrom

I am not entirely satisfied with this report.

I have questions about the Commission's findings and recommendations regarding the impact of the Prison Litigation Reform Act (PLRA). I also believe there is a need to standardize the religious classifications used to describe the nation's prison population and to collect better data on the religious affiliations of prisoners. Finally, while the original project outline called for research into programs aimed at reducing recidivism, I very much regret that our final report does not address this topic.

Impact of the Prison Litigation Reform Act (PLRA)

To the extent that the Prison Litigation Reform Act (PLRA) has limited the filing of frivolous litigation I agree with finding seven and recommendations four and five. But it is possible that the PLRA has placed an equal or greater limitation upon the filing of truly meritorious religious accommodation claims. And if it has, that should be a matter of concern.

Finding seven and recommendations four and five state in full:

- *Finding 7:* The number of reported RLUIPA cases has grown annually, increasing from only four cases in 2001 to 27 cases in 2004, and 135 cases in 2006. Nevertheless, judging from the witness testimony, as well as our inventory of reported cases, the overall volume of litigation is not unmanageable at this time. The total number of reported RLUIPA cases, when compared to the total number of prisoners in state correctional facilities, is small—less than 0.014 percent over the course of six years. The Prison Litigation Reform Act (PLRA) has been a likely factor in creating the level of prisoner free exercise litigation that we find.
- *Recommendation 4:* The PLRA has probably helped maintain the balance we see today between prisoners' rights and the interests of prison officials and the courts, in minimizing the number of frivolous lawsuits. We see no reason to provide religious liberty claims with a special exemption from PLRA provisions relating to exhaustion and the limitations on monetary awards absent physical injury and attorneys' fees.
- *Recommendation 5:* Prison ministry and prisoners' rights advocacy organizations should undertake efforts to enhance the availability of professional legal representation, perhaps through facilitating *pro bono* arrangements with attorneys at local firms, for prisoners who believe their religious rights have been infringed.

Finding seven refers to “the overall volume of litigation [as] not unmanageable at this time.” But why is the relevant standard “manageability”? If we interpreted the First Amendment to keep the volume of free speech litigation down to a “manageable” level, while violating constitutional rights in the process, would we celebrate? The point applies equally to statutory rights.

Finding seven also states that the total number of “RLUIPA cases...is small—less than 0.014 percent over the course of six years.” Given the limitations of our data I am not confident we can calculate this percentage with such precision. I would therefore change the statement in finding seven to read as follows: “The total number of reported RLUIPA cases, when compared to the total number of prisoners in state correctional facilities, is very small. The available evidence indicates that the percentage of state prisoners filing RLUIPA complaints is well below one percent of the total state prison population.”

Finding seven also speaks about the PLRA being a factor in “creating the level of free exercise litigation that we find.” But is that, by some measure, the desirable level? Has that level been attained, in part, by rejecting meritorious claims?

Recommendation four states that the “PLRA has probably helped maintain the *balance* we see today between prisoners’ rights and the interests of prison officials and the courts, in minimizing the number of frivolous lawsuits.” [Emphasis added.] But, again, the Commission dodges the important question of whether meritorious lawsuits may have been rejected.

Recommendation five’s admonition that prison ministries and advocacy groups should enhance the availability of legal representation is laudable. However, given the fact that the PLRA makes it extremely difficult to obtain compensation for legal fees, even in the event of a successful lawsuit, this recommendation seems hollow.

Taken together, the three statements overlook the very real possibility that the PLRA has curtailed all religious accommodation claims, meritorious as well as frivolous. As we stated on page eight of this report:

Incorporated within CRIPA, the Prison Litigation Reform Act (PLRA) contains a variety of administrative and procedural limitations to prisoners’ access to federal courts. Intended to reduce frivolous prisoner lawsuits, PLRA has substantially cut the number of prisoner lawsuits, subjecting RLUIPA claims to stricter legal standards. *As a result, RLUIPA claims are often dismissed without judgment on the merits, and compensation is strictly limited even after advancing a successful lawsuit.* The latter is due to the fact that PLRA bars inmates from bringing suits ‘for mental or emotional injury suffered while in custody without a prior showing of physical injury.’ [42 U.S.C. § 1997e(e) (2000)] [Emphasis added.]

In this context, the claims of prisoners’ rights advocacy groups are worthy of further investigation by applicable federal, state, and local authorities. The PLRA may in fact place a significant bar to the exercise of prisoners’ religious rights. More careful research is needed. Finally, as my fellow Commissioners have noted elsewhere, there are obvious and important limitations to the data we were able to collect and analyze in preparation of this important

report. For instance, we have provided no pre-PLRA benchmarks against which to evaluate the extent to which PLRA limits meritorious as well as frivolous free exercise lawsuits.

The Need to Standardize Religious Classifications and Improve Data Collection

At the beginning of this report we explicitly acknowledged the difficulties and ambiguities inherent in the current, non-standardized patchwork of religious categories used by various agencies as well as the inconsistencies in the data collection methods. Given those difficulties and ambiguities, I regret the decision of my colleagues to omit suggested findings and recommendations concerning the standardization of religious classifications and improvement of data collection across all federal, state, and local agencies and prison authorities. The protection of the free exercise rights of our incarcerated population to practice their faith requires the collection of standardized data that allows an accurate examination and assessment of any claims of non-accommodation.

I would thus have liked to see the following finding:

A major obstacle to understanding the need for enforcement of prisoners' religious rights is the paucity of statistical data on prisoner religious affiliation and instances of non-accommodation and religious discrimination against prisoners. Prisons do not appear to compile this information in any systematic manner that would be available to public policy makers.

Further, I would like to have seen this additional recommendation: "The Justice Department and state departments of corrections should collect better data on prisoner religious affiliation to allow better enforcement and greater public scrutiny of the extent to which they enforce the religious rights of prisoners."

Impact of Prisoner Religious Accommodation upon Recidivism

The original project outline for this report included research into the Bureau of Prisons' (BOP) use of faith-based organizations to establish community support channels that extend beyond inmates' release with the goal of helping to prevent recidivism. This research would also have included BOP's use of faith-based organizations to offer religious services and counseling and to provide transitional services such as employment training or work release programs.

The nexus between religious accommodation for prisoners, on the one hand, and reduction in recidivism, on the other, would have been a fascinating and important area for this report to address. Regrettably, we were not able to find any systematic collection of data on this topic.

Even so, I would have preferred to include a discussion of this topic and would have supported a recommendation that data on recidivism be collected in the future.

Instead, the entire topic of prisoner reintegration and recidivism is discussed only incidentally in appendix B in our descriptions of two of the non-profit and advocacy organizations that we contacted.

Alpha for Prisons and Re-Entry states they have a program that allows prisoners to explore their faith in a way that assists them in making a smoother transition into mainstream society after completing their prison sentences. It seeks to accomplish this by providing a separate living unit in which program participants are able to define and explore their self-identity. The program is Christian-oriented but accepts all faiths. (See appendix B, page 129.)

The InnerChange Freedom Initiative states that they maintain a re-entry program which focuses on the inmates developing a sense of right and wrong through spiritual or moral filters. Inmates apply their values and life skills in life-like situations and often participate in offsite work programs. Finally, the program seeks to pair each released inmate with a volunteer who functions as a source of support and motivation as the inmate integrates himself back into society. (See appendix B, page 130.)

Arlan Melendez and Michael Yaki

This report does not live up to the Commission's standards and shows that the agency has lost its ability to engage in serious review of civil rights issues, even on its major annual project.

The report is remarkable for its lack of analysis, inability to make specific findings of discrimination, and its unwillingness to require administration offices to answer tough questions. Critical threshold issues are disregarded, including how the extraordinary legal burdens imposed on complainants by the Prison Litigation Reform Act (PLRA) have affected current litigation, and whether the PLRA's provisions have unnecessarily hampered prisoners' religious rights. Just as remarkably, the report takes at face-value prison officials' claims that national-security concerns require them to limit prisoners' religious exercise rights, and elevates those vague claims to play a key role in the Commission's finding and recommendations.

Moreover, execution of the report involved unauthorized changes to the project scope and shortening of Commissioners' time for review—violations of agency procedures almost identical to those sharply criticized by the Government Accountability Office (GAO) in May 2006.

The result is a hasty report that gives some helpful descriptions of the relevant federal agencies and general kinds of religious discrimination reported by inmates. But, the report goes no further. Critically, it sheds little light on the *extent of actual discrimination* or the *performance of federal agencies' enforcement duties* to protect the religious liberties rights of prisoners. Consequently, we cannot approve this report.

Failure to Establish Extent of Religious Discrimination or Adequacy of Federal Response

The U.S. Commission on Civil Rights has the power to issue subpoenas and conduct serious investigations of civil rights abuses, but has refused to do so under its new Republican leadership. In nearly four years, the Commission has not once issued a subpoena for information or testimony. Only once, in 2006, did the Commission leave the comfort of its Washington DC headquarters to hold a meeting in the field where it could hear directly from people voicing complaints of discrimination. Only one of our Republican colleagues bothered to attend that meeting with us, and Vice-Chair Thernstrom has since that Commission meeting on the creation of racially identifiable school districts, as mere "ambulance chasing."¹ The failure to issue subpoenas or use its statutory authority to require full federal agency cooperation² in this report is thus not surprising in light of the Commission's overall record over the past four years. Nevertheless, the failure to use the Commission's full powers considerably undermines this report's credibility and usefulness.

¹ USCCR Transcript of July 11, 2008 Meeting, pg. 158 (available online at www.usccr.gov).

² 42 U.S.C. 1975(b) (e) ("Cooperation. All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.")

The Commission's statutory mandate that this annual report "monitor Federal civil rights enforcement efforts"³ cannot be met without establishing some baseline of the actual incidence of violations of prisoners' religious rights. Yet, this report makes no finding as to whether any instances of reported religious discrimination against prisoners are true. Rather, the report repeats allegations of religious discrimination made by various nonprofit and faith-based groups, but offers no further information as to the persons involved, the merits of their claims, or whether the matter was the subject of government investigation. In fact, many of these allegations are likely true; indeed, all of these allegations may be true as stated. But the Commission's unwillingness to itself investigate any claims of religious discrimination—either those submitted directly to it in recent years by complainants, or those reported by watchdog groups—leaves the Commission in the awkward position of parroting allegations of unknown truth. It may be that the Commission currently lacks the staff expertise or capacity to fully investigate the underlying facts of alleged civil rights violations. However, in making no effort to do so, even at a cursory level, the Commission has failed miserably in satisfying its statutory mandate.

Two data gaps in this report are particularly notable. First and foremost is the lack of the voices of those individuals whose federal civil rights are at stake—the prisoners and inmates who have complained loudly and vociferously regarding their Free Exercise claims being infringed during their incarceration. Neither the Staff Director nor the Commission Majority can adequately explain why the Commission was unwilling or unable to interview inmates to provide true context to its discussions in the report. The most the Commission did was review some public court documents. When compared to the thoroughness with which the Commission exercised its investigative authority for civil and voting rights in the 1960's, the absence of prisoners' own voices in this report is even more egregious.

Second, the report does not appear to consider the widespread use of "private prisons" in incarcerating state and federal prisoners. These for-profit institutions, owned by companies that are publicly traded, contract with state and federal correctional agencies to house inmates for a fee. Their correctional officers are employed by the private company, supervised by the private company, and all paychecks are paid by the private company. The government does not control these institutions. Yet, one such company estimates that five percent of all inmates in the United States are housed in privately-managed correctional facilities, with that number expected to grow.⁴ Obviously, questions of whether such private facilities operate under color of law for First Amendment and Section 1983 purposes are important—but were totally ignored in this report.

Neither does this report reach significant conclusions about the state of the current law or uncover the policies by which key federal agencies (here subdivisions of the Department of Justice) are enforcing the law. The legal background in Chapter 1 and elsewhere only quotes a few of the most significant Supreme Court precedents and looks at the number of lower court filings and dispositions. There is almost no analysis of developing trends and rationales

³ 42 U.S.C. 1975a (c)(1) ("Annual report. The Commission shall submit to the President and Congress at least one report annually that monitors Federal civil rights enforcement efforts in the United States.")

⁴ See, e.g., claims made by one company at <http://www.correctionscorp.com/corrections-management/>.

among federal (or state) courts in handling RLUIPA, RFRA, or other protective statutes. The report fails to address a critical question raised by many prison law and religious liberties scholars: whether courts are applying in these cases a legal standard that is “strict, yet deferential,”⁵ rather than the heightened protection provided by a traditional strict scrutiny standard. These and other vital legal debates over recent cases addressing enforcement of the Establishment Clause of the First Amendment in the prison context are hardly mentioned.

In Chapter 3 staff was unwilling or unable to follow-up with the Department of Justice’s Civil Rights Division (CRD) when it refused to disclose “non-public” information on how it chooses which religious freedom cases to pursue. The Commission’s inquiries appear to have been brushed aside. It may be that there are many meritorious *pro se* claims made by prisoners that fail for lack of sufficient legal intervention that CRD could provide. Or it may be that CRD’s low involvement with religious liberties cases reflects a screening mechanism that effectively stops mostly spurious claims. But, it is impossible to say anything useful about whether CRD is effectively carrying out its enforcement duties without first knowing how it screens cases, and then looking to the outcomes. While there is useful “public” information gathered in this report on the state of the law and some basic operations of enforcement agencies, there is no non-public information here and few implications about the effectiveness of enforcement can be drawn from such information.

Misleading Reliance on Litigation Statistics: the Prison Litigation Reform Act (PLRA)

The report also fails to determine the extent of religious liberty violations or under-enforcement by federal agencies because it relies upon prisoners’ court litigation as the measure of incidence rates. Such an approach fails to recognize that federal judicial remedies for violations of religious liberty are sharply curtailed by the PLRA. Relying on court filings or judgments as an indicator of the incidence of religious rights violations therefore invites gross under-reporting.

The existence of gross under-reporting is supported by the available data, as Margo Schlanger, Professor of Law, Washington University, testified before the Subcommittee on Crime, Terrorism, and Homeland Security, United States House of Representatives:

[The PLRA] has drastically shrunk the number of cases filed: prison and jail inmates filed 26 federal cases per thousand prisoners in 1995; the most current statistic, for 2005, was just 11 cases per thousand prisoners, a decline of nearly 60%. So the PLRA has been extremely effective in keeping down the number of federal lawsuits by prisoners, even as prison populations rise. Even more important than these sharply declining filing rates for understanding the decreasing burden of litigation for prison and jail officials is the statute’s screening provisions which require courts to dispose of legally insufficient prisoner civil rights cases without even notifying the sued officials that they have been sued or receiving a response. No longer need prison or jail officials investigate or answer complaints that are frivolous or fail to state a claim under federal law.

⁵ *E.g.*, Morgan F. Johnson, Comment: Heaven Help Us: The Religious Land Use and Institutionalized Persons Act’s Prisoners Provisions in the Aftermath of the Supreme Court’s Decision in *Cutter v. Wilkinson*, 14 Am. U.J. Gender Soc. Pol’y & L. 585, 595 (2006).

But in addition to filing frivolous or legally insufficient lawsuits, prisoners do, of course, file serious cases....When the PLRA passed, Senator Hatch made a point that its supporters emphasized, over and over: '[We] do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised. The legislation will, however, go far in preventing inmates from abusing the Federal judicial system.'

Yet 'prevent[ing] inmates from raising legitimate claims', is precisely what the PLRA has done in many instances. If the PLRA were successfully 'reduc[ing] the quantity and improv[ing] the quality of prisoner suits,' as its supporters intended, one would expect the dramatic decline in filings to be accompanied by a concomitant increase in plaintiffs' success rates in the cases that remain. The evidence is quite the contrary. The shrunk prisoner docket is less successful than before the PLRA's enactment, more cases are dismissed, and fewer settle. An important explanation is that constitutionally meritorious cases are now faced with new and often insurmountable obstacles.⁶

The problems created by the PLRA, cited by Professor Schlanger and others, are ignored by the Commission. Indeed, the possibility that constitutionally meritorious cases are now faced with "new and often insurmountable obstacles" created by the PLRA is almost entirely unaddressed by the Commission's report.

Instead, the report merely mentions, without serious analysis, some of the five PLRA provisions that can prevent claims from making it to federal courts: (1) a physical injury requirement, (2) attorney's fee restrictions, (3) an administrative exhaustion requirement, (4) filing fees, and (5) prospective relief limitations.

The most irrational of these PLRA requirements is the physical injury requirement that bars lawsuits "for mental or emotional injury suffered while in custody without a prior showing of physical injury."⁷ This provision requires that, in order to sue for compensatory damages in a civil rights case in federal court, a prisoner must demonstrate a physical injury before he or she can win damages for mental or emotional injuries.⁸ Many of the harmful consequences of this provision of the PLRA flow from the fact that most federal courts have applied this provision to bar damages claims involving all constitutional violations that intrinsically do not involve a physical injury, such as religious rights violations.⁹ Despite the lack of physical

⁶ Testimony of Margo Schlanger, Professor of Law, Washington University in St. Louis, on behalf of the American Bar Association, presented to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (Nov. 8, 2007) (available online at: <http://judiciary.house.gov/hearings/pdf/Schlanger071108.pdf>) (internal citation omitted).

⁷ 42 U.S.C. § 1997e(e).

⁸ Some courts have held that the "physical injury" requirement bars compensatory damages but not nominal or punitive damages. *See, e.g., Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). *But see Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

⁹ *See, e.g., Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004) (damages are not available based on retaliation for exercise of First Amendment rights); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002) (violation of due process rights); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (damages are not available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (damages are not available for violation of privacy rights). *But see Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (damages are available for violation of

injury, many of these cases represent serious unconstitutional conditions, but PLRA leaves the courts with few options to remedy such violations. As a letter sent to Congress by liberal and conservative faith-based groups concerned about the impact of PLRA noted:

[A] consequence [of PLRA] has been that victims of religious rights violations, sexual harassment, and even victims of coerced sex are often denied access to appropriate judicial remedies because of the PLRA's 'physical injury' provision, which requires a person to prove he or she suffered a physical injury in order to obtain compensatory damages, regardless of whether any mental or emotional injury was incurred. A prisoner who is repeatedly denied the right to practice his or her religion—attend services, meet with a chaplain, or obtain a bible, Koran, or Torah—cannot prove a physical injury. Likewise, a female prisoner who has her breasts fondled by a male guard may not be able to prove she suffered physical injury. And a child in detention, who is told by a guard that he may not have visits with his mother unless he performs sexual favors for the guard, likely cannot prove a physical injury under the PLRA. These abuses cause suffering that cannot be overlooked simply because they are not physical in nature.¹⁰

Another provision of the PLRA that presents an enormous obstacle to prisoners' religious freedom claims is the exhaustion requirement. Under the exhaustion provision, the PLRA requires courts to dismiss a prisoner's case if he or she has not satisfied all internal complaint procedures at his facility prior to filing suit.¹¹ This means that prisoners must successfully complete internal grievances at every level without making any procedural mistakes, such as missing a deadline or failing to fill out a form correctly, before filing a lawsuit in federal court. According to a statement submitted to the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security in April 2008, by the ACLU, this is not only the most harmful part of the PLRA, it also does nothing to achieve the stated goal of the PLRA:

This is true for a number of reasons. First, there is the reality of prisoner demographics. Prisoners, as a general matter, have very low rates of literacy and education. Moreover, the number of severely mentally ill and cognitively impaired persons in prison is staggering. According to the most recent report by the U.S. Department of Justice, Bureau of Justice Statistics, 56% of State prisoners, 45% of Federal prisoners, and 64% of jail prisoners in the United States suffer from mental illness. And experts estimate that people with mental retardation may constitute as much as 10 percent of the prison population. As a result, the PLRA's exhaustion requirement has proven to be a trap for the unschooled and the disabled.

Second, there is the reality of how prison internal complaint procedures or grievance systems often operate. Deadlines are very short in many grievances systems, almost always a month or less, and not infrequently five days or less. Nonetheless, these deadlines, many measured in hours or days rather than weeks or months, operate as statutes of limitations for federal civil rights claims. Moreover, a typical system does not have just one deadline that could lead to forfeiture of a claim; it may have three or more such deadlines as prisoners must appeal to various levels of a grievance system.

First Amendment rights if prisoner is not seeking compensation for mental or emotional injury); *Cannell v. Lightner*, 143 F.3d 1210 (9th Cir. 1997) (allowing damages for violations of religious rights).

¹⁰ See Letter from Faith-based Organizations to Members of Congress, Re: Need for PLRA reform (available online at http://savecoalition.org/newdev/Faith-based_Organizations'_Letter.pdf).

¹¹ 42 U.S.C. § 1997e(a).

Other technical obstacles arise all the time that lead to prisoners being denied their right to sue. The rules may require that grievances be submitted only on approved forms, and the forms may not be available. The forms may be available, but only from the staff member who is responsible for the action the prisoner wishes to challenge. Many grievance system rules give administrators discretion not to process grievances if the prisoner has filed too many; some systems also require that only one subject be raised on each grievance submitted. Further, it is a routine practice for grievances not to be given responses by staff in a timely manner, whether or not the system rules indicate a deadline for staff responses. There may be ambiguity about what issues are grievable, or a difference between what the rules say and actual practice by administrators. Even a highly educated prisoner, or the rare prisoner with access to legal advice, will be unsure how to proceed when there is no literal way to comply with the rules in circumstances like these. For illiterate, mentally ill, or cognitively challenged prisoners, these convoluted administrative systems are virtually impossible to navigate. Thus, constitutional claims for many of the most vulnerable are lost irrevocably under PLRA because of technical misunderstandings rather than lack of legal merit.¹²

In his testimony about problems with the PLRA before the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security in November 2007, Pat Nolan, Vice President of Prison Fellowship, made the following point about the PLRA's exhaustion provision:

When a specific religious holy day is involved, another requirement of the PLRA prevents relief in the courts: the "exhaustion" of administrative remedies. If a prisoner is prevented from attending Christmas Mass, or is forced to work on Yom Kippur, it is usually only day or two ahead of time that they find out. Even if they file the grievance immediately, the holy day has come and gone before they even get a hearing on their grievance.¹³

In the course of preparing this report, the Commission was presented with some testimony regarding the problems that the PLRA poses to the protection of religious rights in our prisons and jails, raising significant concerns that the statute is deeply flawed. Yet, the Commission took no action to further investigate the validity of these concerns.

Moreover, the report fails to take note that legislation has been introduced in Congress to fix the PLRA in a way that would repeal the physical injury requirement and tweak other harmful provisions of the law, such as the exhaustion requirement, while keeping the screening provision that successfully curtails frivolous litigation. The Prison Abuse Remedies Act of 2007, H.R. 4109 has already been the subject of an April 22, 2008 hearing of the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security. Since H.R. 4109 was introduced in November 2007, there has been

¹² Written Testimony of Caroline Fredrickson, Director of the American Civil Liberties Union Washington Legislative Office and Elizabeth Alexander, Director of the ACLU National Prison Project, submitted for the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Regarding the Prison Abuse Remedies Act of 2007 (H.R. 4109) Apr. 22, 2008 (internal citation omitted).

¹³ Testimony of Pat Nolan, Vice President Prison Fellowship, presented to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (Nov. 8, 2007) (available online at: <http://judiciary.house.gov/hearings/pdf/Nolan071108.pdf>).

strong support for reform of the PLRA voiced by the faith-based community, prisoner advocates, judges, corrections officials and concerned citizens.¹⁴

Despite the legislative fixes urged by H.R. 4109 and bipartisan recognition that the PLRA needs reform because it prevents serious prisoner civil rights claims from getting into court, the Commission ignores these realities and in its recommendations blindly supports the PLRA. Moreover, the Commission ignores the fact that, due to artificial constraints created by the PLRA, the volume of prisoner litigation cannot be used as a reliable measure of the underlying incidence of religious rights violations in America's prisons and jails. Thus, the Commission's treatment of the PLRA's impact on prisoners' religious rights in this country and its blasé attitude toward the possible under-reporting of religious rights violations in prison generally is deeply flawed and must be reconsidered.

Subverting Prisoners' Religious Freedom Rights with Generalized and Non-specific Claims of National Security

While completely dismissing, without investigation or due consideration, the widely known, publicly documented problems with the PLRA, this report takes at face value claims that national-security concerns require prison officials to further limit inmates' religious freedom rights. The Commission never investigated and was offered virtually no expert testimony or submissions on this issue of a national security threat in prisoners' exercise of their religious freedom rights. While specific national security concerns must, of course, be given significant weight in determining the scope of religious rights accorded to particular prisoners, sweeping and generalized claims of national security should not be used to infringe on an entire class of citizens' constitutional rights. But that is exactly what this report appears to countenance in its findings and conclusions.

Failure to Follow Agency Procedures in Compiling This Report

This annual report, designed to monitor an aspect of federal enforcement of civil rights legislation, is the only work product specifically required of the Commission by statute. It is the main focus of the agency's research division for an entire year and has consumed most of the time of the agency's only two remaining social scientists. Yet, for all this time and

¹⁴ See, e.g., Testimony of David A. Keene presented to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (Nov. 8, 2007) (available online at <http://judiciary.house.gov/hearings/pdf/1108072.pdf>) (Mr. Keene is the President of the Conservative Union); Testimony of Hon. John J. Gibbons, Senior Director, Gibbons P.C. presented to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (Apr. 22, 2008) (available online at: <http://judiciary.house.gov/hearings/pdf/Gibbons090422.pdf>) (Judge Gibbons is a retired Judge of the U.S. Court of Appeals for the Third Circuit); Testimony of Ernest D. Preate, Jr., Esq., presented to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (Apr. 22, 2008) (available online at <http://judiciary.house.gov/hearings/pdf/Preate080422.pdf>) (Mr. Preate is the former Attorney General for the State of Pennsylvania); Testimony of Jeanne Woodford presented to the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (Apr. 22, 2008) (available online at <http://judiciary.house.gov/hearings/pdf/Woodford080422.pdf>) (Ms. Woodford is the former Warden of San Quentin State Prison in California and the former Secretary of the California Department of Corrections and Rehabilitation).

attention—the best the national headquarters of the Commission has to offer—the present report almost did not happen due to a series of mismanagement steps.

Staff failed to meet every single deadline described in the agency’s procedures, resulting in very little time for Commissioner input regarding the report. A first draft was given to Commissioners for review several months later than required. Only one round of comments was permitted on this draft before a Commission vote, compared to the two rounds normally accorded to even small briefing reports issued by the agency. There was such confusion and chaos in the report’s assembly that this report was not scheduled for a vote until the very last day of the fiscal year—September 30, 2008. Democratic Commissioners were not consulted about the meeting date and the final report was not completed until October 14th when Commissioner statements such as this were submitted. The upshot is that for the first time in many years, the Commission has failed to timely submit its annual report to Congress in contravention of its statute.

As troubling as these delays, the scope of this report was significantly changed without consultation with all Commissioners. As approved in 2007, this report was to distinctly consider the role of faith-based organizations (FBOs) in prisons. In recent years there have been several significant Establishment Clause challenges¹⁵ to the growing number of religious prison programs operated by FBOs. These cases have considerably clarified the legal landscape in this area, and have revealed some important constitutional pitfalls of FBOs conducting religious programs in prisons. These cases also may provide insight on how FBOs could operate such programs within the bounds of the Establishment Clause. However, it appears that the Commission’s Staff Director, in agreement with certain Republican Commissioners, did not like career staff’s findings concerning FBOs and simply eliminated the separate discussion of them from the text of this report. Contrary to agency rules, no approval of the full Commission was sought in eliminating the examination of FBOs from the scope of this report. It is hard to imagine that such approval could be granted, as any credible and serious report on religious discrimination in prisons surely must include an in-depth examination of the Establishment Clause difficulties posed by state-sponsored religious programming in such inherently coercive environments.

The management failures in assembling this report are repetitions of practices that the Government Accountability Office (GAO) uncovered years ago in its May 2006 report, which sharply criticized the Commission. For instance, two years ago there also were serious complaints about Commissioners not receiving reports in time for adequate review or receiving them “too late to help them in their deliberations.”¹⁶ Among the report’s findings, was the fact that “In some cases, the Commission has made decisions without fully consulting with the Commissioners or documenting its decisions. For example, the Staff

¹⁵ The most notable is the recent decision by the U.S. Court of Appeals for the Eighth Circuit in *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.* 509 F.3d 406 (8th Cir. 2007). The Court of Appeals held that the State of Iowa’s funding of the Innerchange Freedom Initiative, a 24-hour-a-day, seven-days-a-week evangelical Christian rehabilitation program operated by an FBO (Prison Fellowship Ministries) violated the Establishment Clause.

¹⁶ Government Accountability Office, *U.S. Commission on Civil Rights: The Commission Should Strengthen Its Quality Assurance Policies and Make Better Use of Its State Advisory Committees*, pg. 18 (May 2006).

Director did not consult with all the Commissioners or obtain their agreement before he significantly redirected the focus of its 2005 statutorily required national office report.”¹⁷

Despite the new majority’s claims of having redressed the lack of transparency and partisanship in assembly of Commission reports, however, problems persist.

These irregularities, combined with the abovementioned failings to conduct independent legal analysis or independent factual investigation, mark the breakdown of the Commission’s capacity to produce any quality investigative reports. If the agency’s management cannot pull it together when producing its only major annual report, there is little hope that any of the Commission’s many discretionary briefing will be of higher quality. We will continue to push internally for reform of the Commission’s practices, but attention by external stakeholders is needed as well. The Commission is no longer willing or able to carry out its statutory mandate in this or other matters in a satisfactory manner.

The freedom to practice the religion of one’s conscience and the freedom from state-imposed religion are rights essential to our nation from its beginning. These rights apply no less to those who are imprisoned. We must respect the role of religious belief in reshaping the hearts of those who have harmed society and also take care that our prisons are safe and regulated environments. This report, even with its failure to independently investigate claims, uncovers troubling allegations that religious toleration has been lost in many of our nation’s prisons and jails. We think that these allegations merit judicial review and support careful modification of the PLRA to let more meritorious claims be heard. We also hope the Commission will one day restore its investigative and research abilities and revisit attention to these matters.

¹⁷ *Id.* at 3.

Gail Heriot – Statement and Rebuttal

This report contains a measure of useful information—although it is a smaller measure than those who worked on it had hoped for. The scope of the report had to be reduced in order to ensure greater accuracy and timeliness.¹

¹ Prison radicalization is one issue that has not received full attention in this report. Some have expressed concern that the current legal framework may in some ways make terrorist recruitment easier. See Testimony of Robert S. Mueller III, FBI Director, Before the Senate Committee on Intelligence (Feb. 16, 2005), available at <http://www.fbi.gov/congress/congress05/mueller021605.htm> (“prisons continue to be fertile ground for extremists who exploit both a prisoner’s conversion to Islam while still in prison, as well as their socioeconomic status and placement in the community upon their release”). Others have argued that these concerns are exaggerated or that those who express them overlook countervailing positive factors. See Jennifer Warren & Greg Krikorian, “Terror Probe Targets Prison in Folsom” (Aug. 17, 2005)(quoting a retired Bureau of Prisons religious services administrator who said that Islam is a positive force in prisoner rehabilitation). Although the Commission has collected some evidence on this issue, it would be a serious exaggeration to state that it has looked into it systematically. See chapter 2 at 32–37. Our recommendations in this area are therefore quite limited. See recommendations 2–3 at 102. They simply advise state and federal authorities to take such issues into account.

Commissioners Melendez and Yaki accuse the Commission of “[s]ubverting [p]risoners’ [r]eligious [f]reedom [r]ights [w]ith [g]eneralized [a]nd [n]on-specific [c]laims [o]f [n]ational [s]ecurity.” Melendez and Yaki Draft Statement at 8. While this is not the only exaggerated assertion in their statement, it is among the most puzzling. Commissioners Melendez and Yaki would be hard pressed to come up with a reason to disagree with the Commission’s recommendations in this area.

The Commission recommends that prison officials “should take national security into account—carefully, even handedly, and without relying on ethnic or religious stereotypes.” I would be very surprised if Commissioners Melendez and Yaki disagree—especially since their own statement asserts that some national security concerns “must, of course, be given significant weight in determining the scope of religious rights accorded to particular prisoners.” Melendez and Yaki Draft Statement at 8.

A more cogent criticism of the Commission’s recommendations in this area might have been that they are short on substance. Although innocuous, they could have been deleted in the interest of brevity. I doubt any member of the Commission would have objected to that approach if Commissioners Melendez or Yaki had argued for it. They did not. Alas, I suspect that if the members of the majority had acted on their own initiative to leave them out, Commissioners Melendez and Yaki would have rained criticism down upon them for failing to give due attention to the problem of prisoner radicalization. See generally, Craig S. Smith, “Europe Fears Islamic Converts May Give Cover for Extremism,” *New York Times* (July 19, 2004), available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E0DD133AF93AA25754C0A9629C8B63>; Michael Elliott, “The Shoe Bomber’s World,” *Time* (Feb. 16, 2002), available at <http://www.time.com/time/world/article/0,8599,203478,00.html>; Theodore Dalrymple, I. See “Richard Reids in Jail Every Day,” *The Sunday Telegraph* (U.K.) (Dec. 30, 2001), available at <http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2001/12/30/do3001.xml>.

Vice Chair Thernstrom expresses regret that the Commission was unable to follow through with its earlier-expressed intention to study the effects of faith-based organizations efforts on prisoner recidivism. (Thernstrom Draft Statement at 3–4.) I share her regret that the Commission was “not able to find any systematic collection of data on this topic,” and am sympathetic to her view that this is an area in which data should be collected. On the one hand, government commissions sometimes make the mistake of being too quick to recommend exercises in data collection. Data collection is not free. Somewhere, in the basement of many a federal building, are employees who owe their jobs to a long-forgotten commission report tabulating data that no human being will ever give a second glance. I am therefore inclined to vote against filler recommendations calling for more data collection unless its usefulness is clear to me. On the other hand, Vice Chair Thernstrom’s proposal on data collection seems to be a valuable one. It is very possible that I would have supported it if it had been made.

Commissioners Melendez and Yaki have complained with characteristic hyperbole that the Commission “has failed miserably in satisfying its statutory mandate” and that the report shows the Commission “has lost its ability to engage in serious review of civil rights issues.”² But their specific objections are notable mainly for their lack of timeliness. Both were Commission members in 2006 when this year’s topic was selected and the project’s concept paper adopted; indeed they were two of the project’s strongest proponents.³ The strong views they now articulate were not in evidence then.⁴ When the staff’s initial draft of the report was made available to the Commission this past summer, active efforts were needed to improve the report. The other Commission members would have appreciated help from these gentlemen. I do not recall hearing from them.⁵

It is not that all of the objections articulated by the dissenting commissioners are frivolous. I agree with quite a few of them. For example, they criticize the Commission for its “failure to...use its statutory authority to require full federal agency cooperation in this report.” Exactly. The staff’s initial full draft of the report contained repeated statements that the Commission had sought information from the Department of Justice (DOJ), but DOJ had declined to furnish it on the ground that it was not publicly available.⁶ Upon inquiry, I learned that a staff member had been told by a junior DOJ staff member that the requested information would not be forthcoming. No efforts had been made to draw the DOJ staff

² Melendez and Yaki Draft Statement at 1–2.

³ Transcript of Meeting of the U.S. Commission on Civil Rights—May 5, 2006 at 138–40, available at <http://www.usccr.gov/calendar/trnsrpt/050506hbcu.pdf>.

⁴ In 2007, Commissioner Yaki made two minor proposals for modification of the project that were eventually integrated into the project—that a privately operated prison and a jail be included in the discovery plan. Commissioner Melendez made no proposals. Transcript of Meeting of the U.S. Commission on Civil Rights—Aug. 24, 2007 at 16–32, available at <http://www.usccr.gov/calendar/trnsrpt/082407ccr.pdf>.

⁵ RFRA and RLUIPA—the statutes that form the report’s core—were both passed by overwhelming, bipartisan majorities in Congress. It is a shame that this effort to study their enforcement has not enjoyed similar bipartisan support on the Commission. But rather than make an effort to improve the report, the dissenting commissioners preferred the “gotcha” style of politics: Make no effort to point out or correct the problems that you see with the report while there’s time to change it, announce the substance of your objections only after the report has been approved and argue that “the Commission has failed miserably in satisfying its statutory mandate.” Melendez & Yaki Draft Statement at 2.

The dissenters also complain that “[s]taff failed to meet every single deadline described in the agency’s procedures, resulting in very little time for Commissioner input.” A significant contributing factor to the problem was the amount of time staff members must spend responding to the extraordinary number of inquiries and initiatives by these very commissioners. The dissenters have been similarly wasteful of the time of Commission members. At the July 11, 2008 meeting, for example, Commissioner Yaki persuaded Commissioner Melendez to leave the room. They never came back and their special assistant was sent back into the meeting to gather Commissioner Melendez’s belongings. At that point, the meeting had to be adjourned for lack of a quorum. See Transcript of Meeting of the U.S. Commission on Civil Rights—July 11, 2008, available at <http://www.usccr.gov/calendar/trnsrpt/071108ccr1.pdf>. On another recent occasion, Commissioner Yaki injected a note of incivility into the Commission’s proceedings by instructing a briefing witness not to answer Vice Chair Thernstrom’s questions. See Transcript of Briefing of U.S. Commission on Civil Rights—June 6, 2008 at 43–45, available at <http://www.usccr.gov/calendar/trnsrpt/060608ccr1.pdf>.

⁶ As the dissenters point out, the statute that creates the Commission requires all federal agencies to “cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.” 42 U.S.C. 1975(b)(e).

member's attention to DOJ's statutory duty to cooperate with the Commission or to follow up with more senior DOJ staff members. The draft simply reported the situation with passive acceptance. As a practical matter, at that late date, the Commission had only two choices. It could condemn DOJ for its failure to cooperate or it could delete any reference to the unfulfilled request. The former seemed inappropriate, since the Commission had never given senior DOJ staff members a chance to correct the error or to persuade Commission members that the information should remain confidential. I therefore preferred the latter option as did a majority of Commission members. This error is unlikely to be repeated while I remain on the Commission.⁷

Similarly, I have some sympathy for Melendez and Yaki's argument that efforts should have been made to contact aggrieved prisoners. But here their point is overstated. Their claim that "[n]either the Staff Director nor the Commission Majority can adequately explain why the Commission was unwilling or unable to interview inmates to provide true context to its discussions"⁸ can be responded to simply: Neither Commissioner Melendez nor Commissioner Yaki suggested it—at least not to the Commission.⁹ Moreover, the statement that the "most the Commission did was review some public court documents" is untrue. The report bristles with tables, charts, and graphs digesting the results of the staff's extensive information-gathering activities. More than a dozen faith-based and prisoner advocacy organizations responded to the staff's detailed inquiries with extensive written answers. Twenty prisons and jails did likewise. This project was a substantial undertaking. Suggesting otherwise is inappropriate.

Other objections by Commissioners Melendez and Yaki are simply misinformed. For example, they argue that the study design should have included a request for data from a privately operated correctional facility. Yes, *and it did*.¹⁰ Lea County Correctional Facility in

⁷ I also agree with Commissioners Melendez and Yaki that the Commission ought to use its subpoena power with greater frequency. I note, however, that neither of them recommended the use of that power for this or any other report since I joined the Commission in 2007.

⁸ Melendez and Yaki Draft Statement at 2.

⁹ The particular method of contact suggested by the dissenters—interviewing prisoners who had filed past lawsuits—is expensive and time consuming and probably not ideal. I would have preferred efforts to solicit input from prisoners generally. As chairman of the California State Advisory Committee prior to my appointment to the Commission in 2007, I attempted to persuade the now-retired Western Regional Director for the Commission to reach out to prisoners by placing announcements of the Committee's upcoming religious liberties briefing on California prison bulletin boards (or by any alternative means he could suggest). Suffice it to say that he was not inclined to take what he saw as extraordinary efforts. As a newly appointed SAC member, I had little leverage over staff at the time. Commissioners Melendez and Yaki were (and now I am) in a very different position.

¹⁰ Also misleading is the dissenters' assertion that the "important" question of whether private prisons operate under color of law for Section 1983 purposes has been "totally ignored in this report." There is no doubt that corporations hired by a state to operate correctional facilities are operating under color of state law vis-à-vis those prisoners for the purposes of Section 1983. See *Rosborough v. Management & Training Corp.*, 350 F.3d 459 (5th Cir. 2003)(*per curiam*); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100 (6th Cir. 1991), *cert. denied*, 503 U.S. 989 (1992); *Palm v. Marr*, 174 F. Supp. 2d 484, 487-88 (N.D. Tex. 2001); *Kesler v. King*, 29 F. Supp. 2d 356, 370-71 (S.D. Tex. 1998). See also *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 72 n.5 (2001)("[S]tate prisoners...already enjoy a right of action against private correctional providers under 42 U.S.C. sec. 1983") (*dictum*). Although the Supreme Court did not recognize a Bivens-style action against a corporate half-way

Hobbs, New Mexico is a state prison managed by Global Expertise in Outsourcing (“GEO”) Group, Inc., and the Northeast Ohio Correctional Center in Youngstown, Ohio is a federal prison managed by the Corrections Corporation of America.¹¹ If Commissioners Melendez and Yaki had read the report with care, they would have known this.

Given the page limits that the Commission has imposed on the expansion of Commissioner Statements for this report, I cannot respond to each and every issue that Commissioners Melendez and Yaki argue the report should have covered.¹² A general response will have to suffice—that it would have been impossible for this or any Commission to take on more than a fraction of what they regard as indispensable to the report and that the best time to bring up their suggestions was in 2006, when the topic was selected and the project’s concept paper adopted. After the final report has been voted upon is too late.¹³

house operator, it was not because it found the operator was not acting under color of law. Private corporations operating correctional facilities should be pleased that courts have held that they are subject to Section 1983 in this context. If they are not operating under both the color and the fact of law, they would be guilty of a crime for confining individuals against their will and subject to liability for false imprisonment. *See* Model Penal Code at sec. 212.1—212.3; Restatement (Second) of Torts at sec. 35.

¹¹ Appendix B at 118–119. The data from Lea County Correctional Facility is included in appendix C at 146–47. Data from the Northeast Ohio Correctional Center did not arrive in time to be included in the report and were not pursued further.

¹² Commissioners Melendez and Yaki pepper their statement liberally with such claims, but they are not alone in believing that the report could have been improved with more work. *See, e.g.,* Thernstrom Draft Statement at 3. I suspect that all the Commission members agree. Only the dissenters, however, take the position that the report is a miserable failure, because it does not include their ideas. Melendez and Yaki Draft Statement at 2.

¹³ Commissioners Melendez and Yaki argue that the report should have established “a baseline of the actual incidence of violations of prisoners’ religious rights.” Melendez and Yaki Draft Statement at 2. In their view, the Commission is doing its job only if it decides which prisoner grievances are meritorious and which are not, which plaintiffs should have won their RLUIPA or RFRA claims and which should not. I disagree that the Commission’s work must be normative to be valuable and regard the very detailed fact finding in the report as useful despite the dissenting commissioners’ disappointment in it.

Moreover, the task that the dissenters have in mind is a daunting one. Some institutional humility is in order. Deciding even one religious liberty grievance can be tough. It may require an extensive hearing as to facts and law: Does the inmate in fact adhere to the religion he claims? Was he denied the right to participate in an activity that he views as part of his religion? Is this activity in fact a part of the practice of that religion? Did prison officials have a compelling governmental purpose for their decision to prevent him from engaging in that activity? Was that decision the least restrictive means of furthering that compelling governmental purpose? Answering these questions requires expertise not just of world faiths, but of prison administration and security. Doing this for the more than 1000 grievances and lawsuits studied in the report can only be done by an institution ready to make a lot of mistakes. When courts examine these questions, they have the advantage of being focused on one particular case. Even then, the process of litigation is expensive, time-consuming and prone to error.

It is difficult to avoid wondering if the dissenting commissioners are serious about this criticism. Commissioner Yaki has suggested in the past that the Commission should release its reports without any findings or recommendations. His newly found belief that the Commission’s work is somehow lacking when it does not make such finding therefore seems strange. Furthermore, Commissioners Melendez and Yaki have been dissenting or abstaining from all or nearly all judgments made by the Commission over the last two years, even those that seem to me at least to be non-controversial. *See, e.g.,* Transcript of U.S. Commission on Civil Rights Telephonic Meeting, September 30, 2007 (passim). It is unusual under the circumstances to insist on more such judgments.

That does not mean commissioners must speak their peace before the staff begins its work or forever remain silent. Neither does it mean that commissioners should in any way defer to the staff employees on how the report should be organized or what conclusions should be drawn from it. To the contrary, responsibility for the report begins and ends with the eight members of the Commission and should remain with them at all points in the process. To turn primary responsibility over to staff employees is to shirk that responsibility. As the legislation establishing the Commission makes clear, “The Commission shall be composed of eight members.” It is not composed of the staff employees.¹⁴ Had the dissenting commissioners called a few of their complaints to the attention of the other members of the Commission this past summer, it is likely many of their views could have been accommodated despite the shortness of time.

Although the dissenting commissioners do not specifically say so, I sense that they may believe that the Commission’s directions to the staff have sometimes been too open-ended. If so, I agree with them. The problem is compounded by internal procedures that minimize interaction between the Commission and staff. Given our procedures, no one should be surprised when a draft report falls short of what Commission members had hoped for or when staff members express frustration at not being able to read Commission members’ minds. Since it is the Commission and not the staff that is entrusted with the responsibility for issuing reports, a re-thinking of those procedures is in order and would likely improve the quality of future reports.

Nevertheless, all is not lost—as even the dissenting commissioners concede when they characterize part of the report as “helpful.”¹⁵ One of its more useful findings concerns the volume of litigation arising out of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).¹⁶ Although at the time of RLUIPA’s passage some observers were concerned that the new law would lead to an unmanageable level of frivolous or vexatious prison litigation, so far at least, this does not appear to be the case.¹⁷ The Commission uncovered only 250 reported RLUIPA cases filed in court since the statute’s passage in 2000.¹⁸

¹⁴ Although the statute specifically recognizes the position of Staff Director and thus obviously contemplates the existence of a staff, no authority is conferred upon the Staff Director or the staff. Consequently, the staff has only that authority that is delegated by the Commission. Ultimate responsibility for the contents of the report remains with the Commission.

¹⁵ Melendez and Yaki Draft Statement at 1.

¹⁶ 42 U.S.C. sec. 2000cc.

¹⁷ See finding 7 at 102.

¹⁸ Chapter 4 at 80 n.7. While it is possible that these 250 reported cases mask an unusually large number of unreported decisions or lawsuits, I believe that this is unlikely and that the low rate at which state and federal prisoners file religious grievances with the facilities at which they are held is significant evidence against such a possibility. It bears emphasis, however, that the Commission has not attempted to quantify the number of unreported cases. Moreover, the Commission’s technique for uncovering RLUIPA cases—a Lexis search consisting of “RLUIPA but not zoning” almost certainly failed to catch all the reported RLUIPA cases brought by prisoners in the Lexis database. See, e.g., *Shabazz v. Arkansas Dept. of Correction*, 268 Fed. Appx. 487 (8th Cir. 2008). Furthermore, the Commission did not undertake a similar inventory of reported RFRA decisions or of unreported RFRA decisions or lawsuits.

None of the prison officials we heard from expressed alarm at the current overall volume of litigation. Instead, some commented on the beneficial aspects of fostering religious exercise among prisoners.¹⁹

Vice Chair Thernstrom asks why the relevant legal standard should be manageability, and I agree that ultimately it may not be. Perhaps *Fiat Justitia Ruat Caelum* (“let justice be done though the heavens fall”) should be the rule. But it is useful as well as comforting to know that the heavens have not fallen, and if circumstances do not change, they may never fall. Prior to this report, I would have predicted a higher level of frivolous and vexatious litigation than the Commission in fact found, so I have learned something. I am confident that members of Congress will agree the information is useful. In the end, it will be for Congress and not the Commission to decide whether to change the circumstances in the future.

That is not to say that prisoners never attempt to abuse statutes like RLUIPA and the Religious Freedom Restoration Act (“RFRA”). They surely do.²⁰ And no one can guarantee that they won’t do so more often in the future, even if the objectively observable circumstances do not change. Indeed, our research shows that the number of reported RLUIPA cases has been steadily increasing since its passage.²¹ This issue may therefore bear re-examination from time to time.

I am not optimistic that the 250 cases are in any way representative of RLUIPA decisions or lawsuits. As a consequence, almost all the analysis in chapter four must be viewed with skepticism. Reported cases are almost never typical of lawsuits, which are often filed and settled before a judge has the opportunity to decide an issue that can then be reported. I am in particular inclined to take the fact that “[p]risoners prevailed entirely in only 6% of the reported cases” with a grain of salt. As the Commission concedes, “These figures may systematically understate the likelihood that a plaintiff will prevail either in whole or in part. A defendant is most likely to file a motion to dismiss, motion for summary judgment or other dispositive motion in a case in which it has a reasonable chance to prevail. If it does prevail, and the court’s decision is reported to Lexis (as such decisions frequently are), it will be recorded in this tally as a victory for defendants. If the plaintiff succeeds in opposing the motion, the case will be recorded as ongoing, since the plaintiff must still face trial in order to be entitled to a remedy. If the case later settles (resulting in a partial victory for plaintiff) or if it goes to trial and results in either a victory for the plaintiff or the defendant, it is unlikely to enter the tally, since such events usually do not result in legal opinions that can be reported to Lexis. Similarly, cases that are never subject to dispositive motions may end in settlement or trial and will usually fly under the Lexis radar, even though they may well result in plaintiff victories or partial victories.” Chapter 4 at 80 n.8.

For the purposes of this report, “reported” refers to any case reported in the Lexis database regardless of its designation by Lexis as “reported” or “unreported.”

¹⁹ See chapter 2 at 30.

²⁰ This was foreseen by Congress. RFRA’s legislative history makes it clear that courts were intended to separate out good claims from “false religious claims that are actually attempts to gain special privileges or to disrupt prison life.” See Senate Rep. No. 103-111, 1993 U.S. Code Cong. & Ad. News at 1900, quoted in *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996)(dismissing claim by white inmate who argued that as a member of the “Church of Jesus Christ Christian” he should not be assigned to bunk with an African-American inmate).

²¹ Chapter 4 at 80. With the exception of a slight dip in 2004, the number of religious discrimination complaints received by the Special Litigation Section (SPL) of the Civil Rights Division (CRD) of DOJ has also steadily increased from a low of 23 in 2001 to a high of 445 in 2007. Chapter 3 at 45, figure 3.2. Of course, we do not know whether this increase is due to an increased number of frivolous cases, an increased number of RLUIPA violations or simply an increased willingness on the part of prisoners to bring actions for actual violations.

The grievances and lawsuits filed by Wotanists are probably an example of such abuse.²² Wotanists worship—or purport to worship—the ancient Norse gods, chief among them Wotan (or Odin).²³ In fact, Wotanists tend to be white supremacists, whose taste in literature runs to racist screeds and violent rants. Prisons officials, of course, are not required to take a prisoner’s word for it when he claims adherence to a particular faith and argues that his free exercise of that faith is being substantially burdened by prison policies.²⁴ But they must be even-handed in how they evaluate the sincerity of those who purport to adhere to traditional and non-traditional religions.²⁵ This can lead to a “grievance fatigue” that may result in a tendency to err on the side of accommodation (although the Commission does not purport to have found particular instances of over-accommodation).²⁶

²² See, e.g., *Lindell v. McCallum*, 352 F.3d 1107 (7th Cir. 2003)(vacating an entry of summary judgment against a Wotanist inmate); *Wood v. Maine Dep’t of Corrections*, 2007 U.S. Dist. LEXIS 81146 (D. Me. Oct. 25, 2007)(recommendation of U.S. Magistrate to enter summary judgment against Wotanist inmate), summary judgment entered, 2008 U.S. Dist. LEXIS 42245 (D. Me. May 22, 2008).

The Church of the New Song provides another interesting example. Originally founded as a “game” among prisoners, its adherents have filed more than dozen lawsuits in federal court. *Goff v. Graves*, 362 F.3d 543, 546 (8th Cir. 2004). One court described the Church of the New Song, which goes by the acronym “CONS,” as “a masquerade designed to obtain First Amendment protection for acts which would otherwise be unlawful and/or reasonably disallowed....” It reported that members of CONS had (apparently tongue-in-cheek), demanded meals of steak and wine as part of their religious regimen. *Therault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex 1978).

²³ See *Borzzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006)(noting that Wotanism is a religion that “entails the worship of Norse gods” and rejecting Wotanist inmate’s claim that RLUIPA guarantees him to books like *The Temple of Wotan*, which Wisconsin prison authorities had found to promote white-supremacist violence). See also Mattias Gardell, *Gods of the Blood: The Pagan Revival and White Separatism* (2003).

²⁴ See *Coronel v. Paul*, 316 F. Supp. 2d 868, 881 (D. Ariz. 2004)(“The question under the RLUIPA’s substantial burden prong, as this Court interprets it, is whether the state has prevented [the plaintiff] from engaging in conduct both important to him and motivated by sincere religious belief”).

²⁵ Note that prison officials are in a more difficult position than other government officials, who are only rarely, if ever, called upon to resolve such issues. Outside of prison, government officials have no need to determine whether a particular person’s professed faith is genuine, since he is not entitled to direct public assistance in the exercise of that faith.

²⁶ Given the Commission’s concentration on investigating prisoner grievances and litigation, it is very unlikely that the research plan could have uncovered this phenomenon if it existed. One interesting aspect of the issue is the National Institute of Correction’s reference manual on inmate religious beliefs and practices. It lists “Odinism/Asatru” along with “Protestant Christianity,” “Buddhism,” “Islam,” and other traditional faiths as religions that prison authorities must deal with on a fairly regular basis. See National Institute of Corrections, Bureau of Prisons, U.S. Department of Justice, *Technical Reference: Inmates Religious Beliefs and Practices* (Mar. 27, 2003). Among the long list of religious items that such a congregation is permitted to have is “Thor’s Hammer.” There is some evidence that not all versions of Odinism/Asatru have the same overtly racist theme that Wotanism tends to have. See Southern Poverty Law Center, *Behind the Walls: An Expert Discusses the Role of Race-Based Gangs and Other Extremists in America’s Prisons*, Intelligence Report (Winter 2002), available at, <http://www.splcenter.org/intel/intelreport/article.jsp?sid=55>. Mark Pitcavage of the Anti-Defamation League stated in that interview: “Non-racist versions of Asatru and Odinism are pretty much acceptable religions in the prisons. But again, if it is a racist version of these religions, then those materials may be prohibited. I should add, though, that a recent law, the Religious Land Use and Institutionalized Persons Act, puts the burden more squarely on prison officials to make their case that particular sects or practices pose threats to security.” The issue of whether purported adherents to religions like Wotanism might be over-accommodated should be explored more thoroughly in the future.

There is good reason for the concern that RFRA and RLUIPA might lead to frivolous and vexatious litigation. These two statutes do not—because they cannot—put prisoners in the same position as ordinary citizens. Outside of prison, the faithful are ordinarily responsible for their own religious activities. They build their own churches and temples, pay their own clergy, and celebrate the sacraments without direct government assistance. In prison, the situation is different. Prisoners need more than just to be left alone to follow their faith; they need the direct and active cooperation of prison officials. If prisoners are to have chaplains, kosher meals, or even Christmas trees, prison officials must provide for them (and for any extra security these activities may require).

That creates a substantial incentive for prisoners to request things that they would not have provided for themselves on the outside. It also creates an incentive for prison officials to resist even the most reasonable request for religious accommodation in order to protect already strained budgets. Congress has attempted to counteract the latter (but not the former), incentive by imposing a strict standard upon prison officials. They may not place “a substantial burden” on the religious exercise of a prisoner unless the imposition of that burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” It is no excuse that the “burden results from a rule of general applicability.” The Act itself makes it clear that a prison may be “require[d]...to incur expenses in its own operation to avoid imposing a substantial burden on religious exercise.” Religious activity is thus given priority over other uses of time and money. Prison officials must essentially err on the side of greater religious freedom in its rules and regulations.

Courts have ordered prison officials to incur expenses. For example, in *Jackson v. Department of Corrections*, the Court ordered the Massachusetts Department of Correction to “employ an additional Imam” to conduct “weekly jum’ah services” for Muslim prisoners.²⁷ Other courts have commanded prison officials to furnish special diets for prisoners despite the added cost of doing so.²⁸ Moreover, prisons now routinely provide a wide assortment of

²⁷ 2006 Mass. Super. LEXIS 389 23 (Aug. 25, 2006). See also *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 842 (S.D. Ohio 2001), rev’d on other grounds sub nom. *Cutter v. Wilkison*, 349 F.3d 257 (6th Cir. 2003), rev’d 544 U.S. 709 (2005) (“The language of RLUIPA, fairly read, strongly evinces Congress’ intent to require the States to fund new, substantial rights....”)(internal quotation marks omitted).

Not every effort to require prisons to incur expenses to assist in religious free exercise are successful—though every such effort does impose its own costs on prison budgets. See *Smith v. Kylar*, 2008 U.S. App. LEXIS 21341 (3d Cir. Oct. 9, 2008) (affirming trial court’s refusal to order prison to provide Rastafarian chaplain where too few inmates were Rastafarian). Efforts to require prisons to construct a sweat lodge for practitioners of traditional Native American religions appear to have often resulted in failure, see, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), but some prisons that had previously declined to provide a sweat lodge have later changed their policy. See *Pounders v. Kempker*, 79 Fed. Appx. 941, 943 n.2 (8th Cir. 2003).

²⁸ *Toler v. Leopold*, 2008 U.S. Dist. LEXIS 27121 (E.D. Mo. Apr. 3, 2008)(ordering prison officials to provide kosher diet to Jewish convert); *Shaka Zulu Acoola v. Angelone*, 2006 U.S. Dist. LEXIS 21559 (W.D. Va. Apr. 10, 2006)(holding that state prison may be required under RLUIPA to furnish Rastafarian prisoner with a kosher vegan diet); *Caruso v. Zenon*, 2005 U.S. Dist. LEXIS 45904 (D. Colo. 2005)(ordering prison officials to provide halal meat diet to prisoner despite evidence that prisoner had ordered haram food from the prison canteen on numerous occasions and despite availability of vegetarian diet, which satisfies Muslim diet requirements).

special religious items to support worship as well as special security to support a wide variety of religious observances for a wide number of faith traditions ranging from Buddhist to Presbyterian, Rastafarian to Wiccan.²⁹ Court orders are not required.

Both RFRA and RLUIPA are thus experiments—going well beyond the ordinary understanding of what the Constitution requires.³⁰ They are, in my opinion, noble experiments, enjoying wide, bipartisan support. Indeed, to the best of my knowledge, all the members of the Commission hope for their success. But it is nevertheless useful to gather information about how they are working out.

It is entirely possible that part of the reason that frivolous and vexatious RFRA and RLUIPA litigation has not reached greater levels is the Prison Litigation Reform Act of 1995 (“PLRA”),³¹ which was in part passed in response to the perception that federal courts had become overwhelmed with frivolous and vexatious prison litigation. But PLRA applies to prison litigation far beyond the context of religious liberties. An overall evaluation of the statute therefore lies outside the scope of this report, and probably outside the jurisdiction of this Commission. The Commission has limited its recommendation to the following: “We see no reason to provide religious liberty claims with a special exemption from [PLRA’s] provisions relating to exhaustion, the limitation on monetary awards absent a physical injury and attorneys’ fees.”³²

Commissioners Melendez and Yaki are evidently concerned that our recommendation is an endorsement of PLRA. It is not—though it does not oppose it either. Our recommendation is limited to whether RFRA and RLUIPA should be specially exempted from PLRA. A few comments on the effect of PLRA on litigation brought pursuant to RFRA and RLUIPA are in order.

First: Among PLRA’s less controversial provisions is its prohibition on bringing litigation in federal court before the prisoner has exhausted his administrative remedies.³³ This is a common tool in the management of expensive and time-consuming litigation. Requiring that a prisoner give the prison authorities an opportunity to right any alleged wrong before coming to court makes sense under a variety of circumstances. If his claim is meritorious, the prison authorities can address it much more rapidly and efficiently than the courts. If it is not,

²⁹ See National Institute of Corrections, Bureau of Prisons, U.S. Department of Justice, *Technical Reference: Inmates Religious Beliefs and Practices* (Mar. 27, 2003).

³⁰ *Employment Division v. Smith*, 494 U.S. 872 (1990).

³¹ 42 U.S.C. sec. 1997(e).

³² Recommendation 4 at 103.

³³ One important constituency that does tend to oppose such exhaustion requirements strongly is lawyers. Lawyers tend to prefer a judicial forum, where their detailed knowledge of civil procedure and the rules of evidence work to their advantage. This tendency is even more pronounced in the area of prison litigation. Attorneys’ fees are routinely available to successful plaintiffs in civil rights cases under the Civil Rights Attorneys’ Fees Awards Act, 42 U.S.C. sec. 1988. From the attorneys’ point of view it is therefore preferable for the client to win in court rather than to win cheaply, efficiently, but in an administrative process. PLRA’s exhaustion of remedies provision stands in the way of such an award of attorneys’ fees.

the prison authorities may be able to persuade the prisoner of that in the course of handling it. If the prisoner's grievance is intended to be merely vexatious, he may tire of his game before the case makes it into a costly judicial forum.

An exhaustion of remedies requirement can cause problems if prison officials systematically use the opportunity to discourage or delay legitimate claims. But the best way to fix that problem is by changing the prison's grievance procedures or by providing an exception to the exhaustion requirement for patently unfair procedures. Scrapping the exhaustion requirement should be a last resort. In any event, we uncovered no specific evidence of abuse in the religious liberties context.

Second: PLRA's prohibition on money damages for non-physical injuries is more controversial, but there do not appear to be any special reasons to exempt RFRA and RLUIPA from its coverage. Indeed, the opposite may be true: There may be a reason to limit money damages in RFRA and RLUIPA cases that does not apply to other kinds of prison litigation.

On account of PLRA, most lawsuits that make it into court seek injunctive relief rather than money damages. An adherent of traditional Native American religion, for example, may bring suit for an injunction requiring prison officials to provide him with a sweat lodge, but not for money damages arising out of the past failure to provide such a lodge unless he can prove physical injury.³⁴ Since insincere inmates have little reason to bring such litigation, the need for prison officials to engage in the unenviable task of scrutinizing inmates' religious sincerity is greatly reduced.

Third: A final way in which PLRA may affect the volume of prison litigation is its limitations on attorneys' fees. The marginal effect of these limitations on the overall level of litigation, however, is probably very small. To begin with, the most important limitation, that attorneys' fees be no more than 150 percent of actual money damages,³⁵ has been repeatedly held not to apply either to lawsuits for injunctive relief or to any portion of a lawsuit that requests injunctive relief.³⁶ Given the prohibition on money damages for non-physical injuries, most RFRA- and RLUIPA-based lawsuits will likely be for injunctive relief and hence not subject to the limitation.

For those lawsuits that do seek money damages, the limitation on attorneys' fees should be viewed in context. Under American law, parties to litigation bear their own attorneys' fees

³⁴ See, e.g., *Pounders v. Kempker*, 79 Fed. Appx. 941 (8th Cir. 2003) (RLUIPA claim in which an adherent of a traditional Native American religion requests only injunctive relief).

³⁵ 42 U.S.C. sec. 1997e(d)(2). PLRA also 1) restricts any attorneys' fees awarded pursuant to 42 U.S.C. sec. 1988 to 150 percent of the rate specified in the Criminal Justice Act, 18 U.S.C. sec. 3006A; 2) requires that attorneys' fees be "directly and reasonably incurred in proving an actual violation of plaintiff's rights"; and 3) requires that attorneys' fees be "proportionately related to the court ordered relief for the violation" or "directly and reasonably incurred in enforcing the relief ordered for the violation." It also provides that a portion of any award of money damages will be applied to any attorneys' fees award. See chapter 2 at 37–39.

³⁶ See *Dannenberg v. Valadez*, 338 F.3d 1070, 1074–75 (9th Cir. 2003). See also *Walker v. Bain*, 257 F.3d 660, 667 n.2 (6th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); *Boivin v. Black*, 225 F.3d 36, 41 n.4 (1st Cir. 2000).

regardless of who wins the case.³⁷ This rule of law, known as the “American rule,” applies even to plaintiffs who were intentionally and severely victimized by their defendant. It is only because the Civil Rights Attorneys’ Fees Awards Act of 1976³⁸ creates a special exception to the American rule for certain civil rights causes of action that PLRA is in a position to place a limitation on the recovery of attorneys’ fees; PLRA is a very limited exception to a very limited exception to a basic rule that attorneys’ fees are not recoverable.³⁹ Relative to other successful plaintiffs, prison litigants with civil rights claims are awarded generous recovery for their attorneys’ fees.

The 150 percent limitation was in part inspired by *City of Riverside v. Rivera*,⁴⁰ a case brought by several individuals against the City of Riverside and others after several police officers, acting without a warrant, broke up a party using unnecessary force. The trial court found that several of the guests had been wrongly arrested. It awarded \$33,350 in compensatory and punitive damages and \$245,456.25 in attorneys’ fees for 1946.75 attorney hours and 84.5 law clerk hours. In a 5–4 decision, the Supreme Court affirmed the award. In dissent, Chief Justice Burger stated, “[I]t would be difficult to find a better example of legal nonsense than...attorneys’ fees...at \$245,456.25 for the recovery of \$33,350.”⁴¹

Some have argued that courts are somehow constitutionally required to award attorneys’ fees on an hourly basis to plaintiffs who establish that their constitutional rights have been violated. Like Chief Justice Burger, I find such an argument counter-intuitive. Nevertheless,

³⁷ See, e.g., *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975)(discussing American rule on attorneys’ fees).

³⁸ 42 U.S.C. sec. 1988.

³⁹ Vice Chair Thornstrom voted in favor of recommendation five, which essentially urged prison ministry and other organizations to get involved in ensuring that prisoners have access to pro bono attorneys, but she added that “given the fact that PLRA makes it extremely difficult to obtain compensation for legal fees, even in the event of a successful lawsuit, this recommendation seems hollow.” Thornstrom Draft Statement at 2. Since attorneys who are truly working *pro bono* (as opposed to *pro pecunia*), do not get paid for their services and do not have the prospect of a contingent fee, they should, if anything, be more likely to undertake representations when attorneys’ fees are unavailable. Perhaps more important, attorneys working *pro pecunia* should be attracted to RFRA and RLUIPA cases, because PLRA’s limitations on the recovery of attorneys’ fees are extremely modest. What’s striking about the combined effect of the Civil Rights Attorneys’ Fees Awards Act of 1975 and PLRA is that lawyers representing prisoners in RFRA and RLUIPA cases do receive attorneys’ fees in successful cases, not that they don’t. Indeed, the amounts can be extremely generous, and have been responsible for the development of a cottage industry of “public interest law firms” that bring cases in hopes of recovering a contingent fee. While such attorneys are not strictly speaking *pro bono*, their assistance is nevertheless welcome by prisoner plaintiffs.

⁴⁰ 477 U.S. 561 (1986). It is not the only limitation Congress has put on attorneys’ fees arrangements. The Federal Tort Claims Act, 28 U.S.C. sec. 2671, limits the fees that an attorney can collect for obtaining a recovery to only 20 percent of the award for an administrative settlement and 25 percent for a recovery obtained through a judicial proceeding. Similarly, federal law caps the fees that attorneys can charge for recovery of social security benefits to 25 percent of the award. 42 U.S.C. sec. 406. These limitations are caps on fees that attorneys may charge their clients (as opposed to the state or federal government as defendants); they are therefore all the more effective in making it difficult for plaintiffs with meritorious, but small and complex cases to secure representation. Such plaintiffs may not choose to supplement the earnings of their attorneys and therefore often go without representation.

⁴¹ 477 U.S. at 587.

while it may be popular with those who make their living bringing prison litigation, it is well beyond the scope of this report. I note only that insofar as *Employment Division v. Smith*⁴² represents the law, the argument doesn't apply to RFRA- or RLUIPA-based causes of action, since both those statutes establish extra-Constitutional rights to accommodation for prisoners. Remedies available for a statutorily created right may be limited statutorily.

I hope and believe that much of the data in this report will be helpful to policymakers concerned with prisoners' religious liberties. Insofar as the Commission has not explored every important aspect of that question, I hope this report spurs others to conduct the research. It is an area that Congress has given significant attention to over the last couple of decades. I hope it will continue to receive the attention it deserves.

⁴² 494 U.S. 872 (1990).

Abigail Thernstrom – Rebuttal

There are significant areas of overlap between my statement and that of Commissioners Yaki and Melendez. If I had seen their statement before writing my own I would have signed on to a number of the excellent points they made.

For a number of reasons, this turned out to be a very hard report to write. Our former staff director, Ken Marcus, had a very strong hand in formulating this project and developing the project plan. Regrettably, he left the Commission midstream, leaving a brand new director of our Office of Civil Rights Evaluation (OCRE) with the difficult task of assuming responsibility not only for this project but also for the overall operation of the OCRE, while at the same time filling in as “delegated the authority of acting staff director” while the Commission searched for a new staff director. The director of OCRE performed yeoman service for the Commission during this very difficult transition.

In addition, several of our Commissioners bear responsibility for micromanaging this project and changing its direction numerous times during its final phases. Every midstream change in direction came at a cost; they often required the expenditure of additional resources and affected the quality of the final report.

In this context it is important to note that, in the normal life cycle of a statutory report, ambitious research goals are set at the beginning prior to discovering what data are actually available. Then, as the staff issues interrogatories, receives responses, and conducts original research they learn that some of the initial goals are unattainable. Data may turn out to be unavailable, and proposed research may require greater resources and time than anticipated. In the past, the Commission has respected this process, as well as staff’s informed judgment as to the feasibility of proceeding with the project as initially conceived and the importance of making adjustments of one sort or another.

Those principles and processes were not honored by some of our Commissioners in the execution of this report.

Having acknowledged these problems, however, I remain disturbed by two aspects of the dissent by Commissioners Yaki and Melendez: their comments on the lack of analysis of the impact of the Prison Litigation Reform Act, and their disparaging remarks regarding the level of research and analysis performed by USCCR staff.

Regarding the former, I would point out that the Prison Litigation Reform Act (PLRA) was not mentioned in the original concept paper, discovery plan, or chapter outline. Staff research uncovered the significance of the PLRA in the course of implementing the original discovery plan. Regrettably, due to the paucity of existing pre- and post-PLRA data, the timeline for the project, and the limited resources available, the staff was not able to thoroughly investigate this issue, although they did incorporate a brief summary into the final report. As a social scientist, I join Commissioners Yaki and Melendez in their belief that we should have included a broader discussion of the impact of the PLRA.

Regarding Commissioners Yaki and Melendez's criticism of the level of research and analysis performed by USCCR staff, I offer the following observations.

Despite the absence of comprehensive and uniform data on religious discrimination in prisons, our staff forged ahead collecting new data and offering a fresh analysis that cannot be found in the work previously performed by prison authorities, government agencies, or other relevant bodies. This original and innovative research is a credit to the Commission's staff.

I could cite numerous examples of the innovative and labor-intensive research conducted by our staff, but will limit myself to two: Table 2.1 (Comparison of Religious Affiliations of United States Adult Population to Inmates in Federal Prisons, 2007) and table 2.2 (Religious Affiliation of Inmates Professing a Religion in State Prisons, 2007).

Both tables were created by staff by combining data from the Pew Foundation survey of American religious preference with a Bureau of Prisons (BOP) in-house compilation and tabulation of inmate religious preference information. The disparate entries were then recoded using categorizations from the *American Encyclopedia of Religions* to try to derive a set of uniform religious preference categories.

The same point can be made with respect to the religion data in the state prisons that were provided. To the best of staff's knowledge, there are no comparable data elsewhere. The Bureau of the Census does not collect information on religious affiliation, and the Bureau of Justice Statistics does not routinely ask prisoners about their religious preferences. There are perhaps fifty categories that individuals (either inside or outside of prisons) are known to use in describing their religious affiliation.

Leaving aside the quite substantial problem of the accuracy of self-classification, these categories had to be recoded into a manageable number for purposes of clarity and comparison. There is no standard way of recoding such data, and the process was made more complicated by the self identification of religious affiliations, some of which are extremely obscure. Some religious groups contain only a few members, and their concentration in prisons may differ from that in the larger society.

When the large number of religious categories is reduced into "families" of religious affiliation, many additional problems ensue. For example, some self-identified Jews are not recognized as Jewish by other members of the group. The problem occurs with other religious classifications, as well.

The staff also broke new ground in collecting data on religious grievances that had never before been made public. Additionally, the report contains compilations of previously unpublished data done at our request by both state and federal prisons.

Miscellaneous other points:

Commissioners Yaki and Melendez called me to task for having described the Commission's 2006 field briefing in Omaha on racially identifiable school districts as "ambulance chasing."

I stand by my description of the Omaha meeting. The so-called "racially identifiable school district" legislation in question was a fluke of badly crafted legislation passed by a unicameral legislature. As I accurately predicted in 2006, the bill was quickly withdrawn and was therefore a non-issue, not worthy of expending our limited resources. The long-serving and well-respected minority legislator who crafted the bill was seeking to increase the quality of education available to the minority students in his district.¹ In any case, such segregative school assignments—as they were seen to be—would not stand scrutiny in the light of day, and would inevitably be abandoned.

Commissioners Yaki and Melendez have stated that we have failed to meet our mandate to "monitor Federal civil rights enforcement efforts." There seems to be some disagreement here on the meaning of monitoring Federal civil rights enforcement efforts. In my opinion this report did exactly as our statute at 42 U.S.C. 1975a (c)(1) requires: "The Commission shall submit to the President and Congress at least one report annually that monitors Federal civil rights enforcement efforts in the United States." I'm bewildered as to the problem here.

Our failure to study the unique challenges of accommodating religious practice among prisoners incarcerated at "private prisons" was also criticized. At our August 24, 2007 meeting, Commissioner Yaki raised the issue of private prisons,² and I stated on the record that I was "reluctant to define and expand, redefine and thus expand the project" in a way that would further dissipate our resources.³ At the same meeting we also had a detailed discussion about the lack of centralized databases for studying this issue.

Notwithstanding Commissioner Yaki's and Melendez's assertion that we failed to investigate private prisons, our final report makes it abundantly clear that we went well beyond due diligence in attempting to gather such data. Footnotes and comments throughout the report explain that there was, in fact, almost no data available for an analysis. We were dealing with an extremely small subset of the prison population (five percent according to the dissenting statement), that we were unable to compare against the equally problematic, sporadic data on religious accommodation available from prisons in general.

¹ USCCR "Omaha Public Schools: Issues and Implications of Nebraska Legislative Bill 1024," p. 32. Available at <http://www.usccr.gov/pubs/OmahaFinal.pdf>

² Transcript, Aug. 24, 2007 Commission meeting, p. 20

³ Transcript, Aug. 24, 2007 Commission meeting, p. 22.

Todd F. Gaziano – Rebuttal

The civil rights of inmates in state and federal prisons is a worthy but complicated field of study for anyone. Although I agree with many of my fellow Commissioners' statements that follow our report on Enforcing Religious Freedom in Prison, my disagreement with certain substantive criticisms stems from my belief that they rest on oversimplifications regarding the nature of our inquiry and its potential value to others.¹ Moreover, I believe the procedural criticisms by dissenting commissioners are almost completely baseless. For these reasons, I write to highlight some of the considerations before the Commission that led to our findings and recommendations, to explain my reasons to support certain of them, and to suggest areas for further study by outside researchers and policymakers.

Conflicting Interests and Uncertain Tradeoffs in a Prison System

In very simple terms, those convicted of crimes and sentenced to terms of incarceration must surrender some of their customary liberties, for reasons of punishment and deterrence (general and specific).² It is the mark of a civilized and prudent society that it also promotes rehabilitative measures when they do not seriously conflict with penological interests. Based on my involvement in prison issues over the years, I believe that more should be done to study and promote effective rehabilitation programs, including constructive work programs, general and vocational educational offerings, voluntary faith-based and other programs for moral development, and effective prisoner reentry programs. But the prison setting is a difficult one in which to develop these programs and balance other competing interests.

Penological interests extend beyond the other purposes of incarceration (punishment, deterrence), and include the safety of prison workers and inmates, manageability, prison discipline, and the expense to the public of running the prison system. It is vastly easier to state these varied interests than to maximize (or even resolve the conflicts between) them.

¹ In addition to the dissenting statement of Commissioners Melendez and Yaki, the draft statement of Vice Chair Thernstrom seems exclusively to address perceived deficiencies in the report. Commissioner Heriot's draft statement credits the report in several ways, but fails to defend the report in ways that I believe are warranted. Accordingly, this statement is responsive to all three commissioner statements unless otherwise indicated.

² Jails and prisons are not the only government institutions where citizens yield some of their customary liberties. For very different reasons, soldiers must yield some liberties that civilians enjoy. Soldiers who are absent from their duty station without excuse are subject to strict military punishments; they generally must perform whatever tasks they are ordered to undertake, no matter how dangerous, and move to whatever locations in the world they are detailed, even if they must leave their families behind to do so; and they may not end their enlistments in the military except at prescribed intervals or according to special exceptions. Of relevance to this report, soldiers on the battlefield may have limited opportunities to engage in their normal religious practices, and some duty stations may restrict their religious observances even in peacetime, particularly if chaplains of their choosing are not available there (imagine a submarine at sea for many months with space for only one chaplain). The rules regarding, and provision for, religious observance in the military may be quite different in most respects from those for a prison system, but they share some common questions: do some practices (long hair) compromise an important government interest, and if so, how should those competing claims be resolved; which chaplains and religious facilities should the government fund; how and when should the government accommodate special religious observances, practices, and diets?

Not only do reasonable people disagree about the relative importance of the interests at stake, but reasonable people will certainly disagree about the impact of a particular action or policy on those various interests.

That does not mean that rational decisions in penal institutions cannot be made, but some decisions may result in uncertain costs either way. Promoting religious liberty in jails and prisons is a laudable goal in itself and it may serve rehabilitative ends. Yet, the accusation of “religious discrimination” has a very different meaning in prisons than in ordinary civic life, and it is far from the most frequent problem encountered by prisoners or prison officials in promoting religious liberty. The draft statement by Commissioners Melendez and Yaki seems to assume that the facts often, if not automatically, yield easy answers, including when they criticize the Commission for not personally interviewing inmates and otherwise investigating individual incidents of alleged “religious discrimination” in prison. Before I directly address that criticism, it is helpful to summarize a few of the ways religious liberty claims differ in civic and prison life, and why some of the more common claims don’t yield clear answers.

The framework for analyzing free exercise of religion claims in ordinary society is much simpler than in prisons because most of our religious practices do not involve the government in any significant way. How most citizens spend their time, what they wear, how long they grow their hair, whether they attempt to proselytize each other, what shrines they erect, whether they meet in secret, and what religious leaders they follow are ordinarily none of the government’s concern. Thus, if the government interfered with most such practices, the normal presumption would be that citizens’ free exercise rights were infringed. Even outside of prison, however, the Supreme Court has held that the state may enforce laws of general applicability (such as the criminal law against the use of peyote), even if that substantially burdens a sincere religious practice of some citizens.³ Thus, if the law has a rational, non-religious end, it generally will be upheld against a First Amendment Free Exercise claim that it interferes with someone’s religious observance. Luckily (because the government will usually win), the government’s interests do not intersect with our religious practices very often.

Not so in the nation’s jails and prisons. The most common religious liberty issue in prison, as determined by our review of data and expert testimony, is whether prison officials should relax or suspend one of the prison’s normal, and presumably rational, rules in order to grant an inmate’s request for religious accommodation.⁴ These types of “religious accommodation” requests should be contrasted with the less frequent and legally less complex allegations of animus—and purposefully unequal treatment—toward adherents of particular faiths, which are discussed in another section of this statement. A few examples will illustrate the different contexts in which religious liberty issues might arise in prison and non-prison life.

³ *Employment Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990). But see *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating city ordinances regulating animal slaughter because they were targeted to prevent conduct motivated by religious belief, namely the Santerian practice of ritual animal sacrifice).

⁴ See appendix C. A discussion of some of these common grievances is contained in chapter 2 of this report.

If a government official tried to stop a private citizen from wearing a metal crucifix on a chain around her neck, that would present a *prima facie* first amendment violation for interfering with her religious free exercise, in part because the government has no legitimate reason to enact or enforce a rule against the practice. But high-security jails and prisons must prevent inmates from possessing items that can be used as weapons. Naturally, these prisons ban chains and sharp metal objects, and it is silly to argue that such rules present a colorable claim of “religious discrimination” if they are applied evenly to prevent inmates from possessing objects that can be used as weapons. We can imagine an array of requests that present harder questions: what about a wooden crucifix on a necklace made of string? (Can the crucifix be sharpened to gouge an eye? Can the string be used as a garrote?) From our study, it is clear that requests for the use of religious objects present many issues for prison officials, some seemingly easy and some not.⁵

If religious adherents outside of prison want to spend six to seven hours (or longer) cloistered with their religious leaders in purification rituals, the government has no legitimate interest in stopping them. But in most prisons, such requests create many difficulties—and potential claims of “religious discrimination” cut both ways. If the request is denied, the requester might assert his religious grievance. If the request is granted, it would create a precedent that adherents of other faiths may advance. Requests for the construction of sweat lodges by Native American inmates and for permission to spend up to seven consecutive hours in semi-supervised purification ceremonies (in one case, at least 17 times per year),⁶ present a real-world example of the type of requests made in many prison facilities.

The legal framework became considerably more complicated when Congress created statutory rights that are much more favorable to prisoners than those non-incarcerated persons enjoy under the Constitution, and it then sent mixed signals to the courts about how to apply the heightened statutory standards. The Religious Freedom Restoration Act of 1993 (RFRA, which applies to federal institutions)⁷ and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA, which applies to state institutions)⁸ impose a higher burden on the government to accommodate religious-based requests. Under RLUIPA, for example, a prison must justify its imposition of “a substantial burden of a person residing in or confined to [a covered] institution...even if the burden results from a rule of general applicability” by demonstrating that its rule “is the least restrictive means of furthering [a] compelling governmental interest.”⁹

⁵ Should the white supremacists Commissioner Heriot describes, who worship the ancient Norse deities, be permitted to possess “Thor’s Hammer?” See appendix C for an attempt to estimate the relative number of these types of grievances.

⁶ *Fowler v. Crawford*, 534 F.3d 931, 939–42 (8th Cir. 2008). The circuit court affirmed the denial of the prisoner’s claim in part because the prison had taken other steps to accommodate the inmate’s religious observances and because it deemed the prison’s actions to be narrowly tailored to serve the compelling interest of prison safety.

⁷ 42 U.S.C. §§ 2000bb-2000bb-4. See also the statute’s text in appendix A.

⁸ 42 U.S.C. §§ 2000cc-2000cc-5. See also the statute’s text in appendix A.

⁹ 42 U.S.C. § 2000cc-1.

Yet, as our report relates, Congress also instructed the courts in the passage of both RFRA and RLUIPA to give due deference to the judgment of prison officials in evaluating the interests they advance and how tightly the regulation is drawn to advance it, given the officials' expertise and the significant security concerns addressed by prison regulations.¹⁰ My review of the legal scholarship and selected cases confirms my impression that the courts have been somewhat uneven in the application of the heightened standards in RFRA and RLUIPA. It also appears that the courts are not applying the strict scrutiny standard as "strictly" as they do elsewhere.

These statutes may be noble experiments, as Commissioner Heriot points out, but they are still experiments. There may be good reasons for the courts not to apply the strict scrutiny test in RFRA and RLUIPA in the same manner as they do in other areas of the law (particularly in constitutional adjudication), given the conflicting instructions from Congress and the reality of the prison setting.¹¹ But I share Commissioner Heriot's concern that this approach might bleed over in other areas of law, encouraging the courts to relax the strict scrutiny standard as it applies to equal protection cases and other fundamental constitutional rights.

The *Fowler* decision may help illustrate several areas of complexity inherent in prison religious liberty claims. Even under RLUIPA's strict scrutiny standard that is highly favorable to inmates, the Eighth Circuit held that the existence and management of sweat lodges at some prisons was not dispositive of whether the state prison at issue had to comply with the request. The court suggested several reasons why that might be so¹² and we can imagine others. For example, the safety concerns discussed by the court (burning hot coals, the use of metal tools, deer antlers, and hard wood to build the fire, and the enclosed area inaccessible to outside observation), might be more serious at higher security prisons, and the staff needed to supervise such practices may present different strains on each institution.

The resource issue merits special attention because granting some prisoner requests might leave fewer resources to supervise and provide for other programming, religious and non-religious. To reduce the risk of prisoner radicalization and prison violence, experts testified before the Commission that inmates should not be permitted to meet without a prison official supervising the meeting.¹³ Wardens do not appropriate their own budgets, but must operate within the outlays provided to them. In a given year, the outlays reasonably available for programming may be reduced by budget cuts, inflation, increased health care needs, or other special mandates. Staff salaries are a major component of any prison budget, and requests for

¹⁰ Report, chapter 1, IV and note 31 (citing S. Rep. No. 103-111 at 10 (1993); 146 Cong. Rec. S7775 (daily ed. July 27, 2000)).

¹¹ Acts of violence have occurred during periods designated for religious observances. See *Fowler*, 534 F.3d at 935.

¹² *Fowler*, 534 F.3d at 942.

¹³ Testimony of Frank Cilluffo and Gregory Saathoff, USCCR Feb. 8, 2008 briefing. See also Report, *infra*, chapter 2 at 32–37 (regarding steps to reduce prisoner radicalization).

group religious observances may come with a price tag that is difficult to calculate. Granting one group's request may require equal treatment for others down the line.¹⁴

Even when financial considerations are not at play, reasonable judges (like reasonable prison officials), will disagree about very similar requests for religious accommodation. The litigation over inmates' hair length is a good example. Inmates of different faiths have sincere, faith-based reasons to grow their hair longer than regulations permit. Prison officials assert that requests for exemptions present various safety, health, and discipline concerns, including that contraband may be hidden in long hair and that it may help alter an inmate's appearance after an escape. The prisoners, in turn, argue there are less restrictive means to further those goals, including individualized determinations that they, or the hair styles at issue, do not pose such threats.

Although RLUIPA's strict scrutiny standard was applied in both cases, federal appellate judges in the Sixth and Ninth Circuits reached conflicting results on such claims, based in large measure on how much deference they believed Congress required the courts to provide to the judgment of prison officials.¹⁵ There may be ways to harmonize these cases, but I discern no obvious way to do so. And because I am dubious whether either opinion is sound,¹⁶ I would be even more hard-pressed to state in the abstract what the correct rule of law should be—even in most situations.

The legal landscape can be summed up as follows: 1) a prison is a vastly different setting to evaluate religious liberty claims than a non-prison setting; 2) the prison setting requires a fact intensive inquiry, in which Congress directed the courts to give deference to the judgments of prison officials; 3) the typical prisoner requests, claims and resulting decisions often are complex and lead to uncertain short- and long-term tradeoffs, including tradeoffs between different civil rights (such as the civil right of inmates and guards to be free from preventable violence); and 4) reasonable judges and civil rights experts will often come to different conclusions about the same or similar facts. These points are captured in the first sentence of

¹⁴ Is one multi-purpose chapel enough for inmates of many faiths? Perhaps not if the prison builds a sweat lodge and permits followers of Native American faiths to spend significant amounts of time using it. If followers of other religions want to spend longer periods of time in their worship services, how is the room to be allocated? What if members of another faith request a chapel that is decorated and consecrated solely for its religious adherents?

¹⁵ Compare *Hovenaar v. Lazaroff*, 422 F.3d 366, 371-72 (6th Cir. 2005), *cert. denied*, 127 S. Ct. 187 (2006) (holding that the district court should have deferred to the warden's testimony that an individualized review of inmate requests would not satisfy the state's security interest) with *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) (holding that the district court should not have deferred to the justifications for the California prison policy, in part because the prison officials did not seriously consider less restrictive means of satisfying their interests).

¹⁶ Based on a reading of the reported opinions alone (the courts themselves had extensive records), my view is that both circuit court opinions might be wrong. Conflating the issue of whether the plaintiff was deserving of such an exception, the Sixth Circuit seemed to provide excessive deference to the warden's assertion that no individualized determinations could ever be made consistent with safety. In contrast, the Ninth Circuit seemed too quick to dismiss the reasoning of, and the California prison system's reliance on, other pre-RLUIPA decisions, a majority of which upheld hair length restrictions.

the Commission's first finding: "Conflicts over the exercise of religious liberty in prisons are inherently difficult, even intractable at times."

Thus, it is odd that Commissioners Melendez and Yaki complain that the Commission did not interview inmates and otherwise make first-hand, factual determinations regarding the level of "religious discrimination" in prisons. Their statement does not recognize that the setting is any different from most others the Commission has examined in which a denial of civil rights is relatively easy to evaluate if the basic facts are known. For example, in their draft statement they argued that "[religious liberty] rights apply no less to those who are imprisoned." Yes and no. Religious liberties are not extinguished in prison, but as the discussion above demonstrates, the corresponding rights do not apply in the same manner in prison (or in a submarine for that matter), as they do outside of prison. Or, to put it differently, their application often yields different questions and problems, many of which are inherently difficult or intractable.

Commissioners Melendez's and Yaki's position that the Commission should have "independently investigate[d] claims" of religious discrimination by "interview[ing] inmates" is particularly unhelpful. They assert that such interviews and investigations may have provided additional context to augment the testimony by public interest lawyers, prison religious leaders, prison chaplains, etc. Conceding the point, it begs two questions: 1) would it have been worth the cost for this extra context, and 2) why urge it only after the Commission's study is concluded and its report finalized?

The investigation undertaken for this report was substantial. The Commission issued interrogatories to five different components of the U.S. Department of Justice (including the Bureau of Prisons and the Civil Rights [Enforcement] Division), nine federal prisons, nine state prisons, two county jails, and eight prisoners' rights advocacy groups. Contrary to the dissent's assertions, two of the prisons—one federal and one state—were privately managed. No two entities submitted the requested information in an identical way, requiring staff to standardize the voluminous data received to the extent possible for useful comparison. The Commission also heard live testimony from representatives of prisoner advocacy organizations and prison ministries (some of whom brought the unique perspective of having been former inmates themselves), prison chaplains, and prison officials, to probe the competing interests in accommodating prisoners' religious practices. The Commission compiled and analyzed the data from the prison systems, reviewed the scholarly literature on religious liberty in prisons, and further collected and analyzed reported RLUIPA decisions to assess the number and nature of prisoner free exercise cases disposed of by the courts.

I concur that the Commission could have done more. That is always so. But I am not sure the best use of our dwindling appropriations would have been to send our skeleton crew on numerous field trips to prisons to judge the merits of random prisoner complaints.

How many individual grievances should the Commission have investigated? Commissioners Melendez and Yaki do not say, but among the thousands of grievances each year, a small sample from only a few prisons might be more misleading than informative. So how would representative grievances (100 plus?), have been chosen? How many hours would it take to

investigate each grievance given that the particular facts and circumstances matter immensely in such matters? Who would have reviewed the allegations and justifications and made a final determination? Should the Commission have conducted mini-trials to challenge the respective parties' claims? Should we have subpoenaed the prisoners, warden, and other authorities in each case,¹⁷ audited the prison's finances where relevant, and deposed all other witnesses under oath? How many staffers would it have taken to collect the initial evidence and conduct the initial interviews? How could we have paid for their travel and expenses with cuts to our budget?

Even if such individualized determinations might have been justified, there is no public record of Commissioners Melendez or Yaki requesting them. During my tenure, Commissioners Melendez and Yaki never once discussed their purported desire that the Commission engage in a case-by-case investigation of religious liberty grievances or interview individual inmates at any of our Commission meetings.¹⁸ If they had, commissioners could have asked some of the questions above. I am dubious that the dissenting commissioners could have proposed an investigative plan that was both manageable and meaningful, but if they had, I would have supported it. Nor do they indicate in their joint statement that they raised such a request in an informal manner with Commission staff. If they did so and did not get satisfaction, it was incumbent on them to raise it at one of the Commission's business meetings.

Moreover, if individual or generalized findings of discrimination could have been established by one or two individuals with a minimum amount of time and effort, why didn't Commissioners Melendez, Yaki, or their special assistant undertake the effort? There are several prisons within a reasonable driving distance of where they live. Without more, we can only suppose they did not think the effort would have been manageable or meaningful within the time available.

Finally, if Commissioners Melendez and Yaki believe the Commission remiss in not making more detailed legal determinations, including noting trends in the law and passing judgment on the courts' application of the relevant statutes, then they should either have a) drafted those legal determinations for us to consider and vote on, or b) made such legal pronouncements themselves in their statements accompanying the report. The report covers some of these matters, but apparently not enough to satisfy the dissenting commissioners. It would be far more useful, even after our record closed, for the dissenting commissioners to

¹⁷ I agree with Commissioners Melendez, Yaki, and Heriot that we should use our subpoena authority more often to secure evidence in important matters, but I would not delegate that authority (if it can be), to our staff to issue subpoenas as they see fit. The rules and practices that congressional committees typically employ seem appropriate for a collegial body like ours. The congressional practice normally requires an initial written request, a refusal of the request, and a subsequent vote of the constitutional officers who possess the subpoena power—often after a good faith negotiation over the proper scope of the subpoena to be issued. While that process is warranted for certain information, it seems excessive for the independent investigation of individual prisoner grievances.

¹⁸ I was appointed to the Commission and took my oath of office less than an hour before our February 8, 2008 briefing relating to this report. Commissioner Heriot has confirmed that the record of prior meetings also contains no such request.

set forth what their legal findings and recommendations would have been rather than simply complain that no one did so.

The Potential Value of the Commission's Report

The report some commissioners claim they wanted would have been worthy, but the perfect really is the enemy of the good, particularly in light of the agency's continuously diminishing manpower and resources. As it is, the accompanying report is still very useful and suggests new avenues for research by other scholars. The Commission's FY 2008 statutory report was an overly ambitious undertaking, even before the Commission's budget was cut. Despite these difficulties, the Commission has managed to collect, categorize, analyze, and present some interesting data and analysis on what is at once a fascinating, and sometimes intractable, issue.

The substantial investigation conducted by the Commission, including dozens of document requests and interrogatories, live testimony from a diverse group of experts, and analysis of reported decisions, is described in the preceding section. The numerous charts of data prepared for the report speak for themselves. Even if the dissent's suggestion that the Commission only reviewed publicly available information were true (which it is not), the manner in which the information was presented would still be of significant value to policymakers and researchers.

The report does not purport to have examined the universe of prisoner religious grievances or RLUIPA cases, but the information provided still sheds considerable light on the frequency and nature of different types of religious discrimination claims and reveals trends over time—specifically, a significant increase in the number of religious liberty complaints received by the Department of Justice since RLUIPA's passage and a corresponding growth in the number of reported RLUIPA cases (at least in one database), during the same time period. This is true even though religious grievances make up a very small proportion of all grievances filed in prisons, regardless of jurisdiction.

It is likely not possible to point to one factor that explains the increases in the number of grievances and RLUIPA cases filed in recent years, although that is a predictable result for some time after Congress enacts a favorable statutory right. The existence of these cases might support a number of propositions, including that prisoners are being well served in raising meritorious claims, that frivolous claims are increasing, or both. The Commission need not resolve every question in order to have made a substantial contribution. The report provides helpful data to policymakers and raises other issues for scholars to pursue in their own work.

Despite the increase in litigation, there appears to be no discernable pattern of intentional discrimination on the part of the prisons surveyed. The prison officials who responded to the Commission's interrogatories and testified at our headquarters acknowledged the salutary effect of inmates' religious observances and the value of preserving prisoners' free exercise rights. These witnesses seemed to acknowledge individual incidents of religious animus and occasional insensitivity to particular religious free exercise requests. Yet, many of the

prisoner rights experts also seemed to concede a growing commitment of prison officials toward better training and greater willingness to accommodate religious exceptions to prison rules and practices.

I am encouraged by the apparently favorable trend.

The Report's Findings and Recommendations

Although we remain responsible for its final form and content, the Commission relies on its professional staff to draft the body of our reports. As is appropriate, commissioners themselves spend relatively more time drafting and modifying the Commission's findings and recommendations. On statutory reports such as this, we rely on the Commission's record as well as our own knowledge and experiences in civil rights matters. Yet, it is not always clear why we have drawn these conclusions. Because some of the findings and recommendations in this report have received criticism from various commissioners, I provide some of my own thoughts, which may or may not reflect those of other commissioners who voted for them.

The Commission considered some evidence of unequal treatment against inmates from non-majority religions. Our data suggest that this type of "religious discrimination" claim is not as common as other requests for religious accommodation,¹⁹ but it is a particularly serious claim and much harder for prison officials to justify if the allegations are true. Yet, these claims are not self-proving in at least two respects, even assuming the truthfulness of the factual allegations: 1) the alleged discriminatory treatment must be based on reasonably comparable activities or requests (one faith's dietary restrictions may be much easier to satisfy than regular meals of steak and wine), and 2) radicalization concerns do present some basis for content-based discrimination. On the other hand, a facially neutral rule can sometimes have a discriminatory purpose or effect. Thus, the cancellation of all religious services on December 25 because of staff vacations will impose a special burden on Christian worshipers.²⁰ And equal space and time allocations for services may be unreasonable for groups with many more members and which seek to offer more programming.²¹ Thus, at least some care is warranted in reviewing this evidence.

Our report notes that non-Christians had a higher grievance rate and suggests that the alleged discriminatory treatment "may be due to a tendency of prison administrators and security staff to view all faith practices from the perspective of the dominant faith. These witnesses asserted that where practices of other religions deviate or are not in sufficient similarity to those of the predominant faiths, they are less likely to be accommodated."²²

¹⁹ See chapter 2 and appendix C.

²⁰ See Hearing Transcript at 139.

²¹ See Hearing Transcript at 83.

²² Report at 29 (citations omitted).

Several witnesses at our February 2008 briefing provided credible testimony that discriminatory treatment was sometimes motivated by animus toward particular religions—which never can be justified. Pat Nolan, Vice President of Prison Fellowship, testified about several incidents of sectarian animus, including some he personally witnessed.²³ Chaplain Patrick McCollum described several anti-Wiccan incidents, including one in which an inmate was allegedly not allowed to attend a Wiccan service because the guard told her it would be better for her soul if she did not go; another inmate allegedly was told that his wife’s death was possibly related to his attendance at Wiccan services.²⁴

It was Chaplain McCollum who introduced the idea of a “Dominant Religious Lens Factor...a process whereby administrators and security staff view all faith practices from the perspective of the dominant faith,” which was summarized in the body of the Commission’s Report.²⁵ One of McCollum’s examples was the insistence of prison officials that he “preach” to the inmates from the chapel’s pulpit, even though that violated several Wiccan principles.²⁶ Imam Abuquadir Al-Amin testified that Islam is greatly misunderstood, that some prison staff ridicule inmates who participate in Muslim programs, deny halal meals even when Jewish prisoners are given kosher meals, and are insensitive to conflicts with Friday devotional services.²⁷

Even without RFRA’s or RLUIPA’s heightened protection for religious liberty in prison, there is no excuse for discriminatory treatment consciously motivated by animus toward a particular faith. It is unconstitutional, degrading, and repugnant. Yet, the Commission also shares the concerns of several witnesses and others who submitted written material that prison officials need to ensure their refusal to make reasonable accommodations, particularly toward inmates of non-majority faiths, is not due to indifference to, unfamiliarity with, or subconscious prejudice against particular faith traditions. In short, special efforts are needed to ensure against such possibilities.²⁸

Our first of five recommendations relates to this concern:

Prison officials need to pay particular attention to ensuring that inmates of non-Christian faiths are not having their free exercise rights unduly burdened. To the extent that resource limitations impact prisons’ ability to accommodate prisoners’ religious requests, such burdens should be spread across all faith groups in a fair and reasonable manner.²⁹

²³ Hearing Transcript at 79–80 (involving disrespect toward an Orthodox Jewish inmate and its signaling effect on the behavior of other inmates); Report at 27, n. 40.

²⁴ Hearing Transcript at 122 and 125, respectively.

²⁵ *Id.* at 123.

²⁶ Hearing Transcript at 124 (McCollum testified that Wiccans do not “preach” to each other, and that they form a circle, the center of which represents their sacred space.); *See also* Report at 27, n. 40.

²⁷ Hearing Transcript at 101–102.

²⁸ Pat Nolan testified he thought the most serious problem was not animus toward religion, but “bureaucratic lethargy.” “It’s more work for them.” Hearing Transcript at 82. As an example, he cited the policy of some prisons to allow inmates to attend the activities of only one religious group, when he advocated allowing prisoners to attend as many as were compatible with their beliefs. *Id.* at 82–83.

²⁹ *See* chapter 5.

RFRA and RLUIPA may require more, and with respect to this type of disparate treatment claim, their heightened requirements for religious accommodations are especially helpful. It may be harder to serve halal meals in a predominantly non-Islamic area, but that effort should be undertaken nevertheless. The right answer is not to stop serving kosher meals to Orthodox Jewish prisoners, as might have been possible before RFRA and RLUIPA.

I would commend the U.S. Department of Justice to work with chaplains and prison ministry officials to prioritize the investigation of disparate treatment claims, particularly of non-dominant religious adherents. These individuals may be more vulnerable to ridicule, and some extra attention should be devoted to their complaints of unequal treatment.³⁰

Unfortunately, some prisoners will try to exploit favorable rules under RFRA and RLUIPA to seek frivolous accommodations in the name of equality. And some content-based discrimination is justified to prevent prisoner radicalization and violence. The Church of New Song's (CONS) meal requests and some Wotanists' teachings described in Commissioner Heriot's statement are examples of these respective problems. The CONS demand for steak and wine is possibly in jest, but the white supremacist rantings of many of the Wotanists are more dangerous. The existence of RFRA and RLUIPA may shift the type of claims that are litigated in court, but there will always be hard cases, even if the allegation is one of "disparate treatment."

I also wish to note my agreement with Commissioner Heriot's draft statement on three other matters relating to our findings and recommendations, and to elaborate briefly on one of them. I joined the Commission's even-handed recommendations on prisoner radicalization, but agree with Commissioner Heriot that more research would have been necessary before we could make more detailed recommendations. I also agree with Commissioner Heriot's statement on the limited nature of our finding and recommendation regarding the Prisoner Litigation Reform Act, and her sound refutation of erroneous claims made by the dissenting commissioners.

Finally, I agree with Commissioner Heriot's explanation of the value of *pro bono* representation for prisoners in religious liberty cases, as set forth in the Commission's final recommendation, and I want to add an additional observation. The work of prisoner rights groups and religious ministries (even if they do not offer legal representation), serves prisoners and the justice system extremely well to the extent that they tend to filter the meritorious from the frivolous grievances. Those who engage in such legal representation or facilitate the appointment of other *pro bono* counsel not only serve the needs of individual prisoners, but will also tend to create helpful precedents that will guide prison officials. This tendency to do more good than harm is caused, in part, by the fact that they are not

³⁰ I am also troubled by the testimony from two witnesses that the exhaustion requirement for litigation is abused by prison officials to ignore the grievance process, especially the allegation that some prisons have a standing practice of throwing away all inmates' grievances and claiming that they were lost. See Hearing Transcript at 133–135 and 140. It should be noted that the Rev. McCollum, who made one of the allegations, credited the federal Bureau of Prisons with training staff to follow the law. Thus, the Civil Rights Division may want to focus its enforcement attention on state prison practices and use BOP training and practice as a possible model.

necessarily expecting a financial reward. Our encouragement of this type of work is not hollow, and the work itself is far from it.

Substantive Complaints Relating to Early Drafts of the Report

I agree with many of the substantive criticisms of early drafts of this report that Commissioners Melendez, Yaki, and Heriot raise in their respective statements, although I would not record my own disappointment here but for their comments. The early drafts of this report did leave much to be desired; I trust the mistakes of this summer will not be repeated soon. I believe the initial plan was too ambitious an undertaking, but it should also be noted that some unique circumstances conspired to make the staff's job substantially more difficult this year.³¹

Despite these hopefully unique circumstances, I want to join one of the most serious criticisms (which amounts to both a substantive and procedural mistake), mentioned by Commissioners Melendez, Yaki, and Heriot, to wit, the staff's failure to press the Department of Justice for more complete responses to our initial set of interrogatories. Federal agencies are required by law to "cooperate fully" with the Commission's requests.³² If the DOJ expressed reluctance to provide us with certain information because of its sensitivity or its potential to interfere with its ongoing investigations, I might have agreed with the DOJ's position and sought to negotiate some form of accommodation under which sensitive information was redacted. But the staff should have pressed for a more detailed explanation from the DOJ and raised that with the Chairman and other commissioners for our direction. It was completely unacceptable to learn for the first time in the text of a draft report that information was withheld and nothing further was done about it.³³

The Dissenters' Curious Procedural Complaints

Commissioners Melendez and Yaki also raise several more serious procedural complaints in their draft statement, namely the Commission's alleged "Failure to Follow Agency Procedures in Compiling This Report." I respectfully dissent from their dissent.

The delayed deadlines for commissioner review were problematic, but the record reflects commissioners were given more than one round of review and comment, contrary to what is

³¹ The Commission may have been motivated to adopt the topic in 2007 because of the religious liberty expertise of its then Staff Director, Ken Marcus. Mr. Marcus completed much of the early work for the report, including that for the February briefing, but his departure in January 2008 was followed by several months without a Staff Director for the Commission. For several months, the Commission's chief social scientist attempted to perform both his normal job and that of an acting Staff Director. Due to repeated budget cuts, the General Counsel's Office operated with only three of its nine authorized attorneys, and one attorney was on leave for much of the fiscal year. When Martin Dannenfelser was finally confirmed as Staff Director, he faced a new learning curve.

³² 42 U.S.C. § 1975b(e).

³³ Because the failure appears to be our own (I believe the DOJ would have accommodated our requests in some manner if the Commission had pressed its case), it served no purpose to discuss that in the body of the report. Whether commissioners needed to take up report space to confess our error or not, we have now done so.

alleged by the dissenters. It also is not true that the failure to complete this report and transmit it to Congress until this month, as regrettable as that is, is “in contravention of the statute.” The statute provides that we complete “one report annually that monitors Federal civil rights enforcement efforts.”³⁴ The statute does not provide that the report must be transmitted to Congress and the President by the end of each fiscal year in which it was begun. It appears that has been our practice, and it seems a sound one, but it is not required by the statute itself, or to my knowledge, any other binding notice and comment rulemaking. We can and should consciously depart from our informal rules when the circumstances justify it.³⁵ In this case, there was no compelling reason to transmit the report without commissioner statements such as these.

It is also false that “Democratic Commissioners were not consulted about the [final] meeting date,” in which commissioners were to approve the report. All commissioners were consulted in the same electronic communication from the Staff Director, and I have an email record that at least Commissioner Yaki responded. The Chairman had to choose a date that maximized the number of commissioners who could participate, as well as allow the most time for commissioner input before the end of the fiscal year. Accordingly, a telephonic meeting on September 30, 2008 was selected. Moreover, any error was harmless since all commissioners did participate in the September 30 telephonic meeting who expressed any interest in doing so.

Other complaints by Commissioners Melendez and Yaki border on the ridiculous. They complain that the draft report was “changed without consultation with all Commissioners.” All commissioners were equally consulted on the drafts. If Commissioner Melendez or Commissioner Yaki submitted corrections to and suggestions on any of the drafts to the Staff Director (they shared none with me), I hope the Staff Director corrected the mistakes they pointed out and carefully considered their other suggestions. In reviewing a draft report, if any commissioner finds a particular discussion erroneous, confusing, tedious, or irrelevant, he or she should inform at least the Staff Director. It is absurd to argue that the Staff Director needs a majority vote to correct errors or otherwise edit the document based on commissioner input. If the next draft does not contain somebody’s cherished page or paragraph, any commissioner can move to have it restored in the report.

Commissioners Melendez and Yaki seem particularly displeased that the discussion of the role of faith-based organizations and faith-based programming in prisons was shortened in the final report. Thankfully, many sections of the final report were shortened, which made it much more readable and less prone to legal error. Nevertheless, the report does discuss the leading case mentioned by the dissent, just in a different chapter. But more importantly, Commissioners Melendez and Yaki did not raise an objection to this edit at the September 30 meeting or any other time of which I am aware. Many of us had specific corrections,

³⁴ 42 U.S.C. § 1975a(c)(1).

³⁵ For the most part, our Administrative Instructions are just that: instructions to our staff on how to perform their administrative duties. They may create expectations among commissioners, but when we collectively decide by vote or otherwise to make an exception to them, it is ridiculous to hear the complaint that we have somehow violated our rules.

amendments, and suggestions that we offered in the Commission's final meeting of the year. Some of them were sent to other commissioners in advance for their consideration. We spent several hours proposing, revising, and voting on various changes to the report. Nothing stopped the dissenting commissioners from offering whatever they wanted.

It also is worth pausing to consider whether any other collegial body that issues investigative reports similar to ours could operate as Commissioners Melendez and Yaki seem to suggest the Commission should operate. I doubt it. It seems completely unworkable that every "significant" change (how is that defined?) suggested by any commissioner to staff on every section of a 200-page report should be separately debated and voted on by the entire Commission. What is the purpose of the professional staff once they send us the first draft of a report? Should they have no discretion in editing it? Should they ignore our comments? In my view, the most analogous institution to our own with regard to issuing investigative reports is a committee of Congress, which I once had the pleasure to serve. Members of a congressional committee may file concurring or dissenting views to a report, but it would be an absurd and unworkable rule if the Chairman of the committee could not direct the staff to make changes in a draft report without convening the committee and seeking their approval on each draft change.

In their draft statement, Commissioners Melendez and Yaki wrote that they will "push internally for reform of the Commission's practices but attention by external stakeholders is needed as well." As a new commissioner, I have been quite persistent and specific in seeking substantive and procedural changes in the past ten months. But I do not cry foul when I don't get my way. Rather than hiding behind vague accusations that reform is needed, Commissioners Melendez and Yaki should be equally specific about procedural changes they desire and propose them at our business meetings so that we can discuss them and vote on them. I have agreed with several of their suggestions in the past, but I may be less willing to do so in the future if they play political games and misrepresent our actions.

Commissioners Melendez and Yaki should also engage in the hard work of actually proposing alternative findings, recommendations, and corrections instead of carping that they would have preferred a different type of report. Their tedious complaints are nothing more than interference if they won't actually engage in the serious work of the Commission.

APPENDIX A: STATUTORY TEXT

Religious Freedom Restoration Act

United States Code
Title 42. The Public Health and Welfare
Chapter 21B. Religious Freedom Restoration

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
- (2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
- (3) governments should not substantially burden religious exercise without compelling justification;
- (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
- (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term “government” includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term “covered entity” means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term “exercise of religion” means religious exercise, as defined in section 2000cc-5 of this title.

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term “granting,” used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Civil Rights of Institutionalized Persons Act

United States Code
Title 42 The Public Health and Welfare
Chapter 21 Civil Rights
Subchapter IA Institutionalized Persons

§ 1997. Definitions

As used in this subchapter—

(1) The term “institution” means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

(2) Privately owned and operated facilities shall not be deemed “institutions” under this subchapter if—

(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State;

(B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII [42 U.S.C.A. §§ 1381 et seq., 1395 et seq.], or under a State plan approved under title XIX [42 U.S.C.A. § 1396 et seq.], of the Social Security Act, constitutes the sole nexus between such facility and such State; or

(C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII [42 U.S.C.A. §§ 1381 et seq., 1395 et seq.], or under a State plan approved under title XIX [42 U.S.C.A. § 1396 et seq.], of the Social Security Act, constitutes the sole nexus between such facility and such State;

(3) The term “person” means an individual, a trust or estate, a partnership, an association, or a corporation;

(4) The term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States;

(5) The term “legislative days” means any calendar day on which either House of Congress is in session.

§ 1997a. Initiation of civil actions

(a) Discretionary authority of Attorney General; preconditions

Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, 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, as defined in section 1997 of this title, 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, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this subchapter to persons residing in or confined to an institution as defined in section 1997(1)(B)(ii) of this title only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

(b) Discretionary award of attorney fees

In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney’s fee against the United States as part of the costs.

(c) Attorney General to personally sign complaint

The Attorney General shall personally sign any complaint filed pursuant to this section.

§ 1997b. Certification requirements; Attorney General to personally sign certification

(a) At the time of the commencement of an action under section 1997a of this title the Attorney General shall certify to the court—

(1) that at least 49 calendar days previously the Attorney General has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that the Attorney General has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of the Attorney General's intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under section 1997a of this title—

(A) the Attorney General has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which the Attorney General believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) the Attorney General has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is the Attorney General's opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) the Attorney General is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that the Attorney General believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) The Attorney General shall personally sign any certification made pursuant to this section.

§ 1997c. Intervention in actions

(a) Discretionary authority of Attorney General; preconditions; time period

(1) Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe 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, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

(2) The Attorney General shall not file a motion to intervene under paragraph (1) before 90 days after the commencement of the action, except that if the court determines it would be in the interests of justice, the court may shorten or waive the time period.

(b) Certification requirements by Attorney General

(1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a) of this section—

(A) that the Attorney General has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution of—

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that the Attorney General believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) The Attorney General shall personally sign any certification made pursuant to this section.

(c) Attorney General to personally sign motion to intervene

The Attorney General shall personally sign any motion to intervene made pursuant to this section.

(d) Discretionary award of attorney fees; other award provisions unaffected

In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. Nothing in this subsection precludes the award of attorney's fees available under any other provisions of the United States Code.

§ 1997d. Prohibition of retaliation

No person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting.

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by

telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) Definition

As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

§ 1997f. Report to Congress

The Attorney General shall include in the report to Congress on the business of the Department of Justice prepared pursuant to section 522 of Title 28—

- (1) a statement of the number, variety, and outcome of all actions instituted pursuant to this subchapter including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;
- (2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;
- (3) an analysis of the impact of actions instituted pursuant to this subchapter, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;
- (4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and
- (5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

§ 1997g. Priorities for use of funds

It is the intent of Congress that deplorable conditions in institutions covered by this subchapter amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this subchapter, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision to require the redirection of funds from one program to another or from one State to another.

§ 1997h. Notice to Federal departments

At the time of notification of the commencement of an investigation of an institution under section 1997a of this title or of the notification of an intention to file a motion to intervene under section 1997c of this title, and if the relevant institution receives Federal financial assistance from the Department of Health and Human Services or the Department of Education, the Attorney General shall notify the appropriate Secretary of the action and the reasons for such action and shall consult with such officials. Following such consultation, the Attorney General may proceed with an action under this subchapter if the Attorney General is satisfied that such action is consistent with the policies and goals of the executive branch.

§ 1997i. Disclaimer respecting standards of care

Provisions of this subchapter shall not authorize promulgation of regulations defining standards of care.

§ 1997j. Disclaimer respecting private litigation

The provisions of this subchapter shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this subchapter shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

Religious Land Use and Institutionalized Persons Act

United States Code

Title 42. The Public Health and Welfare

Chapter 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. Protection of religious exercise of institutionalized persons**(a) General rule**

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

- (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
- (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. Judicial relief**(a) Cause of action**

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted**(e) Prisoners**

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term “granting,” used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term “claimant” means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term “Free Exercise Clause” means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term “government”—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term “land use regulation” means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term “program or activity” means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

APPENDIX B: METHODOLOGICAL ISSUES

Methodology for Selecting Correctional Institutions and Nonprofit Organizations

The Commission gathered much of the information contained in this report by issuing interrogatories to various entities. It sent interrogatories to five different components of the U.S. Department of Justice to learn about their responsibilities and accomplishments enforcing religious nondiscrimination requirements in prisons. The Commission issued interrogatories to correctional institutions, nonprofit organizations, and advocacy groups to gather information on alleged religious discrimination against prisoners and limitations on religious organizations' opportunities to receive federal funding to provide prison services. Among the correctional institutions, the Commission chose nine federal prisons under the jurisdiction of the Bureau of Prisons (BOP), nine state prisons and their respective departments of corrections, and two county jails under the authority of sheriff's offices. The Commission also issued interrogatories to 12 nonprofit organizations, eight of which are advocacy groups and four are faith-based organizations. This appendix describes how the correctional institutions and nonprofit organizations were selected.

Methodology for Selecting Correctional Institutions

Identification and Selection of Purposive Samples

The Commission employed a multi-stage approach to selecting its samples of federal and state prisons and county jails. The actual selection technique was a modified form of reputational, snowball, network, or chain sampling. In the first stage of the sampling process, the Commission focused on institutions where alleged or actual religious discrimination against incarcerated persons had occurred. The Commission did not elect to include correctional institutions with no known incidents for comparison since the sample size for each category of correctional institutions is so small that there is no real methodological or substantive benefit. On the other hand, by employing this criterion, the Commission maximizes the number of correctional institutions with known alleged or actual incidents and thus is able to shed some light on the nature of this problem.

The second stage in the sampling process involved the use of experts. Because there is not a known universe of such prisons and jails, the Commission sought the assistance of nationally known nonprofit organizations, primarily advocacy groups and faith-based organizations, with an interest in inmates' free exercise of religious rights. The Commission invited them to recommend federal prisons, state prisons, and county jails that met the criterion of known incidents of alleged or actual religious discrimination against inmates.

The nonprofit organizations that responded to the Commission's request included

- American Civil Liberties Union (Southern California and Connecticut offices)¹
- American Friends Service Committee (Maine and New Jersey offices)
- Human Rights Watch
- Maine Indian Tribal State Commission
- Muslim Advocates
- Muslim Chaplain Association
- Muslim Public Affairs Council
- Prison Fellowship
- Prison Legal News
- Sikh American Legal Defense and Educational Fund
- Sikh Coalition
- The Aleph Institute
- The Becket Fund for Religious Freedom
- United Church of Christ

Federal Prisons

The third stage in the sampling process involved selection of correctional institutions from the recommended pools. As of March 26, 2008, the nonprofit organizations had recommended nine federal prisons and three prison complexes.² Included in this mix were a women's prison and a privately managed prison. These correctional institutions were located in eight states.³ The criteria that the Commission applied to select the final set of federal prisons were a) maximizing the number of states in which the selected correctional institutions are located, b) ensuring a reasonably balanced representation of prison security levels, c) inclusion of at least one women's prison, and d) ensuring at least one privately managed prison. The nine federal prisons that the Commission selected were

1. Federal Correctional Institution Danbury, Danbury, Connecticut (Security level: low; women's prison)
2. Federal Correctional Institution La Tuna, Anthony, Texas (Security level: low)
3. Federal Correctional Institution Schuylkill, Minersville, Pennsylvania (Security level: medium)
4. Northeast Ohio Correctional Center, Youngstown, Ohio (Security level: low; privately managed by Corrections Corporation of America)
5. United States Penitentiary Lewisburg, Lewisburg, Pennsylvania (Security level: high)

¹ A representative from the Connecticut office of the American Civil Liberties Union participated in the Commission's briefing on "Discrimination Against Native Americans in Border Towns" in November 2007. The staff sought his advice in identifying correctional institutions with known alleged or actual incidents of religious discrimination against Native American prisoners. He indicated that he was currently investigating religious discrimination against four Muslim inmates in a state prison in Wyoming.

² One advocacy group also recommended two federal prisons under the jurisdiction of the U.S. Department of Homeland Security. Since the study's focus is on the U.S. Department of Justice, staff did not consider them.

³ The eight states are California, Colorado, Connecticut, Illinois, Indiana, Ohio, Pennsylvania, and Texas.

6. United States Penitentiary Lompoc, Lompoc, California (Security level: medium)
7. United States Penitentiary Marion, Marion, Illinois (Security level: medium)
8. United States Penitentiary Florence Administrative Maximum, Florence, Colorado (Security level: high)
9. United States Penitentiary Terre Haute, Terre Haute, Indiana (Security level: high)

State Prisons

As of March 26, 2008, nonprofit organizations had identified 39 state prisons and two state departments of corrections in 17 states.⁴ In addition to the criteria employed in the selection of federal prisons, the Commission added two others. The first was selection of at least one faith- and character-based prison. With regard to the second, because several advocacy groups and faith-based organizations recommended state prisons in which alleged or actual religious discrimination against Jewish, Muslim, Native American, and Sikh prisoners occurred, the Commission ensured that selected state prisons also evidenced such incidents. The final set included a women's prison, a privately managed prison, and a faith- and character-based prison.

The nine state prisons that the Commission selected were

1. California Department of Corrections and Rehabilitation, California State Prison Solano, Vacaville, California (Security level: II and III; the highest level is IV)
2. California Department of Corrections and Rehabilitation, California Correctional Institution, Tehachapi, California (Security level: minimum, medium, maximum)
3. Delaware Department of Correction, Delores J. Baylor Women's Correctional Institution, New Castle, Delaware (Security level: minimum, medium, maximum)
4. Florida Department of Corrections, Union Correctional Institution, Raiford, Florida (Security level: seven; highest)
5. Florida Department of Corrections, Wakulla Correctional Institution, Crawfordville, Florida, a faith- and character-based prison (Security level: four; the highest level is seven)
6. Maine Department of Corrections, Maine State Prison, Warren, Maine (Security level: maximum)
7. New Mexico Corrections Department, Lea County Correctional Facility, Hobbs, New Mexico (Security level: III; the highest security level is IV; privately managed by Global Expertise Outsourcing Group)
8. New York State Department of Corrections, Fishkill Correctional Facility, Beacon, New York (Security level: I to IV)
9. Texas Department of Criminal Justice, Stiles Unit, Beaumont, Texas (Security level: V; highest)

⁴ The seventeen states are California, Delaware, Florida, Georgia, Illinois, Maine, Maryland, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Texas, Vermont, Virginia, Washington, and Wyoming.

County Jails

As of March 26, 2008, advocacy groups and faith-based organizations recommended six jails, and staff recommended a seventh, all located in seven states.⁵ The Commission's two selection criteria for jails were overcrowding and size of the incarcerated populations. The two county jails the Commission selected were

1. Harris County Jail, Houston, Texas.⁶ The Harris County Jail consists of four buildings in close proximity to each other (Security level: minimum, medium, maximum)
2. Men's Central Jail, Los Angeles, California,⁷ one of eight jails within the Los Angeles Jail System. Analysis is based on information provided by the Los Angeles Jail System pertaining to the entire system. (Security level: mixed)

Tables B.1, B.2, and B.3 present summary profiles of the federal prisons, state prisons, and county jails, respectively.

⁵ The seven states are California, Florida, Maine, New York, Pennsylvania, Texas, and Utah.

⁶ The Harris County Jail is under the jurisdiction of the Harris County Sheriff's Office and is not a part of the Texas Department of Criminal Justice. It houses prisoners with different security levels in different parts of the institution.

⁷ The Men's Central Jail is under the jurisdiction of Los Angeles County Sheriff's Department and not a part of the California State Department of Corrections and Rehabilitation. It houses prisoners with different security levels in different parts of the institution.

Table B.1
Summary Profile of Federal Prisons

Prison	Management	Gender	Security level	Capacity	Number of inmates in FY 2007
FCI Danbury Danbury, CT	BOP	Women	Low	508	1,217 (as of 2/2008)
FCI La Tuna Anthony, TX	BOP	Men	Low	770	1,486
FCI Schuylkill Minersville, PA	BOP	Men	Medium	849	1,290
USP Florence ADMAX Florence, CO	BOP	Men	High	490	470
USP Lewisburg Lewisburg, PA	BOP	Men	High	988	1,306
USP Lompoc Lompoc, CA	BOP	Men	Medium	1,009	1,598
USP Marion Marion, IL	BOP	Men	Medium	990	908
USP Terre Haute Terre Haute, IN	BOP	Men	High	960	1,438
Northeast Ohio Correctional Center Youngstown, OH	Corrections Corporation of America	Men	Low	1,195	1,335

Note: FCI refers to Federal Correctional Institution; USP refers to United States Penitentiary. The original Terre Haute Facility was activated in 1940 while the new one was activated in 2005. Federal and non-federal inmates are housed in these prisons.

Sources: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Requests 1–3, June 6, 2008; U.S. Department of Justice, Federal Bureau of Prisons, Supplemental Response to the U.S. Commission on Civil Rights' Interrogatories, Supplemental Responses to Interrogatory Requests 1–3, July 7, 2008.

Caption: Of the nine federal prisons, eight house male inmates and one, female inmates. One of the nine is privately managed. The nine prisons are evenly divided with respect to low, medium, and high security level.

Table B.2
Summary Profile of State Prisons

Prison	Management	Gender	Security level	Capacity	Number of inmates (as of)
California State Prison—Solano Vacaville, CA	State of California	Men	Level II, Level III- Medium	5,918	5,670 (May 2008)
California Correctional Institution—Tehachapi Tehachapi, CA	State of California	Men	Minimum, Medium, Maximum	5,606	4,723 (May 2008)
Delores J. Baylor Women's Correctional Institution New Castle, DE	State of Delaware	Women	Minimum, Medium, Maximum	484	374 (April 2008)
Stiles Unit Beaumont TX	State of Texas	Men	Level V	2,897	2,881 (February 2008)
Lea County Correctional Facility Hobbs, NM	Global Expertise Outsourcing Group, Inc. (GEO Group)	Men	Level III (Level IV is highest)	1,267	1,240 (March 2008)
Maine State Prison Warren, ME	State of Maine	Men	Maximum	938	868 (March 2008)
Fishkill Correctional Facility Beacon, NY	State of New York	Men	Levels I to IV	1,824	1,669 (March 2008)
Union Correctional Institution Raiford, FL	State of Florida	Men	Level 7 (highest level)	1,969	2,106 (June 2008)
Wakulla Correctional Institution Crawfordville, FL (Faith/character-based prison)	State of Florida	Men	Level 4 (Level 7 is highest)	1,205	1,337 (June 2008)

Sources: Response to U.S. Commission on Civil Rights' Interrogatories by the California State Prison—Solano (response to interrogatory requests 1 and 3, May 21, 2008), California Correctional Institution—Tehachapi (response to interrogatory request 1, May 21, 2008; Yaser Samara, correctional business manager, California Correctional Institution—Tehachapi, telephone interview, July 10, 2008), Delores Baylor Women's Correctional Institution (response to interrogatory request 1, April 9, 2008; Patrick Ryan, warden, Delores J. Baylor Women's Correctional Institution, interview, July 10, 2008), Fishkill Correctional Facility (response to interrogatory requests 1 and 3, March 28, 2008), Lea County Correctional Facility (response to interrogatory requests 1 and 3, March 31, 2008), Maine State Prison (response to interrogatory requests 1 and 3, March 21, 2008), Stiles Unit (response to interrogatory requests 1 and 3, April 22, 2008), Union Correctional Facility (response to interrogatory requests 1 and 3, July 8, 2008), Wakulla Correctional Facility (response to interrogatory requests 1 and 3, July 8, 2008).

Caption: Of the nine state prisons, eight house male inmates and one houses female inmates. One of the nine is privately managed and one is a faith- and character-based prison. Security level ranges from minimum to maximum, with some having mixed levels.

Table B.3
Summary Profile of County Jails

Jail	Management	Gender	Security level	Capacity	Number of detainees (as of)
Harris County Jail Houston, TX	Harris County Sheriff's Office				(April 2008)
701 Jail		Men	Maximum	3,965	4,400 (est.)
1200 Jail		Women on 4 th flr; men on 1 st flr.	Maximum	3,933	4,400 (est.)
1307 Jail		Men	Medium	1,024	1,000 (est.)
711 Jail		Men	Minimum	144	144 (est.)
Los Angeles County Jail Los Angeles, CA	Los Angeles County Sheriff's Office				(March 2008)
Pitchess Detention Center—East		Men	Mix	1,944	1,736
Pitchess Detention Center—North		Men	Mix	1,648	1,520
Pitchess Detention Center—South		Men	Mix	1,536	1,373
North County Correctional Facility		Men	Mix	4,295	3,727
Central Jail		Men	Mix	5,640	4,860
Twin Towers		Men	Mix	4,660	3,465
Century Regional Detention Facility		Women	Mix	2,380	2,222
Mira Loma		Men	Mix	1116	1007

Note: The Harris County Jail consists of four facilities. The Los Angeles County Jail consists of eight facilities. The Mira Loma Facility houses Immigration and Customs Enforcement detainees only.

Sources: The Harris County Jail Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Requests 1 and 2, April 9, 2008; Don McWilliams, Major, Office of the Inspector General, Harris County Jail, interview, June 25, 2008. The Los Angeles County Jail Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Requests 1 and 2, May 6, 2008; Los Angeles County Sheriff's Office interview, June 25, 2008.

Caption: The Harris County Jail consists of four jails. Except for one floor in one jail, all house male inmates. Security levels range from minimum to maximum. The Los Angeles County Jail consists of eight jails, all but one housing male inmates. The security level at all eight Los Angeles County jails is mixed.

Correctional Institutions Reporting of Inmates' Religious Affiliations

The Federal Bureau of Prisons (BOP) and the states the Commission studied offered data on inmates' religious affiliations in a variety of formats, several of them far more detailed than others. The two jails—Harris County and Los Angeles County—did not provide information on inmates' religious affiliations.

Table B.4 shows the inmates' religious affiliations within BOP's report. The Commission regrouped these religions using a scheme later detailed in appendix D to obtain the results showed in table 2.1 of this study.

Table B.4
Categories of Religion the Bureau of Prisons Used to Report Federal Inmate Affiliations

Bureau of Prisons				
Adventist	Catholic	Messianic	No Preference/Unknown	Protestant
American Indian	Church of Christ	Moorish	Non-Trinitarian Christian (Oneness)	Rastafarian
Atheist	Hindu	Mormon	Orthodox	Santeria
Baha'i	Jehovah's Witness	Muslim	Other	Sikh
Buddhist	Jewish	Nation of Islam	Pagan	

Sources: See e-mail from Chaplain Joe Pryor, Chaplaincy Administrator, Federal Bureau of Prisons, U.S. Department of Justice, to Dr. Robert Lerner, Asst. Staff Director for the Office of Civil Rights Evaluation, U.S. Commission on Civil Rights (July 16, 2008, 10:56 a.m. EDT) attachment: "Federal Bureau of Prisons, Inmate Religious Preference and Religious Program Participation;" and U.S. Department of Justice, Federal Bureau of Prisons, *2007 Annual Report of Religious Services*, no date, p. 2, chart 2 (on file with the commission).

Of the state prisons selected for study, two of the nine were unable to respond to the Commission's request for information on inmates' religious affiliations. The California Correctional Institution–Tehachapi states that it

does not conduct any form of compiling or tracking specific to an inmate's professed faith except for those inmates that formally participate in a religious faith group sponsored by the Chaplain. The [religious affiliation] information collected at intake is available, however to compile this information for the inmate population exclusively for this survey would be time consuming and create a major workload impact.⁸

The California State Prison–Solano states that "it has no current data at this time that estimates [sic] the percentages of inmates that profess specific religions...."⁹

Table B.5 lists the religions each of the remaining seven states identified as prisoner affiliations. Notably, four of the seven reported inmates' religious affiliations in 10 or fewer categories. Three of the states identified them in more than 50 categories. The Commission collapsed these categories to present the information in table 2.2 of this study.

⁸ California Correctional Institution–Tehachapi, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10, May 21, 2008.

⁹ California State Prison–Solano, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 10, May 21, 2008.

Table B.5
Categories of Religion the Responding State Prisons Used to Report Inmate Affiliations

Maine State Prison				
Buddhists	Jehovah's Witness	Muslims	Protestants	Wicca-Pagans
Catholics	Judaism	Native Americans		
Fishkill Correctional Institution				
Buddhist	Jewish	Muslim	Rastafarian	Wicca
Catholic	Moorish Science Temple	Protestant	Sikh	
Lea County Correctional Facility				
Baptist	Christian Faith	Jehovah's Witness	Mormon	No preference
Catholic	Church of God	Methodist	Native Americans	
Delores J. Baylor Women's Correctional Institution				
Baptist	Islamic	Lutheran	Not Reported	Protestant
Catholic	Jewish	Methodist	Other	Unknown
Stiles Unit				
Agnostic	Church of God Holiness	Jehovah 's Witness	Native American	Regular Baptist
American Baptist	Church of God in Christ	Jewish	Nazarene	Roman Catholic
Assemblies of God	Church of God Tennessee	Living Church of God	Neo Pagan	Satanist
Atheist	Church of Jesus Christ Christian	Lutheran	None	Seventh Day Adventist
Baptist	Disciples of Christ	Messianic Jewish	Odinist Asatru	Southern Baptist
Buddhist	Eastern Orthodox	Methodist	Other	Southern Methodist
Catholic Apostolic	Episcopal	Missionary Baptist	Pentecostal	Thelema
Christian Catholic	Free Methodist	Moorish Science	Pentecostal Church of God	Unitarian
Christian Identity	General Baptist	Mormon	Pentecostal Churches	United Church of God
Christian Non-Denominational	Greek Orthodox	Muslim	Presbyterian	Unknown
Christian Science	Hinduism	Nation of Islam	Protestant Church of NA	Zen Buddhist
Church of Christ	House of Yahweh	Nation of Islam Farakhan		

Table continued

Table continued

Union Correctional Institution				
Agnostic	Church of Christ	Jewish	Native American	Satanism
Apostolic Church of God	Church of God in Christ	Krishna Consciousness	None	Seventh Day Adventist
Assemblies of God	Church of the Nazarene	Mennonite	Odinist/Asatru	Shi'ite Muslim
Atheist	Episcopal	Messianic Jewish	Pentecostal	Southern Baptist
Baptist	Evangelical Lutheran	Methodist	Pentecostal Church of God	Sunni Muslim
Brethren	Foursquare International	Missouri Synod Lutheran	Philadelphia Church of God	Taoism
Buddhist	Greek Orthodox	Mormon (LDS)	Presbyterian	Tennessee Church of God
Christian	Hindu	Muslim	Protestant	Unknown
Christian Identity	Holiness	Mysticism	Rastafarian	Wicca
Christian Science	Holiness Church of God	Nation of Islam	Roman Catholic	Witness
Christian Separatist	House of Yahweh	Nation of Yahweh/Hebrew Israel	Santeria	
Wakulla Correctional Institution				
African Methodist Episcopal	Church of Christ	Jehovah's Witness	Mysticism	Refused to Answer
American Baptist	Church of God in Christ	Jewish	Nation of Islam	Roman Catholic
Apostolic Church of God	Church of God Pentecostal	Krishna Consciousness	Nation of Yahweh/Hebrew Israel	Separatist Christian
Assemblies of God	Episcopal	Mennonite	National Baptist	Seventh Day Adventist Native American
Assembly of Yahweh	Evangelical Lutheran	Messianic Jewish	None	Southern Baptist
Atheist	Freewill Baptist	Methodist	Odinist/Asatru	Sunni Muslim
Baha'i	General Baptist	Missouri Synod Lutheran	Pentecostal	Thelema
Baptist	Holiness	Moorish Science	Presbyterian	Unknown
Buddhist	Holiness Church of God	Mormon (LDS)	Protestant	Wicca
Christian	House of Yahweh	Muslim	Rastafarian	Zen Buddhist
Christian Science	Independent Baptist			

Sources: Response to U.S. Commission on Civil Rights' Interrogatories by the Delores Baylor Women's Correctional Institution (response to interrogatory request 10, April 9, 2008;), Fishkill Correctional Facility (response to interrogatory request 10, March 28, 2008), Lea County Correctional Facility (response to interrogatory request 10, March 31, 2008), Maine State Prison (interrogatory response to request 10, March 21, 2008), Stiles Unit (supplemental response to interrogatory request 10, June 27, 2008), Union Correctional Facility (response to interrogatory request 10 July 8, 2008), Wakulla Correctional Facility (interrogatory response to request 10, July 8, 2008).

Caption: The number of different religions the selected state institutions use to report the affiliations of inmates varies widely from 8 to 58 categories, including the designations of "none" and "other." Those with extensive religious categories specify various types of Protestants, Jews, and other groups.

Other anomalies in states' reporting that affect the interpretation of figures in table 2.2 are identified below:

- Delores J. Baylor Women's Correctional Institution: Because of the large number of inmates whose religion was not reported—28.8 percent—the facility separately collected another set of religious affiliation data based on inmates in units three through nine in an effort to reduce the size of the category. The Commission chose to employ the first set of data the facility sent because the follow-up sample substantially reduced the total count of inmates forming the basis of the analysis.
- Lea County Correctional Facility: The facility provided a percentage distribution of inmates by religion based on the total population of 1,240, which included prisoners expressing no religion. However, the Commission's interrogatory specifically stated, "Among the prisoners that professed a faith, please estimate the percentage that profess specific religions." In addition, the base of 1,240 included three Wiccans, but the correctional facility did not report this religious category separately because it constituted less than one percent.¹⁰ To correct the figures to make them more comparable to the other states depicted in table 2.2, Commission staff estimated the percentage distribution of inmates by religion based on a total that excludes inmates expressing no religion. This increased the percentage of Catholics to 52.5 (from 50.0), Baptists to 15.8 (from 15.0 percent), Christian to 21.1 (from 20.0), and Native Americans to 6.3 (from 6.0). The percentage of the other categories remained the same. Commission staff included the Wiccans, which constituted 0.3 percent.
- Fishkill Correctional Facility: Fishkill's percentages are not based on counts of official records, but are "reasonable estimates" the warden provided.¹¹

Methodology for Selecting Advocacy Groups and Faith-Based Organizations

The Commission invited nationally known advocacy groups and faith-based organizations with an interest in religious discrimination against prisoners to suggest relevant advocacy groups. It further invited additional suggestions from the recommended groups. This technique of identifying cases for study is known variously as reputational, snowball, network, or chain sampling. The advocacy groups and faith-based organizations collectively recommended 13 groups. Staff identified two others, thus bringing the total to 15. The Commission's two selection criteria to identify the final sample of advocacy groups were intended to ensure inclusion of organizations that represent incarcerated persons a) of all faiths and b) of specific faiths. The eight advocacy groups that the Commission selected were

1. American Friends Service Committee, New England Regional Office, Maine
2. Americans United for the Separation of Church and State
3. Muslim Public Affairs Committee
4. Pacific Justice Institute
5. Prison Legal News

¹⁰ Lynn Baade, program warden, Lea County Correctional Facility, telephone interview, Apr. 8, 2008.

¹¹ William Connolly, superintendent, Fishkill Correctional Facility, telephone interview, Apr. 8, 2008.

6. Sikh American Legal Defense and Education Fund
7. The National Prison Project of the American Civil Liberties Union
8. The Becket Fund for Religious Freedom

Advocacy groups and faith-based organizations identified a pool of 11 faith-based organizations. The Commission's three selection criteria were intended to ensure the inclusion of faith-based organizations that a) volunteer services to incarcerated persons, b) contract with governments to provide services to incarcerated persons in prison/jail settings, and c) represent faiths not represented among the Commission's pool of selected advocacy groups. The following four¹² faith-based organizations were selected:

1. Alpha for Prisons and Re-Entry (voluntary faith-based organization)
2. The Aleph Institute (voluntary faith-based organization)
3. Muslim Chaplain Association (voluntary faith-based organization)
4. InnerChange Freedom Initiative (contractual faith-based organization)

Profile of the Nonprofit Organizations' Missions

The Aleph Institute

Rabbi Sholom D. Lipskar founded the Aleph Institute, a nonprofit charitable institution that focuses on Jews in the military, in prison, and in the family. The organization concentrates on providing social services for families; solving religious, educational, and humanitarian problems in societal institutions; and addressing problems of the U.S. criminal justice system. For Jewish inmates, the Aleph Institute sends thousands of books, spiritual materials, Tefillin, Torah Tapes, and ritual food to encourage them to continue their spiritual education. The organization also provides a variety of counseling programs for family members of Jewish inmates and rabbinical visits to correctional facilities. Because two of the organization's primary goals are to advocate the rights of Jews to obtain kosher food and to work schedules that are consistent with the Jewish observance of the Sabbath, the Aleph Institute publishes the *Aleph Advisory* and the *Institutional Handbook of Jewish Practice and Procedure* in order to provide educational literature to wardens on Jewish rituals and holidays.¹³

Alpha for Prisons and Re-Entry

AlphaUSA sponsors Alpha for Prisons, an 11-week program that focuses on rehabilitation and personal introspection of inmates. The organization collaborates with the prisoners' correctional institutions and schedules meetings that are consistent with the prisoners' currently existing regimen. The Faith-based Re-Entry Initiative is a Christian-based re-entry program that allows prisoners to explore their faith and assists them in making a smoother transition into mainstream society after completing their prison sentences by providing a

¹² The original intent was to study three voluntary faith-based organizations. This was increased to four with the inclusion of a contractual faith-based organization.

¹³ "Prison Program," Aleph Institute, http://aleph-institute.org/programs_for_inmates.htm (last visited June 16, 2008).

separate living unit in which program participants are able to define and explore their self-identity. While the program is driven by religion, being Christian is not a requirement.¹⁴

American Friends Service Committee, New England Regional Office, Maine

The Religious Society of Friends, or Quakers, created the American Friends Service Committee (AFSC) in 1917. The AFSC strongly believes in brotherhood and tolerance of others, regardless of differences, such as religion or economic status. Bound by the organization's emphasis on the power of human and divine love, members strive to aid victims of poverty, injustice, and war.¹⁵ The AFSC's New England Regional Office in Maine heads the Wabanaki Program which focuses on educating the youth of the Wabanaki, a Native American name associated with five tribes: the Abenaki, the Penobscot, the Maliseet, the Passamaquoddy, and the Mi'kmaq.¹⁶ By encouraging collaboration of Wabanaki youth and non-Wabanaki members in this program, the AFSC promotes tolerance and prevents racism, especially towards Native Americans.¹⁷

Americans United for Separation of Church and State

Americans United for Separation of Church and State (Americans United) is a nonprofit, nonpartisan group founded in 1947 to uphold the principle of Separation of Church and State. The organization is committed to freedom of religion and tolerance. Among its members are Christians, Jews, Buddhists, Democrats, Republicans, and Independents.¹⁸ Americans United brings cases before the Supreme Court on behalf of those whose religious rights have been violated, serves as a resource for political officials, and publishes the educational magazine *Church & State*, which covers religious freedom issues.¹⁹

¹⁴ "About," Alpha for Prisons, <http://www.alphausa.org/prisons/about.htm> (last visited June 16, 2008).

¹⁵ American Friends Service Committee, Board of Directors, "Mission and Values" <http://www.afsc.org/about/mission.htm> (last visited June 19, 2008)

¹⁶ "Native Languages of the Americas: Wabanaki Confederacy (Wabenaki, Wobenaki)," <http://www.native-languages.org/wabanaki.htm> (last visited June 12, 2008).

¹⁷ "Wabanaki Program," AFSC–Maine, <http://www.afsc.org/newengland/wabanakis.htm> (last visited June 12, 2008).

¹⁸ "About American United Frequently Asked Questions," Americans United for Separation of Church and State, http://www.au.org/site/PageServer?pagename=about_faq (last visited June 17, 2008).

¹⁹ "About AU: Advocacy," Americans United for Separation of Church and State, http://www.au.org/site/PageServer?pagename=about_advocacy (last visited June 17, 2008).

"About AU: Education," Americans United for Separation of Church and State, http://www.au.org/site/PageServer?pagename=about_education (last visited June 17, 2008).

"About AU: Litigation," Americans United for Separation of Church and State, http://www.au.org/site/PageServer?pagename=about_litigation (last visited June 17, 2008).

The Becket Fund for Religious Liberty

The Becket Fund for Religious Liberty (Becket Fund) is a nonpartisan, nonprofit law firm that specializes in defending the First Amendment right to freedom of religion. It is committed to the idea that each person is entitled to practice their faith freely and receive equal treatment in society. The Becket Fund serves the public via three forums: the courts, media, and academic institutions. It strives to uphold the right of prisoners to practice the traditions of their faith.²⁰ To accomplish its goals, the Becket Fund has filed lawsuits under the Religious Land Use and Institutionalized Persons Act (RLUIPA), including, for example, against the Florida Department of Corrections and the Texas Department of Criminal Justice.²¹

InnerChange Freedom Initiative

The InnerChange Freedom Initiative is a re-entry program modeled after the life of Jesus Christ. It seeks to care for the spiritual, intellectual, emotional, and physical facets of the inmate's life while working in collaboration with the inmate's correctional facility. This organization focuses on "responsibility, education and work, care for person and property and the opportunity for a new life."²² The InnerChange Freedom Initiative re-entry program can be divided into three parts. The first focuses on the inmates developing a sense of right and wrong through spiritual or moral filters. In the second part, inmates apply their values and life skills in life like situations and often participate in offsite work programs. The third part involves each released inmate being paired with a volunteer who functions as a source of support and motivation as the inmate integrates himself back into society.²³

Muslim Chaplains Association

Chaplain Bilal Ansari founded the Muslim Chaplains Association (MCA) in 2006 to promote the dignity and worth of the individual, faith as a necessity to achieve wholeness, and spiritual care for the person, community and general society; inclusion and diversity; "justice and equality"; and "professional competency and ethical practice."²⁴ MCA promotes these values by accepting members and serving others regardless of race, ethnicity, gender, age, disability, religion, or faith group, and not by imposing its doctrine upon those with whom it confers or counsels. MCA ensures competence and professionalism in the religious vocation

²⁰ "About Us," The Becket Fund for Religious Liberty, <http://www.becketfund.org/index.php/article/82.html?PHPSESSID=3fe5c151feac908febdbcc6adb1e9800> (last visited June 16, 2008).

²¹ "Prisons," The Becket Fund for Religious Liberty, <http://www.becketfund.org/index.php/topic/8.html> (last visited June 16, 2008).

²² "About IFI," InnerChange Freedom Initiative, <http://www.ifiprison.org/contentindex.asp?ID=135> (last visited June 16, 2008).

²³ *Id.*

²⁴ "About Muslim Chaplains Association," Muslim Chaplains Association, http://www.muslimchaplains.org/about_overview.php (last visited June 20, 2008).

by providing chaplains with educational and employment resources at workshops and career events.²⁵

Muslim Public Affairs Council

The founders of the Muslim Public Affairs Council (MPAC) established the organization in 1986, based on the values of freedom and equality for all, mercy, justice, peace, and human dignity. The organization seeks to strengthen these values in the American community by providing information to the public, and to shape public policy by working with the government, media and other public policy organizations. MPAC emphasizes the importance of pluralism in leadership by encouraging Muslim Americans to become involved in government.²⁶ Its members strive to shed more light on Muslim Americans and bring attention to their aspirations.²⁷ MPAC also has created several programs, for example, the Hate Crimes Prevention Department which partners with groups such as the Anti-Defamation League to end hate crimes and discrimination targeting Muslims.²⁸

The National Prison Project of the American Civil Liberties Union

The American Civil Liberties Union (ACLU) believes that the rule of the majority must always protect the rights of the individual. The ACLU seeks to protect civil rights, specifically a person's right to privacy; First Amendment rights to freedom of speech, religion, press, and association; Fifth Amendment rights to due process, and Fourteenth Amendment rights to equal protection under the law.²⁹ It has created the National Prison Project to litigate on behalf of prisoners and work toward improved prison conditions. Since 1972, the National Prison Project has represented more than 100,000 men, women, and children and addressed prison issues such as adequate medical care for prisoners, denial of programs to HIV-positive prisoners, and violations of prisoners' rights during the Hurricane Katrina evacuation.³⁰

²⁵ "Education," Muslim Chaplains Association, <http://www.muslimchaplains.org/education.php> (last visited June 16, 2008).

²⁶ "Our Vision, Our Mission," Muslim Public Affairs Council, <http://www.mpac.org/about/vision-mission/> (last visited June 12, 2008).

²⁷ "MPAC Timeline 20 Years of Service to the Community," About MPAC, <http://www.mpac.org/about/timeline/> (last visited June 12, 2008).

²⁸ "About the Hate Crime Prevention Department," Hate Crime Prevention, <http://www.mpac.org/hate-crime-prevention/history/> (last visited June 12, 2008).

²⁹ "About Us," ACLU American Civil Liberties Union, <http://www.aclu.org/about/index.html> (last visited June 16, 2008).

³⁰ "ACLU Lawsuit Charges Grossly Inadequate Medical Care at State Prison in Nevada," ACLU American Civil Liberties Union, Mar. 6, 2008, <http://www.aclu.org/prison/medical/34366prs20080306.html> (last visited June 16, 2008).

"Alabama Department of Corrections Continues to Deny Programs to HIV-positive Prisoner," ACLU American Civil Liberties Union, Dec. 11, 2007, <http://www.aclu.org/prison/restrict/33120res20071211.html> (last visited June 16, 2008).

Pacific Justice Institute

The Pacific Justice Institute (PJI) is a nonprofit legal defense organization that provides free legal assistance. The group specializes in cases relating to freedom of religion, parental rights, and other civil liberties. PJI's cases may involve "harassment because of [one's] religious faith, students' and teachers' rights to share their faith at school, and curtailment of evangelism by the government."³¹ The organization serves as an educational resource and has most recently commented on legal issues pertaining to gay marriage and anti-child pornography laws. It also publishes a variety of literature.³²

Prison Legal News

Prison Legal News (PLN) is a monthly magazine focusing on such issues as prison conditions, religious freedom, free speech, prison rape, and abuse of female prisoners in correctional institutions in the United States, both state and federal, and in other parts of the world. PLN's articles are written by a range of sources including prisoners themselves. Prisoners, civil and criminal attorneys, prison rights activists, and journalists subscribe to this magazine.³³

Sikh American Legal Defense and Education Fund

The Sikh American Legal Defense and Education Fund (SALDEF) is the largest and oldest Sikh American national organization. It strives to uphold the civil rights of Sikh Americans and works with government and media representatives, lawyers, and journalists to educate the public about Sikh culture. Through multiple publications and outreach programs, SALDEF helps media representatives provide an accurate portrayal of Sikhs. SALDEF also provides legal assistance to those battling workplace and housing discrimination and other violations of civil liberties. To date, SALDEF is the only Sikh organization that is a member of the Leadership Conference for Civil Rights. Its representatives have appeared before congressional committees on such issues as hate crimes, racial profiling, and workplace discrimination.³⁴

"ACLU Report Details Horrors Suffered by Orleans Parish Prisoners in Wake of Hurricane Katrina," ACLU American Civil Liberties Union, Aug. 10, 2006. <http://www.aclu.org/prison/conditions/26421prs20060810.html> (last visited June 16, 2008).

³¹ "About Us," Pacific Justice Institute, <http://www.pacificjustice.org/aboutus/QA/> (last visited June 16, 2008).

³² "Press Releases," Pacific Justice Institute, <http://www.pacificjustice.org/resources/news/> (last visited June 17, 2008).

³³ "Frequently Asked Questions," Prison Legal News Dedicated to Protecting Human Rights, <http://www.prisonlegalnews.org/FAQ.aspx> (last visited June 16, 2008).

³⁴ "SALDEF Mission," Sikh American Legal Defense and Education Fund (SALDEF), <http://www.saldef.org/content.aspx?z=11&a=1421&title=About%20US%20>>%20Mission> (last visited June 16, 2008).

APPENDIX C: RELIGIOUS GRIEVANCES AT SELECTED FEDERAL/STATE PRISONS, COUNTY JAILS

Table C.1a

Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the Federal Prisons, Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	2,815	2,984	2,855	2,659	2,718	3,243	3,818	3,841	4,010	4,099	4,345	37,387
Religious grievances	77	69	75	63	87	86	71	91	94	150	114	977
% of all grievances for FY	2.7	2.3	2.6	2.4	3.2	2.7	1.9	2.4	2.3	3.7	2.6	2.6
No. of religious grievances granted	10	7	7	5	6	5	4	8	3	9	4	68
% of all religious grievances for FY	13.0	10.1	9.3	7.9	6.9	5.8	5.6	8.8	3.2	6.0	3.5	7.0
Nature of religious grievances:												
Access to religious program	42	43	43	34	42	56	45	50	54	80	56	545
% of all religious grievances for FY	54.5	62.3	57.3	54.0	48.3	65.1	63.4	54.9	57.4	53.3	49.1	55.8
Number granted	5	5	2	3	4	3	3	3	3	2	3	36
% of specific religious grievances for FY	11.9	11.6	4.7	8.8	9.5	5.4	6.7	6.0	5.6	2.5	5.4	6.6
Access to religious diet	7	5	6	8	15	13	5	7	8	16	15	105
% of all religious grievances for FY	16.7	11.6	14.0	23.5	35.7	23.2	11.1	14.0	14.8	20.0	26.8	19.3
Number granted	0	1	0	1	1	1	0	1	0	1	1	7
% of specific religious grievances for FY	0.0	20.0	0.0	12.5	6.7	7.7	0.0	14.3	0.0	6.3	6.7	6.7
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	28	21	26	21	30	17	21	34	32	54	43	327
% of all religious grievances for FY	36.4	30.4	34.7	33.3	34.5	19.8	29.6	37.4	34.0	36.0	37.7	33.5
Number granted	5	1	5	1	1	1	1	4	0	6	0	25
% of specific religious grievances for FY	17.9	4.8	19.2	4.8	3.3	5.9	4.8	11.8	0.0	11.1	0.0	7.6

Sources: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008; U.S. Department of Justice, Federal Bureau of Prisons, Supplemental Response to U.S. Commission on Civil Rights' Interrogatories, Supplemental Response to Interrogatory Request 17, July 7, 2008.

Caption: For the federal prisons as a group, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 3.2 to 13.0. The figure for the period as a whole is 7.0 percent.

Table C.1b

Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the USP Florence ADMAX Facility, Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	556	797	685	565	734	1,211	1,231	1,083	1,199	1,505	1,742	11,308
Religious grievances	25	32	21	13	17	16	17	36	32	47	37	293
% of all grievances for FY	4.5	4.0	3.1	2.3	2.3	1.3	1.4	3.3	2.7	3.1	2.1	2.6
No. of religious grievances granted	4	0	4	0	2	2	1	1	0	1	0	15
% of all religious grievances for FY	16.0	0.0	19.0	0.0	11.8	12.5	5.9	2.8	0.0	2.1	0.0	5.1
Nature of religious grievances:												
Access to religious program	12	17	11	4	7	6	10	20	18	27	15	147
% of all religious grievances for FY	48.0	53.1	52.4	30.8	41.2	37.5	58.8	55.6	56.3	57.4	40.5	50.2
Number granted	3	0	1	0	1	0	1	0	0	0	0	6
% of specific religious grievances for FY	25.0	0.0	9.1	0.0	14.3	0.0	10.0	0.0	0.0	0.0	0.0	4.1
Access to religious diet	3	1	2	0	0	3	0	0	1	0	2	12
% of all religious grievances for FY	12.0	3.1	9.5	0.0	0.0	18.8	0.0	0.0	3.1	0.0	5.4	4.1
Number granted	0	0	0	0	0	1	0	0	0	0	0	1
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	33.3	0.0	0.0	0.0	0.0	0.0	8.3
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	10	14	8	9	10	7	7	16	13	20	20	134
% of all religious grievances for FY	40.0	43.8	38.1	69.2	58.8	43.8	41.2	44.4	40.6	42.6	54.1	45.7
Number granted	1	0	3	0	1	1	0	1	0	1	0	8
% of specific religious grievances for FY	10.0	0.0	37.5	0.0	10.0	14.3	0.0	6.3	0.0	5.0	0.0	6.0

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008.

Caption: At the USP Florence ADMAX Facility, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 19.0. The figure for the period as a whole is 5.1 percent.

Table C.1c
Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the FCI La Tuna,
Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	200	176	182	126	211	169	209	199	310	249	258	2289
Religious grievances	6	2	0	2	6	7	7	2	5	6	29	72
% of all grievances for FY	3.0	1.1	0.0	1.6	2.8	4.1	3.3	1.0	1.6	2.4	11.2	3.1
No. of religious grievances granted	0	1	0	0	0	0	0	0	0	0	0	1
% of all religious grievances for FY	0.0	50.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.4
Nature of religious grievances:												
Access to religious program	4	2	0	2	5	5	2	0	0	4	23	47
% of all religious grievances for FY	66.7	100.0	0.0	100.0	83.3	71.4	28.6	0.0	0.0	66.7	79.3	65.3
Number granted	0	1	0	0	0	0	0	0	0	0	0	1
% of specific religious grievances for FY	0.0	50.0	0.0	0.0	0.0	0.0	0.0	0.0		0.0	0.0	2.1
Access to religious diet	0	0	0	0	0	2	2	2	2	2	2	12
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	28.6	100.0	40.0	33.3	6.9	16.7
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	2	0	0	0	1	0	3	0	3	0	4	13
% of all religious grievances for FY	33.3	0.0	0.0	0.0	16.7	0.0	42.9	0.0	60.0	0.0	13.8	18.1
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008.

Caption: At the FCI La Tuna, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 50.0. The figure for the period as a whole is 1.4 percent.

Table C.1d
Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the USP Marion,
Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	440	259	253	295	357	452	392	574	531	503	174	4,230
Religious grievances	6	7	6	17	31	27	11	19	17	10	4	155
% of all grievances for FY	1.4	2.7	2.4	5.8	8.7	6.0	2.8	3.3	3.2	2.0	2.3	3.7
No. of religious grievances granted	2	0	0	3	0	0	1	1	1	1	0	9
% of all religious grievances for FY	33.3	0.0	0.0	17.6	0.0	0.0	9.1	5.3	5.9	10.0	0.0	5.8
Nature of religious grievances:												
Access to religious program	1	4	4	13	18	17	5	5	11	4	4	86
% of all religious grievances for FY	16.7	57.1	66.7	76.5	58.1	63.0	45.5	26.3	64.7	40.0	100.0	55.5
Number granted	0	0	0	3	0	0	1	0	1	0	0	5
% of specific religious grievances for FY	0.0	0.0	0.0	23.1	0.0	0.0	20.0	0.0	9.1	0.0	0.0	5.8
Access to religious diet	1	1	1	2	9	4	0	2	1	0	0	21
% of all religious grievances for FY	16.7	14.3	16.7	11.8	29.0	14.8	0.0	10.5	5.9	0.0	0.0	13.5
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	4	2	1	2	4	6	6	12	5	6	0	48
% of all religious grievances for FY	66.7	28.6	16.7	11.8	12.9	22.2	54.5	63.2	29.4	60.0	0.0	31.0
Number granted	2	0	0	0	0	0	0	1	0	1	0	4
% of specific religious grievances for FY	50.0	0.0	0.0	0.0	0.0	0.0	0.0	8.3	0.0	16.7	0.0	8.3

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008.

Caption: At the USP Marion, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 33.3. The figure for the period as a whole is 5.8 percent.

Table C.1e
Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the USP Lewisburg,
Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	385	336	289	549	429	474	663	608	570	376	492	5,171
Religious grievances	8	4	1	6	15	12	14	11	18	24	13	126
% of all grievances for FY	2.1	1.2	0.3	1.1	3.5	2.5	2.1	1.8	3.2	6.4	2.6	2.4
No. of religious grievances granted	0	1	0	0	1	1	2	2	1	3	2	13
% of all religious grievances for FY	0.0	25.0	0.0	0.0	6.7	8.3	14.3	18.2	5.6	12.5	15.4	10.3
Nature of religious grievances:												
Access to religious program	6	3	1	5	3	9	9	6	9	7	3	61
% of all religious grievances for FY	75.0	75.0	100.0	83.3	20.0	75.0	64.3	54.5	50.0	29.2	23.1	48.4
Number granted	0	1	0	0	1	1	1	0	1	0	1	6
% of specific religious grievances for FY	0.0	33.3	0.0	0.0	33.3	11.1	11.1	0.0	11.1	0.0	33.3	9.8
Access to religious diet	0	0	0	0	1	2	0	0	2	2	1	8
% of all religious grievances for FY	0.0	0.0	0.0	0.0	6.7	16.7	0.0	0.0	11.1	8.3	7.7	6.3
Number granted	0	0	0	0	0	0	0	0	0	0	1	1
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	100.0	12.5
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	2	1	0	1	11	1	5	5	7	15	9	57
% of all religious grievances for FY	25.0	25.0	0.0	16.7	73.3	8.3	35.7	45.5	38.9	62.5	69.2	45.2
Number granted	0	0	0	0	0	0	1	2	0	3	0	6
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	20.0	40.0	0.0	20.0	0.0	10.5

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008.

Caption: At the USP Lewisburg, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 25.0. The figure for the period as a whole is 10.3 percent.

Table C.1f
Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the FCI Schuylkill, Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	115	194	167	161	136	195	309	271	196	295	292	2,331
Religious grievances	0	0	4	9	5	8	3	4	1	5	5	44
% of all grievances for FY	0.0	0.0	2.4	5.6	3.7	4.1	1.0	1.5	0.5	1.7	1.7	1.9
No. of religious grievances granted	0	0	0	0	1	1	0	0	0	1	1	4
% of all religious grievances for FY	0.0	0.0	0.0	0.0	20.0	12.5	0.0	0.0	0.0	20.0	20.0	9.1
Nature of religious grievances:												
Access to religious program	0	0	1	2	2	5	2	3	1	3	3	22
% of all religious grievances for FY	0.0	0.0	25.0	22.2	40.0	62.5	66.7	75.0	100.0	60.0	60.0	50.0
Number granted	0	0	0	0	1	1	0	0	0	0	1	3
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	50.0	20.0	0.0	0.0	0.0	0.0	33.3	13.6
Access to religious diet	0	0	0	1	1	1	1	1	0	0	1	6
% of all religious grievances for FY	0.0	0.0	0.0	11.1	20.0	12.5	33.3	25.0	0.0	0.0	20.0	13.6
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	0	0	3	6	2	2	0	0	0	2	1	16
% of all religious grievances for FY	0.0	0.0	75.0	66.7	40.0	25.0	0.0	0.0	0.0	40.0	20.0	36.4
Number granted	0	0	0	0	0	0	0	0	0	1	0	1

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008.

Caption: At the FCI Schuylkill, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 20.0. The figure for the period as a whole is 9.1 percent.

Table C.1g
Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the USP Terre Haute, Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	489	428	473	270	300	289	312	416	603	761	884	5,225
Religious grievances	17	6	26	10	7	2	9	3	12	45	20	157
% of all grievances for FY	3.5	1.4	5.5	3.7	2.3	0.7	2.9	0.7	2.0	5.9	2.3	3.0
No. of religious grievances granted	1	1	2	0	0	0	0	0	0	3	1	8
% of all religious grievances for FY	5.9	16.7	7.7	0.0	0.0	0.0	0.0	0.0	0.0	6.7	5.0	5.1
Nature of religious grievances:												
Access to religious program	11	5	9	6	4	1	9	3	8	29	6	91
% of all religious grievances for FY	64.7	83.3	34.6	60.0	57.1	50.0	100.0	100.0	66.7	64.4	30.0	58.0
Number granted	0	0	0	0	0	0	0	0	0	2	1	3
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	6.9	16.7	3.3
Access to religious diet	1	1	3	3	2	0	0	0	0	6	5	21
% of all religious grievances for FY	5.9	16.7	11.5	30.0	28.6	0.0	0.0	0.0	0.0	13.3	25.0	13.4
Number granted	0	1	0	0	0	0	0	0	0	1	0	2
% of specific religious grievances for FY	0.0	100.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	16.7	0.0	9.5
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	5	0	14	1	1	1	0	0	4	10	9	45
% of all religious grievances for FY	29.4	0.0	53.8	10.0	14.3	50.0	0.0	0.0	33.3	22.2	45.0	28.7
Number granted	1	0	2	0	0	0	0	0	0	0	0	3
% of specific religious grievances for FY	20.0	0.0	14.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	6.7

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008.

Caption: At the USP Terre Haute, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 16.7. The figure for the period as a whole is 5.1 percent.

Table C.1h
Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the USP Lompoc, Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	400	504	490	487	418	268	520	455	225	164	242	4,173
Religious grievances	8	7	14	3	2	1	2	13	3	4	3	60
% of all grievances for FY	2.0	1.4	2.9	0.6	0.5	0.4	0.4	2.9	1.3	2.4	1.2	1.4
No. of religious grievances granted	2	2	0	1	0	0	0	3	0	0	0	8
% of all religious grievances for FY	25.0	28.6	0.0	33.3	0.0	0.0	0.0	23.1	0.0	0.0	0.0	13.3
Nature of religious grievances:												
Access to religious program	4	4	14	2	1	1	1	11	1	3	2	44
% of all religious grievances for FY	1.0	0.8	2.9	0.4	0.2	0.4	0.2	2.4	0.4	1.8	0.8	1.1
Number granted	1	1	0	0	0	0	0	3	0	0	0	5
% of specific religious grievances for FY	25.0	25.0	0.0	0.0	0.0	0.0	0.0	27.3	0.0	0.0	0.0	11.4
Access to religious diet	2	1	0	1	1	0	1	1	2	0	1	10
% of all religious grievances for FY	0.5	0.2	0.0	0.2	0.2	0.0	0.2	0.2	0.9	0.0	0.4	0.2
Number granted	0	0	0	1	0	0	0	0	0	0	0	1
% of specific religious grievances for FY	0.0	0.0	0.0	100.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	10.0
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	2	2	0	0	0	0	0	1	0	1	0	6
% of all religious grievances for FY	0.5	0.4	0.0	0.0	0.0	0.0	0.0	0.2	0.0	0.6	0.0	0.1
Number granted	1	1	0	0	0	0	0	0	0	0	0	2
% of specific religious grievances for FY	50.0	50.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	33.3

Source: U.S. Department of Justice, Federal Bureau of Prisons, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 6, 2008.

Caption: At the USP Lompoc, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 33.3. The figure for the period as a whole is 13.3 percent.

Table C.1i
Magnitude, Trend, Nature, and Percent of Religious Grievances Granted at the FCI Danbury,
Fiscal Years 1997–2007

Grievances	Fiscal Year											Total
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
All grievances	230	290	316	206	133	185	182	235	376	246	261	2,660
Religious grievances	7	11	3	3	4	13	8	3	6	9	3	70
% of all grievances for FY	3.0	3.8	0.9	1.5	3.0	7.0	4.4	1.3	1.6	3.7	1.1	2.6
No. of religious grievances granted	1	2	1	1	2	1	0	1	1	0	0	10
% of all religious grievances for FY	14.3	18.2	33.3	33.3	50.0	7.7	0.0	33.3	16.7	0.0	0.0	14.3
Nature of religious grievances:												
Access to religious program	4	8	3	0	2	12	7	2	6	3	0	47
% of all religious grievances for FY	57.1	72.7	100.0	0.0	50.0	92.3	87.5	66.7	100.0	33.3	0.0	67.1
Number granted	1	2	1	0	1	1	0	0	1	0	0	7
% of specific religious grievances for FY	25.0	25.0	33.3	0.0	50.0	8.3	0.0	0.0	16.7	0.0	0.0	14.9
Access to religious diet	0	1	0	1	1	1	1	1	0	6	3	15
% of all religious grievances for FY	0.0	9.1	0.0	33.3	25.0	7.7	12.5	33.3	0.0	66.7	100.0	21.4
Number granted	0	0	0	0	1	0	0	1	0	0	0	2
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	100.0	0.0	0.0	100.0	0.0	0.0	0.0	13.3
Religious rituals	0	0	0	0	0	0	0	0	0	0	0	0
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Number granted	0	0	0	0	0	0	0	0	0	0	0	0
% of specific religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Delivery/preparation of religious diet	3	2	0	2	1	0	0	0	0	0	0	8
% of all religious grievances for FY	42.9	18.2	0.0	66.7	25.0	0.0	0.0	0.0	0.0	0.0	0.0	11.4
Number granted	0	0	0	1	0	0	0	0	0	0	0	1
% of specific religious grievances for FY	0.0	0.0	0.0	50.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	12.5

Source: U.S. Department of Justice, Federal Bureau of Prisons, Supplemental Response to U.S. Commission on Civil Rights' Interrogatories, Supplemental Response to Interrogatory Request 17, July 7, 2008.

Caption: At the FCI Danbury, of the religious grievances filed from fiscal years 1997 through 2007, the percentage granted ranged from 0.0 to 50.0. The figure for the period as a whole is 14.3 percent.

Table C.2a
Magnitude, Trend, and Nature of Religious Grievances at the Maine State Prison, Fiscal Years 2002–2007

	Fiscal Year						Total
	2002	2003	2004	2005	2006	2007	
Panel A: Grievances seeking informal resolution	Not tracked						
Panel B: Grievances seeking formal resolution							
All grievances	1,017	449	474	522	440	465	3,367
Religious grievances	10	1	14	6	10	4	45
% all grievances for FY	1.0	0.2	3.0	1.1	2.3	0.9	1.3
Nature of religious grievances:							
Denied religious items	0	1	3	1	1	2	8
% of all religious grievances for FY	0.0	100.0	21.4	16.7	10.0	50.0	17.8
Denied religious groups*	3	0	4	1	5	0	13
% of all religious grievances for FY	30.0	0.0	28.6	16.7	50.0	0.0	28.9
Denied diet/food issues	5	0	7	3	3	0	18
% of all religious grievances for FY	50.0	0.0	50.0	50.0	30.0	0.0	40.0
Denied religious ceremony	2	0	0	1	1	2	6
% of all religious grievances for FY	20.0	0.0	0.0	16.7	10.0	50.0	13.3

Note: Religious grievance categories are as presented by the Maine State Prison. With respect to the category "Denied religious groups," it offers three examples at the request of the Commission. These are "not allowed to go to a religious service that was held during a recreation period," "...denied exercise of religion because [it was claimed] that he was praying too loudly while in his cell" and "...denied Wiccan Bible while [pagan inmate] was in protective custody."

Sources: Maine State Prison, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, March 21, 2008; E-mail from Robert Costigan, Prison Administrative Coordinator, Maine State Prison, to Sock-Foon MacDougall, Social Scientist, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights (April 3, 2008, 10:18 a.m. EDT) (on file with the commission).

Caption: At the Maine State Prison, for the period fiscal years 2002–2007 as a whole, most of the religious grievances filed seeking formal resolution, 40.0 percent, come under the category "Denied diet/food."

Table C.2b
Magnitude and Trend of Religious Grievances at the Fishkill Correctional Institution, Fiscal Years 2004–2007

	Fiscal Year				Total
	2004	2005	2006	2007	
Panel A: Grievances seeking informal resolution	Not tracked				
Panel B: Grievances seeking formal resolution					
All grievances	1,127	1,446	1,371	1,617	5,561
Religious grievances	6	29	14	23	72
% all grievances for FY	0.5	2.0	1.0	1.4	1.3
Nature of religious grievances:	Not available				

Source: Fishkill Correctional Institution, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, March 28, 2008.

Caption: At the Fishkill Correctional Institution, from fiscal years 2004 to 2007, religious grievances as a proportion of all grievances filed seeking formal resolution ranged from 0.5 to 2.0 percent. The figure for the period as a whole is 1.3 percent.

Table C.2c
Magnitude, Trend, and Nature of Religious Grievances at the Lea County Correctional Facility,
Fiscal Years 1998–2007

	Fiscal Year										Total
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	
Panel A: Grievances seeking informal resolution											
All grievances								1,482	2,117	1,831	5,430
Religious grievances								17	25	31	73
% all grievances for FY								1.1	1.2	1.7	1.3
Nature of religious grievances:											
Denied religious services								3	8	12	23
% of all religious grievances for FY								17.6	32.0	38.7	31.5
Sweat Lodge related								12	14	13	39
% of all religious grievances for FY								70.6	56.0	41.9	53.4
Denied religious Items								2	2	6	10
% of all religious grievances for FY								11.8	8.0	19.4	13.7
Disrespectful of Native American religious items								0	1	0	1
% of all religious grievances for FY								0.0	4.0	0.0	1.4
Panel B: Grievances seeking formal resolution											
All grievances	678	1,780	1,207	844	749	671	646	507	680	587	8,349
Religious grievances	0	59	0	0	5	10	4	4	3	6	91
% of all religious grievances for FY	0.0	3.3	0.0	0.0	0.7	1.5	0.6	0.8	0.4	1.0	1.1
Nature of religious grievances:											
Denied religious services	0	3	0	0	1	0	0	0	1	5	10
% of all religious grievances for FY	0.0	5.1	0.0	0.0	20.0	0.0	0.0	0.0	33.3	83.3	11.0
Disrespectful of Native American religious items	0	0	0	0	1	1	1	0	0	0	3
% of all religious grievances for FY	0.0	0.0	0.0	0.0	20.0	10.0	25.0	0.0	0.0	0.0	3.3
Denied religious items	0	0	0	0	1	4	0	3	1	1	10
% of all religious grievances for FY	0.0	0.0	0.0	0.0	20.0	40.0	0.0	75.0	33.3	16.7	11.0
Sweat Lodge related	0	56	0	0	1	5	2	1	1	0.0	66
% of all religious grievances for FY	0.0	94.9	0/0	0.0	20.0	50.0	50.0	25.0	33.3	0.0	72.5
Denied vegetarian diet	0	0	0	0	1	0	0	0	0	0.0	1
% of all religious grievances for FY	0.0	0.0	0.0	0.0	20.0	0.0	0.0	0.0	0.0	0.0	1.1
Forced to participate in Christmas celebrations	0	0	0	0	0	0	1	0	0	0	1
% of all religious grievances for FY	0.0	0.0	0.0	0.0	0.0	0.0	25.0	0.0	0.0	0.0	1.1

Note: Some religious grievances have been appropriately aggregated into categories for more meaningful analysis. The aggregated categories and their respective grievances are shown below.

Panel A:

Denied religious services: not allowed to attend services, service cancelled, different Native American tribe's ceremonies.

Disrespectful of Native American religious items: staff handling of Native American religious items

Denied religious items: Islamic Items, not ordered, prayer oil denied, Satanic items denied, not allowed to keep Native American religious items in cell, not allowed to wear religious cloth.

Sweat Lodge Ceremony related: pallet wood for Sweat Lodge, more wood for Sweat Lodge, Sweat Lodge cancelled, let out late for Sweat Lodge ceremony.

Panel B:

Denied religious services: not able to go to services, access a room for service, not allowed to preach faith, different Native American tribe's ceremonies.

Disrespectful of Native American religious items: loss of peace pipe, search of medicine bag.

Denied religious items: not allowed to order Wicca items, not allowed anointing oil, not allowed to wear regalia, cloths, not receiving Muslim order, not allowed Satanic items.

Sweat Lodge Ceremony related: firewood for Sweat Lodge Ceremony, cut hair burned at Sweat Lodge, not allowed to go to Sweat Lodge Ceremony, no herbs and tobacco for Sweat Lodge Ceremony.

Source: Lea County Correctional Facility, Response to U.S. Commission on Civil Rights' Interrogatories Response to Interrogatory Request 17, March 31, 2008.

Caption: At the Lea County Correctional Institution, for the period fiscal years 2005–2007 as a whole, most of the religious grievances filed seeking informal resolution, 53.4 percent, come under the category “Sweat Lodge Related.” For those seeking formal resolution, for the period fiscal years 1998–2007 as a whole, most, 72.5 percent, also come under the category “Sweat Lodge Related.”

Table C.2d
Magnitude and Trend of Religious Grievances at the Baylor Women's Correctional Institution,
Fiscal Years 2004–2007

	Fiscal Year				Total
	2004	2005	2006	2007	
Panel A: Grievances seeking informal resolution					
All grievances	41	132	137	428	738
Religious grievances	3	6	1	0	10
% all grievances for FY	7.3	4.5	0.7	0.0	1.4
Nature of religious grievances:					
Denied association with other Muslims	1	0	0	0	1
% of all religious grievances for FY	33.3	0.0	0.0	0.0	10.0
Pertaining to various aspects of					
Religious observances	2	6	1	0	9
% of all religious grievances for FY	66.7	100.0	100.0	0.0	90.0
Panel B: Grievances seeking formal resolution					
All grievances	41	132	137	428	738
Religious grievances	2	2	1	0	5
% all grievances for FY	4.9	1.5	0.7	0.0	0.7
Nature of religious grievances:					
Not allowed to wear specific garment	1	0	0	0	1
% of all religious grievances for FY	50.0	0.0	0.0	0.0	20.0
Denied attendance at Muslim functions	1	0	0	0	1
% of all religious grievances for FY	50.0	0.0	0.0	0.0	20.0
Pertaining to various aspects of religious observances					
	0	2	1	0	3
% of all religious grievances for FY	0.0	100.0	100.0	0.0	60.0

Note: Some religious grievances have been appropriately aggregated into categories for more meaningful analysis. The aggregated categories and their respective grievances are shown below.

Panel A: Denied religious services/performance of prayers/advisor visits/proper teacher: seeks to have teacher from specific sect, cannot attend Muslim teachings, loss of church privileges, not allowed to attend chapel, denied church service, Muslim advisor not allowed to visit, required to be outside during prayers.

Panel B: Denied religious services/proper teacher: new Muslims cannot attend service, not allowed to attend chapel.

Source: Delores J. Baylor Women's Correctional Institution, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, April 9, 2008.

Caption: At the Baylor Women's Correctional Institution, for the period fiscal years 2004–2007 as a whole, most of the religious grievances filed seeking informal resolution, 90.0 percent, come under the category "Pertaining to various aspects of religious observances." For those seeking formal resolution, for the same period as a whole, most, 60.0 percent, also come under the category "Pertaining to various aspects of religious observances."

Table C.2e

Magnitude, Trend, and Nature of Religious Grievances at the California State Prison–Solano, Fiscal Years 2004–2007

	Fiscal Year				Total
	2004	2005	2006	2007	
Panel A: Grievances seeking informal resolution	Not tracked				
Panel B: Grievances seeking formal resolution					
All grievances	4,943	4,903	5,711	5,424	20,981
Religious grievances	7	19	18	30	74
% all grievances for FY	0.1	0.4	0.3	0.6	0.4
Nature of religious grievances:					
Denied access	3	13	12	15	43
% of all religious grievances for FY	42.9	68.4	66.7	50.0	58.1
Denied religious diet cards	1	1	1	1	4
% of all religious grievances for FY	14.3	5.3	5.6	3.3	5.4
Denied religious services	1	3	4	4	12
% of all religious grievances for FY	14.3	15.8	22.2	13.3	16.2
Staff complaints	1	1	0	5	7
% of all religious grievances for FY	14.3	5.3	0.0	16.7	9.5
Denied religious supplies	0	1	1	4	6
% of all religious grievances for FY	0.0	5.3	5.6	13.3	8.1

Note: Religious grievance categories as presented by the California State Prison–Solano.

Source: California State Prison–Solano, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, May 21, 2008.

Caption: At the California State Prison–Solano, for the period fiscal years 2004–2007 as a whole, most of the religious grievances filed seeking formal resolution, 58.1 percent, come under the category “Denied access.”

Table C.2f
Magnitude, Trend, and Nature of Religious Grievances at the California Correctional Institution–Tehachapi, Fiscal Years 2004–2007

	Fiscal Year				Total
	2004	2005	2006	2007	
Panel A: Grievances seeking informal resolution					
All grievances		1,059	1,069	579	2,707
Religious grievances		8	5	0	13
% all grievances for FY		0.8	0.5	0.0	0.5
Nature of religious grievances:					
Denied religious Items/literature		2	1	0	3
% of all religious grievances for FY		25.0	20.0	0.0	23.1
Denial related to dietary accommodation		1	1	0	2
% of all religious grievances for FY		12.5	20.0	0.0	15.4
Pertaining to various aspects of religious observances		3	2	0	5
% of all religious grievances for FY		37.5	40.0	0.0	38.5
Denied receipt of religious items separate from hobby program items		1	0	0	1
% of all religious grievances for FY		12.5	0.0	0.0	7.7
Request Duran to be considered as religion		0	1	0	1
% of all religious grievances for FY		0.0	20.0	0.0	7.7
Panel B: Grievances seeking formal resolution					
All grievances	3,779	5,033	4,193	3,915	16,920
Religious grievances	12	12	15	5	44
% all grievances for FY	0.3	0.2	0.4	0.1	0.3
Nature of religious grievances:					
Denial related to diet	2	0	1	0	3
% of all religious grievances. for FY	16.7	0.0	6.7	0.0	6.8
Denied religious items	1	1	1	0	3
% of all religious grievances for FY	8.3	8.3	6.7	0.0	6.8
Denied supplies and information	0	4	3	0	7
% of all religious grievances for FY	0.0	33.3	20.0	0.0	15.9
Pertaining to various aspects of religious observances	1	3	9	4	17
% of all religious grievances for FY	8.3	25.0	60.0	80.0	38.6
Denied more time in group cells/for medication	0	3	0	0	3
% of all religious grievances. for FY	0.0	25.0	0.0	0.0	6.8
Request to rescind religious representative denied	0	0	1	0	1
% of all religious grievances for FY	0.0	0.0	6.7	0.0	2.3
Request for \$50,000 for denial of prayer services denied	0	0	0	1	1
% of all religious grievances for FY	0.0	0.0	0.0	20.0	2.3
Nature of grievance unavailable	8	1	0	0	9
% of all religious grievances for FY	66.7	8.3	0.0	0.0	20.5

Note: Some religious grievances have been appropriately aggregated into categories for more meaningful analysis. The aggregated categories and their respective grievances are shown below.

Panel A—Denied religious literature/items: Muslim literature, wants American Indian knickknack instead of tobacco, Buddhist wants to order religious material, Hauamal-Wotanist wants copies of religious literature.

Denial related to dietary accommodation: Ramadan Special diet, Muslim requesting Ramadan meals.

Pertaining to various aspects of religious services: Ramadan accommodation, American Indian means to conduct services, one visit per week to the chapel, Muslim chaplain to conduct rounds once per week, Hauamal-Wotanist requesting chaplain's response to a request for interview regarding his beliefs.

Panel B—Denial pertaining to diet: Wants meals prepared in proper way, wants a religious diet card.

Denied religious items: Wants religious books, wants American Indian knickknack instead of tobacco.

Denial related to supplies and information: Wants supplies to build a new Sweat Lodge, wants information and materials.

Pertaining to various aspects of religious services: Wants religious ceremonies conducted, wants more services, wants chapel made available for religious activities, wants to have weekly meetings with spiritual leader and weekly drum ceremony, wants prior notice of cancellation of religious services, requests chaplain conduct more rounds than one per week, requests religious services, wants religious services and literature, wants freedom of religion and the chapel made available, wants to participate in Yule Tide religious services, lack of response from chaplain, wants to practice his religion, wants services, classes, materials and artifacts and allocate funds and an inmate minister program.

Denied more time in group cells/for meditation: Wants time in group cells, wants time for meditation.

Source: California Correctional Institution—Tehachapi, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, May 21, 2008.

Caption: At the California Correctional Institution, for the period fiscal years 2005–2007 as a whole, most of the religious grievances filed seeking informal resolution, 38.50 percent, come under the category “Pertaining to various aspects of religious observances.” For those seeking formal resolution, for the period fiscal years 2004–2007 as a whole, most, 38.6 percent, also come under the category “Pertaining to various aspects of religious observances.”

Table C.2g
Magnitude, Trend, and Nature of Religious Grievances at the Stiles Unit, Fiscal Years 2003–2007

	Fiscal Year					Total
	2003	2004	2005	2006	2007	
Panel A: Grievances seeking resolution at the prison level						
All grievances.	9,431	7,021	8,347	7,449	6,996	39,244
Religious grievances	99	51	65	39	123	377
% all grievances for FY	1.0	0.7	0.8	0.5	1.8	1.0
Nature of religious grievances:						
Relates to religious Service/membership	66	36	44	30	61	237
% of all religious grievances for FY	66.7	70.6	67.7	76.9	49.6	62.9
Relates to religious paraphernalia/items	8	9	14	7	9	47
% of all religious grievances for FY	8.1	17.6	21.5	17.9	7.3	12.5
Relates to religious grooming	1	4	4	0	0	9
% of all religious grievances for FY	1.0	7.8	6.2	0.0	0.0	2.4
Discrimination based on religion	9	2	3	2	53	69
% of all religious grievances for FY	9.1	3.9	4.6	5.1	43.1	18.3
Relates to processing of religious grievance	15	0	0	0	0	15
% of all religious grievances for FY	15.2	0.0	0.0	0.0	0.0	4.0
Panel B: Grievances seeking resolution at the regional level						
All grievances.	1,805	1,742	2,389	2,310	1,947	10,193
Religious grievances	27	14	14	13	58	126
% all grievances for FY	1.5	0.8	0.6	0.6	3.0	1.2
Nature of religious grievances:						
Realities to religious service/membership	23	11	7	11	18	70
% of all religious grievances for FY	85.2	78.6	50.0	84.6	31.0	55.6
Relates to religious paraphernalia/items	2	2	7	2	4	17
% of all religious grievances for FY	7.4	14.3	50.0	15.4	6.9	13.5
Discrimination based on religion	2	1	0	0	36	39
% of all religious grievances for FY	7.4	7.1	0.0	0.0	62.1	31.0

Note: Religious grievance categories as presented by the Stiles Unit.

Source: Stiles Unit, Supplemental Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, June 27, 2008.

Caption: At the Stiles Unit, for the period fiscal years 2003–2007 as a whole, most of the religious grievances filed seeking informal resolution, 62.9 percent, come under the category “Relating to religious services/membership.” For those seeking formal resolution, for the same period as a whole, most, 55.6 percent, also come under the category “Relating to religious services/membership.”

Table C.3

Magnitude and Trend of Religious Grievances in the Los Angeles County Jail, Fiscal Years 2004–2007

	Fiscal Year				Total
	2004	2005	2006	2007	
Panel A: Grievances seeking informal resolution					
Total	2,914	5,844	6,414	8,560	23,732
Of a religious nature	13	21	36	65	135
Percent	0.4	0.4	0.6	0.8	0.6
Panel B: Grievances seeking formal resolution					
Not tracked					

Source: Los Angeles County Jail, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 16, May 6, 2008.

Caption: At the Los Angeles County Jail, from fiscal years 2004 to 2007, religious grievances as a proportion of all grievances filed seeking informal resolution ranged from 0.4 to 0.8 percent. The figure for the period as a whole is 0.6 percent.

Table C.4
Nature of Religious Grievances at State Prisons, Aggregated Fiscal Years

	A	B	C	D	E	F	G	H	I	J	K	L	M	X	Y
Panel A: Grievances seeking informal/prison level resolution															
Maine State Prison (FYs 2002–2007)	Not tracked														
Fishkill Correctional Institution (FYs 2004–2007)	Not tracked														
Lea County Correctional Facility (FYs 2005–2007)	10	0	23	0	39	0	0	0	0	0	1	0	0	0	0
Delores J. Baylor Women's Correctional Institution (FYs 2004–2007)	0	0	9	0	0	0	0	0	0	0	0	0	0	1	0
California State Prison-Solano (FYs 2004–2007)	Not tracked														
California Correctional Institution–Tehachapi (FYs 2005–2007)	3	2	5	0	0	0	0	0	0	0	0	0	0	2	0
Stiles Unit (FYs 2003–2007)	47	0	237	9	0	0	0	15	69	0	0	0	0	0	0
	A	B	C	D	E	F	G	H	I	J	K	L	M	X	Y
Panel B: Grievances seeking formal/regional level resolution															
Maine State Prison (FYs 2002–2007)	8	18	6	0	0	0	0	0	0	13	0	0	0		0
Fishkill Correctional Institution (FYs 2004–2007)	Not tracked														
Lea County Correctional Facility (FYs 2005–2007)	10	1	10	0	66	0	0	0	0	0	3	0	0	1	0
Delores J. Baylor Women's Correctional Institution (FYs 2004–2007)	0	0	3	0	0	0	0	0	0	0	0	0	0	2	0
California State Prison-Solano (FYs 2004–2007)	6	4	12	0	0	0	0	0	0	0	0	43	7	0	0
California Correctional Institution–Tehachapi (FYs 2005–2007)	3	3	17	0	0	7	3	0	0	0	0	0	0	2	9
Stiles Unit (FYs 2003–2007)	17	0	70	0	0	0	0	0	39	0	0	0	0	0	0

Note: The key to the religious grievance categories is presented below. See notes in tables C.2a–C.2g in this appendix for further descriptive details.

A—Religious paraphernalia/literature

B—Dietary accommodation and diet cards

C—Various aspects of religious observances

D—Grooming

E—Pertaining to the Sweat Lodge Ceremony

F—Supplies and information

G—More time to be spent in group cells/for meditation

H—Processing of religious grievances by prison authorities

I—Discrimination based on religion

J—Denied religious groups (see table C.2a in this appendix for examples provided by the prison)

K—Disrespectful of Native American religious items

L—Denied access

M—Staff complaints

X—Other: single occurrence of each of the following religious grievances:

1. Denied wearing of specific garments (Baylor Women's Correctional Institution; seeking formal resolution)
2. Forced participation in Christmas celebrations (Lea County Correctional Facility; seeking formal resolution)
3. Denied association with other Muslims (Baylor Women's Correctional Institution; seeking informal resolution)
4. Denied attendance at Muslim functions (Baylor Women's Correctional Institution; seeking formal resolution)
5. Denied receipt of religious item separate from hobby program items (California Correctional Institution–Tehachapi; seeking informal resolution)
6. Denied request for Duran to be considered a religion (California Correctional Institution–Tehachapi; seeking informal resolution)
7. Denied request to rescind religious representative (California Correctional Institution–Tehachapi; seeking formal resolution)
8. Denied request for \$50,000 for denial of prayer services (California correctional institution–Tehachapi; seeking formal resolution)

Y—Nature of grievance unknown

Sources: Response to U.S. Commission on Civil Rights' Interrogatories by the California State Prison–Solano (response to interrogatory request 17, May 21, 2008), California Correctional Institution–Tehachapi (response to interrogatory request 17, May 21, 2008; Delores Baylor Women's Correctional Institution (response to interrogatory request 17, April 9, 2008;), Fishkill Correctional Facility (response to interrogatory request 17, March 28, 2008), Lea County Correctional Facility (response to interrogatory requests 17, March 31, 2008), Maine State Prison (interrogatory response to requests 17, March 21, 2008; Robert Costigan, prison administrative coordinator, Maine State Prison, e-mail, April 3, 2008.), Stiles Unit (supplemental response to interrogatory request 17, June 27, 2008).

Caption: Some types of religious grievances are more prominent in some prisons than others. For example, at the Stiles Unit, those pertaining to “various aspects of religious observances” (column titled “C”) are pronounced. At the Lea County Correctional Facility, religious grievances “pertaining to the Sweat Lodge Ceremony” (column titled “E”) are most prevalent.

Table C.5
Religions Affiliated with Grievances Filed, Aggregated Fiscal Years

	Maine State Prison (FY 2002–2007)	Lea County Correctional Facility (FYs 2005–2007)	California State Prison–Solano (FYs 2004–2007)	California Correctional Institution–Tehachapi (FYs 2004–2007)	Total
Panel A: Grievances seeking informal resolution	Not tracked		Not tracked		
Asatru		0		0	0
Buddhist		0		1	1
Catholicism		2		0	2
Christian (non-Catholic)/Protestantism		8		1	9
Hauamal-Wotanist				2	2
Islam		8		5	13
Judaism		3		0	3
Native American beliefs		41		3	44
Satanism/Sectionist beliefs		6		0	6
Wiccans		5		0	5
Unknown		0		1	1
Panel B: Grievances seeking formal resolution					
Asatru	4	0	0	1	5
Buddhist	0	0	0	2	2
Catholicism	1	4	0	0	5
Christianity (non-Catholic)/Protestantism	4	3	0	0	7
Christianity (not specified)	0	0	20	1	21
Hauamal-Wotanist	0	0		1	1
Islam	16	6	17	11	50
Judaism	1	2	4	0	7
Native American beliefs	12	70	4	7	93
Nature/other	0	0	29	0	29
Pentecostal	0	0	0	1	1
Satanism/Sectionist beliefs	7	1	0	0	8
Wiccan beliefs	0	5	0	3	8
Unknown	0	0	0	18	18

Sources: Maine State Prison, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, March 21, 2008; Lea County Correctional Facility, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, March 31, 2008; California State Prison–Solano, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, May 21, 2008; California Correctional Institution–Tehachapi, Response to U.S. Commission on Civil Rights' Interrogatories, Response to Interrogatory Request 17, May 21, 2008.

Caption: At these four facilities, the religions more likely to be associated with the religious complaints are Native American Beliefs, Islam, Christianity, and Nature/other.

APPENDIX D: SUPPLEMENTAL TABLES FOR ANALYSIS OF RLUIPA CASES

Chapter four presents an analysis of RLUIPA cases according to the year, plaintiff's religion, basis of discrimination, circuit, outcome, and other factors. It contains summary information by religion and geographic area (judicial circuit). This appendix presents some results using more detailed religious categories. Table D.1 of this appendix contains a summary of the classification results broken down by the specific religious traditions identified in each judicial case. The designation of "Other" includes religions, denominations and faith groups that Commission staff could not accurately identify due to lack of specificity by the respondent (e.g., a respondent who designated his religion as "Mysticism" could not be accurately identified as belonging to a particular religious tradition and was therefore categorized as "Other"). It also shows the number of RLUIPA cases by state and offers greater insight into cases with multiple issues.

Table D.1
Classification Scheme Used to Group Religions from RLUIPA Cases

Religion	Religions, Denominations, Faith Groups included
Afro-Caribbean	African Traditional Spirituality, Rastafarian, Rastafarian-Nazarite, Yoruba/Palero/Vodun, Yoruba-Santeria
Atheist	Atheist
Baha'i	Baha'i
Buddhist	Buddhist
Christian	Apostolic Faith Church, Apostolic Pentecostal, Assemblies of Yahweh, Catholic, Christian, Church of Christ, Identity Christian, Jehovah's Witness, Messianic Jewish, Orthodox Christian, Sacred Name Sabbatarian
Hindu	Hare Krishna, Hindu
Jewish	African Hebrew Israelite, Hebrew-Israelite, Jewish, Jewish-ultra-Orthodox, Nazarite, Nazarite-Christian, Orthodox Jew, Yahweh Evangelical, Yahwist, Yawist
Muslim	Five Percent Nation, Melanic, Moorish Science Temple, Muslim, Muslim-Shi'ite, Muslim-Sunni, Nation of Islam, Orthodox Muslim
Native American	Native American
Pagan	Asatru, Odinist, Satanist, Wiccan, Wotanist/Odinist
Sikh	Sikh
Taoist	Taoist
Other	Christian Separatist (racial), Church of God, Israyl Identity Faith, Nuwaubu, Occultist/Esoteric Christian, Tulukeesh, Veganism, White Supremacist
Unknown/Unspecified	Unknown, Unspecified

Source: The religious traditions identified above use categories employed by the Pluralism Project at Harvard University. The Pluralism Project at Harvard University, <http://www.pluralism.org>. Religions, denominations and faith groups assigned to each religious tradition were determined by USCCR staff, for the limited purpose of analyzing trends in the data collected, using the *Encyclopedia of American Religions*. J. Gordon Melton, ed., 7th ed. (2003).

Caption: Specific religions and denominations have been grouped into broader categories according to their origins, resulting in fifteen categories of religions.

Table D.2
RLUIPA Cases in Federal Court by Religious Categories Used in this Study

Detailed Religious Categories	Religion														Total Cases
	Afro-Caribbean	Atheist	Baha'i	Buddhist	Christian	Hindu	Jewish	Muslim	Native American	Other	Pagan	Sikh	Taoist	Unknown/ Unspecified	
African Hebrew-Israelite							1								1
African Traditional Spirituality	1														1
Apostolic Faith Church (Christian)					1										1
Apostolic Pentecostal (Christian)					1										1
Asatru											3				3
Assemblies of Yahweh					1										1
Atheist		2													2
Buddhist				3											3
Catholic					5										5
Christian					11										11
Christian Separatist (racial)										1					1
Church of Christ					1										1
Church of God										1					1
Five Percent Nation								1							1
Hare Krishna						1									1
Hebrew-Israelite							3								3
Hindu						1									1
Identity Christian					2										2
Israyl Identity Faith										1					1
Jehovah's Witness					2										2
Jewish							28								28
Jewish-ultra-Orthodox							1								1
Melanic								1							1
Messianic Jewish					1										1
Moorish Science Temple								2							2
Muslim								57							57
Muslim-Shi'ite								3							3
Muslim-Sunni								6							6
Nation of Islam								3							3

continued

Table D.2 (continued)

Detailed Religious Categories	Religion														Total Cases
	Afro-Caribbean	Atheist	Baha'i	Buddhist	Christian	Hindu	Jewish	Muslim	Native American	Other	Pagan	Sikh	Taoist	Unknown/ Unspecified	
Native American									29						29
Nazarite							1								1
Nazarite Christian							2								2
Nuwaubu										1					1
Occultist/Esoteric Christian										1					1
Odinist											2				2
Orthodox Christian					1										1
Orthodox Jew							1								1
Orthodox Muslim								1							1
Rastafarian	21														21
Rastafarian-Nazarite	1														1
Sacred Name Sabbatarian					1										1
Satanist											1				1
Sikh												2			2
Taoist													2		2
Tulukeesh										1					1
Unknown														5	5
Unspecified														16	16
Veganism										1					1
White Supremacist										1					1
Wiccan											7				7
Wotanist/Odinist											2				2
Yahweh Evangelical							1								1
Yahwist							1								1
Yawist							1								1
Yoruba/Palero/Vodun	1														1
Yoruba-Santeria	1														1
Total Cases	25	2	0	3	27	2	40	74	29	8	15	2	2	21	250

Source: The religious traditions identified above use categories employed by the Pluralism Project at Harvard University. The Pluralism Project at Harvard University, <http://www.pluralism.org>. Religions, denominations and faith groups assigned to each religious tradition were determined by USCCR staff, for the limited purpose of analyzing trends in the data collected, using the *Encyclopedia of American Religions*. J. Gordon Melton, ed., 7th ed. (2003).

Caption: Diverse religions are represented in the groupings that the Commission used to present data in this study. For example, 40 of the 250 cases involved Jewish inmates.

Table D.3
RLUIPA Cases in Federal Court by Plaintiff's Religion (Detailed Categories) and Year of Origin

Religion	Year of Cases' Origin						Totals
	2001	2002	2003	2004	2005	2006	
African Hebrew Israelite						1	1
African Traditional Spirituality						1	1
Apostolic Faith Church					1	1	2
Asatru					1	2	3
Assemblies of Yahweh						1	1
Atheist				1	1		2
Buddhist				1		2	3
Catholic					1	4	5
Christian				1	3	7	11
Christian Separatist				1			1
Church of Christ				1			1
Church of God					1		1
Five Percent Nation		1					1
Hare Krishna						1	1
Hebrew-Israelite			1			2	3
Hindu			1				1
Identity Christian					2		2
Israyl Identity Faith						1	1
Jehovah's Witness		1		1			2
Jewish		2	2	5	7	12	28
Jewish—Orthodox						2	2
Melanic		1					1
Messianic Jewish						1	1
Moorish Science Temple					1	1	2
Muslim—not indicated	2		5	7	11	32	57
Muslim—Orthodox						1	1
Muslim—Shi'ite		1	2				3
Muslim—Sunni					1	5	6
Nation of Islam					1	2	3
Native American			4	4	7	14	29
Nazarite	1				1	1	3
Nuwaubu						1	1
Occult/Esoteric Christian						1	1
Odinist				1	1		2
Orthodox Christian						1	1
Rastafarian		1	3	2	3	13	22
Sacred Name Sabbatarian						1	1
Satanist						1	1
Sikh					1	1	2
Taoist				1		1	2
Tulukeesh						1	1
Unspecified		1	1		5	14	21
Veganism						1	1

continued

Table D.3 (continued)

Religion	Year of Cases' Origin						Totals
	2001	2002	2003	2004	2005	2006	
White Supremacist					1		1
Wiccan	1		2		1	3	7
Wotanist/Odinist			1			1	2
Yahweh Evangelical				1	1	1	3
Yoruba/Palero/Vodun						1	1
Yoruba-Santeria					1		1
Total Cases	4	8	22	27	53	136	250

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: This table breaks down the broader description of cases brought by adherents to specific religions found in table D.1, indicating the number of cases brought by each specific religious group represented in RLUIPA litigation between 2001 and 2006.

Table D.4
RLUIPA Cases in Federal Court by State and Year

State	2001	2002	2003	2004	2005	2006	Total Cases
Alabama					1	2	3
Alaska							
Arizona					2	7	9
Arkansas		1			2		3
California	2	2		1	6	26	37
Colorado				3		1	4
Connecticut						2	2
Delaware					1	1	2
District of Columbia						2	2
Florida		1	1		1	3	6
Georgia			1	1	1	2	5
Hawaii							
Idaho					1	1	2
Illinois			2	2	2	7	13
Indiana					3	4	7
Iowa				1			1
Kansas							
Kentucky						3	3
Louisiana			1			1	2
Maine							
Maryland					1		1
Massachusetts			1				1
Michigan		2			2	7	11
Minnesota					1		1
Mississippi						3	3
Missouri			1	1	1	2	5
Montana						1	1
Nebraska							
Nevada							
New Hampshire				2			2
New Jersey					1		1
New Mexico							
New York		2	3	4	2	5	16
North Carolina						3	3
North Dakota					1		1
Ohio	1		2		1	3	7
Oklahoma			2		2		4
Oregon				1			1
Pennsylvania				1	2	7	10
Rhode Island					1		1
South Carolina					1	4	5
South Dakota					1	1	2
Tennessee					1	1	2
Texas	1		1	3	5	8	18

continued

Table D.4 (continued)

State	2001	2002	2003	2004	2005	2006	Total Cases
Utah						1	1
Vermont							
Virginia			1	2	5	12	20
Washington					1	4	5
West Virginia						1	1
Wisconsin			6	5	4	11	26
Wyoming							
Total Cases	4	8	22	27	53	136	250

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: This table sets forth the number of RLUIPA cases initiated in each specific state between 2001 and 2006.

Table D.5
RLUIPA Cases in Federal Court by State and Plaintiff's Religion (Detailed Categories)

State	Afro-Caribbean	Atheist	Baha'i	Buddhist	Christian	Hindu	Jewish	Muslim	Native American	Other	Pagan	Sikh	Taoist	Unknown/ Unspecified	Total Cases
Alabama									1		1			1	3
Arizona						1	3		2	1				2	9
Arkansas							1	1	1						3
California	5				5		4	7	6	1	1	1		7	37
Colorado							1	2	1						4
Connecticut	1							1							2
Delaware								2							2
District of Columbia							1	1							2
Florida							3	1	2						6
Georgia							2	1		1				1	5
Idaho								1	1						2
Illinois	4				1	1	1	4			2				13
Indiana					1			4	1		1				7
Iowa							1								1
Kentucky								2				1			3
Louisiana	1						1								2
Maryland							1								1
Massachusetts	1														1
Michigan				2	1		1	2		1	2			2	11
Minnesota								1							1
Mississippi											1			2	3
Missouri					2		1		1	1					5
Montana					1										1
New Hampshire							1		1						2
New Jersey					1										1
New York	1				2		1	11		1					16
North Carolina							1	2							3
North Dakota									1						1
Ohio					2		1		1		3				7
Oklahoma					1		1	2							4
Oregon								1							1
Pennsylvania	3			1	2		1	3							10
Rhode Island					1										1
South Carolina	1							3						1	5
South Dakota							1		1						2
Tennessee					1		1								2
Texas					3		3	6	4	1				1	18
Utah														1	1
Virginia	7				1		4	5						3	20
Washington								4		1					5

continued

Table D.5 (continued)

State	Afro-Caribbean	Atheist	Baha'i	Buddhist	Christian	Hindu	Jewish	Muslim	Native American	Other	Pagan	Sikh	Taoist	Unknown/ Unspecified	Total Cases
West Virginia	1														1
Wisconsin		2			2		4	7	5		4		2		26
Total Cases	25	2	0	3	27	2	40	74	29	8	15	2	2	21	250

Source: Compiled by the U.S. Commission on Civil Rights. See table D.1 for the faith-based groups included in each tradition.

Caption: This table sets forth by state the numbers of prisoner plaintiffs of various religious traditions filing RLUIPA litigation between 2001 and 2006.

Table D.6
States in Judicial Circuits

First Circuit	Fifth Circuit	Ninth Circuit
Maine	Louisiana	Alaska
Massachusetts	Mississippi	Arizona
New Hampshire	Texas	California
Rhode Island	Sixth Circuit	Hawaii
Second Circuit	Kentucky	Idaho
Connecticut	Michigan	Montana
New York	Ohio	Nevada
Vermont	Tennessee	Oregon
Third Circuit	Seventh Circuit	Washington
Delaware	Illinois	Tenth Circuit
New Jersey	Indiana	Colorado
Pennsylvania	Wisconsin	Kansas
Fourth Circuit	Eighth Circuit	New Mexico
Maryland	Arkansas	Oklahoma
North Carolina	Iowa	Utah
South Carolina	Minnesota	Wyoming
Virginia	Missouri	Eleventh Circuit
West Virginia	Nebraska	Alabama
	North Dakota	Florida
	South Dakota	Georgia
		District of Columbia

Note: The Commission did not identify any RLUIPA cases in the states shown in boldface.

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: Chapter five presented RLUIPA data according to court circuit, which represents different regions of the nation. This table shows the states in each circuit. The states in boldface are those in which the Commission did not find any RLUIPA cases.

Table D.7
Bases of RLUIPA Cases in Federal Court by Plaintiff's Religion (Detailed Categories)

Religion	Bases of Nonaccommodation											Total Bases
	Accessories	Diet	Dress	Forced participation	Forced practice	Grooming	Literature	Other	Practice	Facility's salaried clergy positions	Unknown	
African Hebrew Israelite		1	1						1			3
African Traditional Spirituality							1					1
Apostolic Faith Church							1		1			2
Asatru									3			3
Assemblies of Yahweh						1						1
Atheist	1			1			1		1			4
Buddhist		3										3
Catholic	1						1		3			5
Christian	2	1		1			2		6			12
Christian Separatist									1			1
Church of Christ									1			1
Church of God							1					1
Five Percent Nation							1		1			2
Hare Krishna		1										1
Hebrew-Israelite		1				1			1			3
Hindu		1										1
Identity Christian	2						1		2			5
Israyl Identity Faith		1				1			1			3
Jehovah's Witness					1		1					2
Jewish	3	22	5			2	1		8			41
Jewish—Orthodox	1	2	1			1	1		1			7
Melanic							1					1
Messianic Jewish									1			1
Moorish Science Temple						1			1			2
Muslim—not indicated	8	20	2	2	1	9	8	1	33			84
Muslim—Orthodox	1	1										2
Muslim—Shi'ite									3			3
Muslim—Sunni	2	4		1		1	1		4			13
Nation of Islam		1					1		1			3
Native American	17	2	5			9			20			53
Nazarite						3						3
Nuwaubu		1							1			2
Occult/Esoteric Christian	1						1					2
Odinist	1						1					2
Orthodox Christian						1						1

continued

Table D.7 (continued)

Religion	Bases of Nonaccommodation											Total Bases
	Accessories	Diet	Dress	Forced participation	Forced Dress	Grooming	Literature	Other	Practice	Facilities Salaried Clergy Positions	Unknown	
Rastafarian		5				21	1		2			29
Sacred Name Sabbatarian		1							1			2
Satanist							1					1
Sikh		1				1	1					3
Taoist							2					2
Tuluakeesh	1	1					1		1			4
Unspecified	1	8				7	1	2	2		1	22
Veganism		1										1
White Supremacist					1		1					2
Wiccan	4	1	2				4		4	1		16
Wotanist/Odinist		1					2					3
Yahweh Evangelical		2							2			4
Yoruba/Palero/Vodun							1					1
Yoruba-Santeria	1	1										2
Total Bases	47	84	16	5	3	59	40	3	107	1	1	366

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: This table breaks out the bases of RLUIPA litigation as filed by prisoners of each specific religion represented in the collected cases.

Table D.8
Federal RLUIPA Cases Filed by the Numbers of Bases and Reasons Offered for Denial

Number of Bases per Case	Number of Reasons Per Case						Total Cases	Total Number of Bases
	1	2	3	4	5	6		
1	97	41	18	7	2		165	165
2	32	14	12	3	2	1	64	128
3	7		5	1			13	39
4	2	4		1			7	28
5							0	0
6					1		1	6
Total Cases	138	59	35	12	5	1	250	366
Total Number of Reasons	138	118	105	48	25	6	440	

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: This table details the number of bases of complaints raised by prisoners per case as compared to the number of reasons for denial.

Table D.9
Type of Reason for Denial of RLUIPA Cases in Federal Court by Disposition

Plaintiff's Religion	Defendant(s) successful	Plaintiff(s) successful		Mixed result		Ongoing	Total Reasons
	No relief granted	All requested relief granted	Remedies pending	No relief granted	Some relief granted		
African Hebrew Israelite	1						1
African Traditional Spirituality						1	1
Apostolic Faith Church	2						2
Asatru	2					1	3
Assemblies of Yahweh	1						1
Atheist	1				1		2
Buddhist	2	1					3
Catholic	4					1	5
Christian	7		1			3	11
Christian Separatist						1	1
Church of Christ	1						1
Church of God	1						1
Five Percent Nation					1		1
Hare Krishna	1						1
Hebrew-Israelite	2				1		3
Hindu					1		1
Identity Christian	1					1	2
Israyl Identity Faith	1						1
Jehovah's Witness	1	1					2
Jewish	17	5				6	28
Jewish—Orthodox	1					1	2
Melanic					1		1
Messianic Jewish						1	1
Moorish Science Temple	1	1					2
Muslim—not indicated	34	3			3	17	57
Muslim—Orthodox	1						1
Muslim—Shi'ite	1	1				1	3
Muslim—Sunni	2					4	6
Nation of Islam	3						3
Native American	19	1		1	1	7	29
Nazarite	2					1	3
Nuwaubu						1	1
Occult/Esoteric Christian						1	1
Odinist	2						2
Orthodox Christian	1						1
Rastafarian	17	1			2	2	22
Sacred Name Sabbatarian						1	1
Satanist						1	1
Sikh	1				1		2
Taoist	2						2

continued

Table D.9 (continued)

Plaintiff's Religion	Defendant(s) successful	Plaintiff(s) successful		Mixed result		Ongoing	Total Reasons
	No relief granted	All requested relief granted	Remedies pending	No relief granted	Some relief granted		
Tuluakeesh	1						1
Unspecified	17				1	3	21
Veganism	1						1
White Supremacist	1						1
Wiccan	3	1				3	7
Wotanist/Odinist	2						2
Yahweh Evangelical	2				1		3
Yoruba/Palero/Vodun						1	1
Yoruba-Santeria	1						1
Total Reasons	160	15	1	1	14	59	250

Source: Compiled by the U.S. Commission on Civil Rights.

Caption: This table breaks down by specific religion the outcomes of the 250 RLUIPA cases collected.

