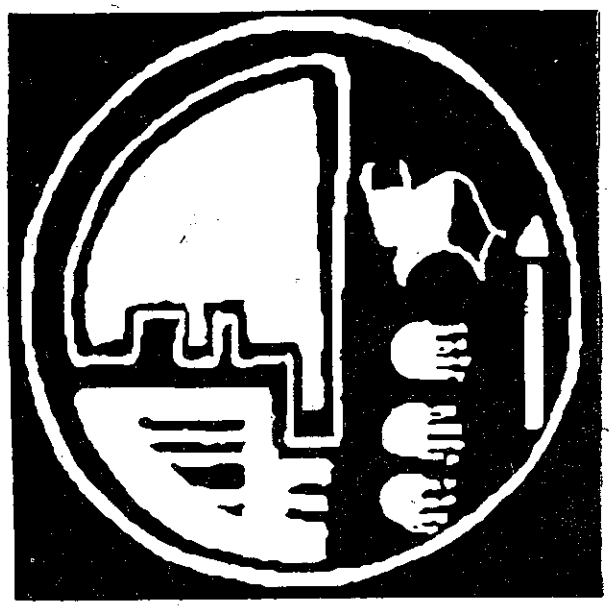
STUDY OF NATIVE AMERICAN PRISONER ISSUES



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Prepared for
NATIONAL INDIAN POLICY CENTER
The George Washington University
Washington, D.C.

Initially authorized by the Congress in P.L. 101-301, the National Indian Policy Center is a developing institution whose goal is to provide formulators of American Indian and Alaska Native policies with data, information, and analyses that would otherwise not be readily available to them. To accomplish this goal, the Center conducts forums and symposia, carries out and contracts for research, and disseminates the products of its research to tribal governments and Indian organizations, the Congress, State governments, and others who may contribute to the shaping of Indian policy.

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I. EXECUTIVE SUMMARY AND RECOMMENDATIONS

Many Native Americans, broadly defined herein as self-identified American Indians, Alaska Natives and Native Hawaiians, are imprisoned within the federal and state prisons operated in the United States. This paper is a study on Native American prisoners and their unique religious needs. Special attention is given to two issues:

1. The protection of Native American prisoners' unique religious freedom rights.
2. Re-entry programs that are culturally appropriate and effective for the Native American population.

This report offers seven recommendations:

Recommendation No. 1:
There is a need to protect religious freedom rights of Native American prisoners.

Recommendation No. 2:
The Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-bb4, provides a strong legal standard to protect the religious freedom rights of Native American prisoners through litigation. There is a need for qualified legal counsel to implement the protections afforded by this new law by litigation in many parts of the country through a carefully developed national litigation strategy. Tribal attorneys and practitioners of federal Indian law should be encouraged to support and participate in the development and implementation of such a strategy.

Recommendation No. 3:
There is a need for the Attorney General of the United States to issue a directive to protect the free exercise of religion by Native American prisoners, along the lines of that which is proposed by the National Native American Prisoner Rights Advocates Coalition (hereinafter "NNAPRAC"). Indian Tribes should join the NNAPRAC and strongly support its advocacy.

Recommendation No. 4:
There is a need for a national Native American corrections and criminal justice project to serve as a clearinghouse for: (a) data gathering, (b) technical assistance to tribes, community programs and inmates, (c) information dissemination, (d) conducting interdisciplinary studies, (e) prisoner advocacy and ex-offender support work, and (f) networking with Native ex-offender projects and the larger criminal justice system on the tribal, state and federal levels. Tribal leaders and major Native organizations should undertake discussions with appropriate government representatives regarding funding for such a project.

Recommendation No. 5:
There is a need for a feasibility study for a pilot project to establish an innovative tribal or Native operated corrections center for Indian inmates, based upon relevant Native culture as the primary rehabilitation tool, as an alternative to incarceration in federal and state prisons. An appropriate Indian tribe should undertake this pilot project as a part of its criminal justice system.

Recommendation No. 6:
There is a need for additional studies on the following subjects:

a. Compile a comprehensive criminal justice bibliography on Native American correctional and criminal justice issues.
b. Compile a comprehensive statistical analysis of Native American arrest, conviction, parole success and recidivism rates in order to determine how Native Americans are being treated in state and federal criminal justice systems in relation to the treatment of citizens of other races.
c. Compile a national inventory of Native American criminal resources in terms of Native American criminal justice professionals, programs, projects, and potential funding resources.

Recommendation No. 7:
Conduct a national dialogue between tribal and correctional leaders for the purpose of better protecting and accommodating Native religious practices in the correctional setting.

Attached to this paper are the following documents that support the recommendations listed above. The attachments are:

1. A summary of a national survey of federal\state prison policies on Native American religious freedom.
2. A summary of a national survey of federal\state prison policies governing the wearing of traditional hair styles by Native prisoners for religious reasons.
3. A copy of the Attorney General Directive to protect the free exercise of religion by Native American prisoners which is proposed by the National Native American Prisoner Rights Advocates' Coalition (NNAPRAC), together with a NNAPRAC membership list.
4. Walter Echo-Hawk's Testimony Before the Senate Select Committee on Indian Affairs on Barriers to Native Free Exercise of Religion (March 7, 1992).
5. A summary of 1992-1993 congressional testimony regarding free exercise problems experienced by Native American prisoners.

The needs of Native prisoners have not abated and their conditions may have worsened since the 1970s. Incarceration rates remain so high that all Native people, Indian Tribes and Native communities are directly impacted by off-reservation prison policies which affect the

basic rights, rehabilitation and well-being of their imprisoned relatives and tribal members who will be returning to Native communities upon release.

Information and studies concerning this incarcerated population are inadequate. Reports from NNAPRAC members indicate that the free exercise of religion continues to be a predominate human rights problem. For examples, the Indian Law Clinic of the University of Colorado Law School indicates that it receives far more requests for assistance from Indian prisoners than it can meet. The Native American Rights Fund (NARF) also receives voluminous free exercise requests, which we try to refer to other counsel with varying degrees of success. With the passage of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-bb4, NARF is developing a national litigation strategy for impact, law development litigation in this area.

Indian country should direct more priority and resources to these human resource and criminal justice areas. These prisoners will be returning home; it is in the Tribes' interest that these members arrive as contributing members of the tribal community, rather than further alienated by prison experiences. The federal government should share in this effort because of the trust responsibility owed to Indian Tribes. The Indian tribes and Native communities are ultimately affected by the treatment and well-being of Indian inmates in very significant ways, and this set of criminal justice issues fall squarely within the zone of the federal trust responsibility.

II. INTRODUCTION

A. Background: Indians and Prisons

Incarceration is an alien concept to traditional Native American societies, which had other forms of social control. Confinement in a cell was introduced to the Americas by European jailers. Prisons originated in the Old World and were imported to the Western Hemisphere by European nations who had a long history of incarcerating large numbers of people in penal institutions. Early colonization efforts, such as Britain's Australian colony, were prompted in part to rid Europe of unwanted criminals in teeming prisons by establishing penal colonies in the New World.[1]

For the indigenous people of the New World, penal institutions were alien criminal justice institutions. Traditional Native American societies did not rely upon imprisonment to punish social offenders. Many of the first Native American experiences with European-style incarceration came when chiefs, warriors, families and, sometimes, entire Tribes were confined as prisoners of war or criminals in the so-called "Indian wars" in places such as Ft. Merrion, Ft. Robinson, Ft. Sill, the Bosque Redondo and Oklahoma Indian Territory.

Today, incarceration is a major reality in the lives of Native American people and communities. Virtually all Native people have either been incarcerated or have had a close family member incarcerated. Yet, little is known about Native American prisoners. Once arrested, Indians generally tend to disappear into the criminal justice system and become the truly forgotten ones. What happens to them? What are the scope and nature of their issues and problems, and how do these affect Native families and communities? Are the rehabilitation needs of Indian inmates being met or are the causes of their criminal behavior being exacerbated? In short, exactly how are Native American human resources being helped or harmed by the United States' criminal justice system? Presently, there is no national program to identify, analyze, assess or address these important issues.

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[1] *See, e.g.*, Robert Hughes, The Fatal Shore: The Epic of Australia's Founding, (Alfred A. Knopf, New York, 1987). Australia was colonized as a British "prison colony" in a bizarre penological experiment to permanently rid England of unwanted criminals - and for the first 100 years of its colonial existence, England transported over 160,000 convicts in chains to Australia for exile in a harsh prison society complete with all the trappings. France also established penal colonies in the Caribbean basin of the Americas for similar purposes.

In 1996, disproportionately high numbers of Native American citizens are confined in America's prisons. Caused by factors such as alcoholism, poverty, social anomy of living in two worlds, lack of access to adequate legal representation, and discrimination, the Native incarceration rate is astounding. The institutionalization of Native America results in the loss of significant human resources by Native communities, to whom a federal trust responsibility is owed. One scholar states:

> According to a 1991 prison population survey by the Native American Rights Fund, the Federal Bureau of Prisons and many state prisons have disproportionately high numbers of Indian inmates. (Survey on file at Native American Rights Fund.) For instance, Native Americans make up approximately 1.5 percent of the total inmate population in federal prisons although they make up less than .5 percent of the total United States population. GETCHES AND WILKINSON, *supra* note 13, at 7. Similarly, Native Americans make up 34.7%, 31.7%, 24.9%, and 15.5% of the prison populations of Hawaii, Alaska, South Dakota, and Montana respectively, although they make up only 18.9%, 15.9%, 6.5%, and 4.7% of the total populations of those states. *Id.*[2]

The 1991 NARF Native American inmate population survey reveals these results, with percentages rounded to the nearest percent:

Prison System	Total Prison Population	Native Prisoners
Federal Bur.of Prisons	63,032	974 (2%)
Alaska	2,427	769 (31%)
Arizona	12,921	412 (3%)
California	101,995	678 (1%)
Colorado	8,057	80 (1%)
Hawaii	2,394	831 (34%)
Idaho	1,956	92 (5%)
Kansas	5,619	74 (1%)
Minnesota	3,346	285 (9%)
Montana	1,487	231 (15%)
Nebraska	2,461	90 (4%)
Nevada	5,862	85 (2%)
New Mexico	3,148	100 (3%)
New York	56,538	208 (1%)
North Carolina	18,622	421 (2%)

[2] Michael J. Simpson, "Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act," 54 MONT L REV 19, n. 138 at 44 (Winter 1993).

North Dakota	574	122 (21%)
Oklahoma	13,056	744 (6%)
Oregon	6,381	156 (2%)
South Dakota	1,370	341 (25%)
Utah	2,521	59 (2%)
Washington	8,788	336 (4%)
Wisconsin	7,609	164 (2%)
Wyoming	1,113	60 (5%)

These thousands of incarcerated Natives represent important human resources of Indian tribes. These tribal members maintain close ties with their tribal communities where they will likely return upon release. It is important to the well-being and cultural survival of Native communities that when these human resources return home after incarceration in federal or state prisons, that these tribal members are culturally viable, contributing members of the Native American communities.

B. The Need for Additional Criminal Justice Studies

There is a paucity of information about Native American prisoners, which is a little studied population of forgotten Americans. In the early 1970s, little was known about the issues and problems faced by Native American prisoners in state or federal prisons other than the impression within Indian country that exceedingly high numbers of tribal members were incarcerated. From a national perspective, the fate of these men, women and children, once confined, was unknown. There was only one reported decision involving Indian prisoners and it involved the right to practice tribal religion in which the Court denied a Sioux Indian the right to wear his hair in the traditional Lakota style for religious purposes. *U.S. ex rel. Goings v. Aaron,* 350 F.Supp. 1 (D. Minn. 1972).

To remedy this information gap, NARF initiated a project in 1972 called the Indian Corrections Project, which operated until 1981, to learn more about these conditions, issues and problems, and to bring necessary litigation to address such problems. During this period, NARF found that no other group addressed those issues on a national basis and that very few groups addressed those issues locally. NARF's project ended in 1982 and has just recently resumed work in this field in 1995 on a more limited basis, as discussed later in this paper.

Today, NARF is unaware of any group that addresses Native American prisoner issues on a national basis, except the Navajo Nation Corrections Project which presently coordinates the National Native American Prisoner Rights Advocates Coalition ("NNAPRAC"). The NNAPRAC was founded in the Spring of 1995 to advocate that the Attorney General of the United States issue a directive to protect the free exercise of religion by Native American prisoners. The members of this informal coalition include many of the local and regional Native organizations who work in the field of corrections and represent the core of information and expertise in this area. *See,* attached membership list.

Recommendations 4-6, listed above, are necessary to remedy the information gap about institutionalized Native Americans. As to the issue of appropriate Native American parole, release and ex-offender programs, Recommendations 4 and 6 chart out necessary studies and projects that are necessary, in my opinion, to further flush out these issues. These recommendations should be further refined in consultation with NNAPRAC members, and perhaps a special NNAPRAC meeting should be held to review and refine these recommendations.

As to Recommendation 5, NARF worked with the Cheyenne River Sioux Tribe in the late 1970s to develop the Swiftbird Project, which was an alternative to incarceration program based upon Native culture for adult felons confined in a five state area and the federal Bureau of Prisons. Our philosophy for this tribally operated correctional program was that: (1) "prisons will always be prisons" regardless of continuing litigation efforts to make them more sensitive to unique needs of Native inmates; and (2) the better approach from the tribal and rehabilitation standpoints is to transfer Indians out of that system altogether and provide them with a more appropriate way. The Swiftbird Project employed Native staff at a specially renovated Job Corps facility. It was operated under the tribe's criminal justice system. It contracted with state and federal prisons to transfer selected Indian inmates to Swiftbird. Swiftbird provided culturally relevant rehabilitation and release programs. This prototype ultimately failed after one or two years of operation due, in my opinion, to staffing and nepotism problems. Yet, the concept remains sound and the need for an alternative to the European system of incarceration continues to be pressing. NARF has the Swiftbird feasibility study and operations manuals on file, should an effort be made to implement Recommendation 5.

The remainder of this paper addresses Recommendations 1-3 and 7, which are necessary to afford relief for the paramount human rights problem faced by Native American prisoners in their continuing struggle to protect their religious liberty.

C. Free Exercise Problems of Native American Prisoners

A major issue confronting Native prisoners across the country is the denial of access to the Free Exercise of religion in federal and state prisons on a basis comparable to that offered to prisoners of other religious groups. This prisoner Free Exercise problem was first described in 1978 by NARF attorneys in testimony before the Senate Select Committee on Indian Affairs in support of the American Indian Religious Freedom Act.[3] Since 1970, this continuing human rights problem has been the subject of over 50 lawsuits to protect the First Amendment rights of Native prisoners, many of which are discussed below. Much of this litigation was very effective in successfully protecting the religious liberty of Native prisoners up until 1987; however, in that year, the Supreme Court seriously weakened the legal standard for protecting the rights of prisoners which opened an entire decade where prisons have been free to restrict Native religious liberty. Beginning with the 1987 decision in *O'Lone v. Estate of Shabazz,* 482 U.S; 342 (1987), First Amendment rights of Native prisoners began to erode. This erosion was greatly speeded with the decisions in *Lyng v. Northwest Indian Cemetery,* 485 U.S. 439 (1988) and *Employment Div. Oregon v. Smith,* 492 U.S. 872 (1990), which created an outright loophole in American law for Native American religious freedom. *See, e.g.,* Walter Echo-Hawk Testimony (attached hereto). Many of the correctional problems which quickly ensued as a result of this loophole and change in law were brought to Congress' attention in 1992 and 1993 by many witnesses who testified at the Senate Indian Affairs field hearings held during 1992 and 1993 in Portland, Los Angeles, Scottsdale, Albuquerque, Minneapolis, Honolulu and Washington, D.C. *See, e.g.,* attached summary of congressional testimony in 1992-93. As the attached NARF prison survey summaries of prison policies on Native religious freedom and on grooming codes indicate, while a few prisons adequately meet the needs of Indian inmates, most do not and there are great inconsistencies between states, and even between institutions located within the same state.

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[3] *See,* Testimony of Kurt V. Blue Dog and Walter R. Echo-Hawk in Hearings Before the Senate Select Committee on Indian Affairs, 95th Cong., 2d. Sess., on S.J. 102 American Indian Religious Freedom, February 24 and 27, 1978 (U.S. Govt. Printing Office: 1978) at pp. 151-191.

Ironically, religion has always been considered by corrections authorities and experts as a primary rehabilitation tool to return prisoners back to society as productive community members. Prison inmates retain protections afforded by the First Amendment, *Pell v. Procunier,* 417 U.S. 817 (1974), including Free Exercise of religion rights. In *Cruz v. Beto,* 405 U.S. 319, 322 (1972), the Supreme Court held that under the First and Fourteenth Amendments inmates of minority religions must be afforded "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious percepts." Indeed, since the very inception of prisons in the United States, religion has always been used as a primary rehabilitation tool to reform prisoners and to make them productive members of society. As stated in the Manual of Correctional Standards (American Correctional Association, 1971) at 468:

> From its very inception in 1870, the American Correctional Association has recognized and emphasized the role of religion in the correctional process.

In *Barnett v. Rodgers,* 410 F.2d 995, 1002 (D.C. Cir., 1969), the court noted the double-edged sword of using religious activity within prisons as a rehabilitation tool:

> Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality. But, quite ironically, while the government provides prisoners with chapels, ministers, free sacred texts and symbols, there subsists a danger that prison personnel will demand from inmates the same obeisance in the religious sphere that more rightfully they may require in other aspects of prison life.

Thus, the state has always freely supplied prisoners with access to religion at taxpayer expense without running afoul of the Establishment Clause, because of the unique circumstances of citizens being within the custody of the state, the importance of religion to rehabilitation, and the need to promote religious rights protected by the Free Exercise Clause of the First Amendment. *See, United States v. Kahane,* 396 F.Supp. 687, 698 (E.D.N.Y.), *aff'd sub nom. Kahane v. Carlson,* 527 F.2d 492 (2d. Cir., 1975):

> Thus, in the prison setting, the establishment clause has been interpreted in light of the affirmative demands of the free exercise clause.

As stated in *Abington School District v. Schempp,* 374 U.S. 203, 298-99 (1963):

> . . . hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners . . . cut off by the State from all civilian opportunities for public communion . . .

Religious access for Indian prisoners is especially important, because many of these prisoners come from or seek to return to tribal communities where traditional tribal religions pervade daily life. *See,* Simpson, "Accommodating Indian Religions", *supra,* 54 MONT L REV at pp. 43-47; Elizabeth Grobsmith, "The Impact of Litigation on the Religious Revitalization of Native American Inmates in the Nebraska Department of Corrections," 43:124 PLAINS ANTHROPOLOGIST (1989).

Similar to Amish communities, traditional religion pervades the life of Indian Tribes and serves as the glue which has held them together over the centuries in the face of great adversities. It is little wonder that the practice of traditional religion is important to the very identity and self-esteem of Indian people, including prisoners. Unfortunately, infringements upon this human right is the primary problem encountered by Indian inmates in American prisons despite the admitted importance of religion in the rehabilitation process. One reason for this irony which NARF found is that little was known by prison officials about the unwritten traditional tribal religions of Native American prisoners. This ignorance compounded discriminatory attitudes against Native inmates that is all too common in many prisons which house large numbers of Native inmates. Litigation addressing this longstanding and deeply ingrained problem is surveyed in the following section of this paper.

III. FREE EXERCISE CASELAW

A. Pre-O'Lone Litigation (1970-1987)

This First and Fourteenth Amendment problem has led to much litigation by NARF on behalf of Indian inmates, which reveals the type of Free Exercise problems of the 1970s and early 1980s:

1. *Calflooking v. Richardson,* No. 1591-73 (D.D.C., Order of February 24, 1974): Granting right of access by federal prisoners to their outside spiritual advisor at McNeil Island Penitentiary.

2. *Gallahan v. Hollyfield,* 670 F.2d 1345 (4th Cir. 1982) [Amicus Brief only]: Cherokee prisoner's right to wear traditional Indian hair style for religious reasons upheld.

3. *Teterud v. Burns,* 522 F.2d 357 (8th Cir. 1975): Wearing traditional hair style by Cree Indian prisoner for cultural and religious reasons was protected by the First Amendment.

4. *Ross v. Scurr,* No. 80-214-A (C.D. Iowa, Order of Mar. 13, 1981): Access to sweat lodge for Indian prisoners' worship ordered.

5. *Bear Ribs v. Carlson,* Civ.No. 77-3985-RJK (C.D. Ca., Order of 1979): Access to Indian sweat lodge for ceremonial worship by Indian prisoners in a federal prison ordered.

6. *Marshno v. McManus,* No. 79-3146 (D.Kan., Order of Nov. 14, 1980): Access to Indian religion granted to Indian prisoners of the Kansas State Penitentiary (sweat lodge, medicine men at state expense, drum ceremonies, possession of sacred objects, such as cedar, sage and sweet grass).

7. *Frease v. Griffin,* No. 79-693-C (D.N.M., Order of Dec. 3, 1980): Indian prisoners of the New Mexico State Penitentiary permitted to wear traditional hair styles for religious purposes and granted use of a sweat lodge for worship ceremonies.

8. *Little Raven v. Crisp,* No. 77-165-C (E.D., Okla., Order of Nov. 8, 1978): Indian prisoners of the Oklahoma Penitentiary granted access to tribal religion (possession of sacred objects allowed, access to medicine men and spiritual leaders granted, religious\cultural activities on a group basis permitted.

9. *Crow v. Erickson,* Civ.No. 72-4101 (S.D., various orders): Sioux Indian inmates' religious freedom protected - sweat lodge, long traditional hair style, and access to religious leaders granted.

10. *Bender v. Wolff,* Civ.No. R-77-0055 BRT (D.Nev., Order of July 5, 1977): Indian prisoners permitted to wear hair in traditional manner according to tribal religious tenets.

11. *Indian Inmates of the Nebraska Penal and Correctional Complex v. Vitek,* Civ.No. 72-L-156 (D.Neb, Orders of Oct. 31, 1974 and May 24, 1976): Religious rights of Indian prisoners to wear traditional hairstyles, worship in sweat lodge and access to medicine men or spiritual leaders granted.

12. *Brown v. Arvae,* Case No. H.C. 2490 (4th Jud.Dis., Idaho, 1987): Religious rights of Indian prisoners accorded Equal Protection and treatment by prison, including access to medicine men, sweat lodges, pipe ceremonies, sacred objects (such as medicine bags, pipes, cedar, feathers, etc.), traditional hairstyles, headbands and religious medallions.

In addition to NARF litigation during the 1970s, the nature of Indian prisoner Free Exercise problems were further identified in the year-long federal government evaluation and Report to Congress of Native Free Exercise problems that was mandated by Section 2 of the Religious Freedom Act, 42 USCA 1996, where widespread problems in federal and state prisons were documented in no less than **fifty-seven (57)** incidents of infringements upon the religious rights of Indian prisoners during the one-year period 1978-79.[4]

After the 1978 passage of the American Indian Religious Freedom Act (AIRFA), the vast majority of Indian prison litigation in the 1980s continued to focus on religious freedom rights, demonstrating the continuing nature of the problem, and Indian prisoners throughout the country relied heavily upon the First Amendment and the "compelling government interest" test to solve the paramount problem faced by them.

The following is a brief summary of this continuing prison litigation leading up to the drastic change in First Amendment prison law by the Supreme Court in *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987), and its companion, *Turner v. Safley,* 482 U.S. 78 (1987), and

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[4] *See,* American Indian Religious Freedom Act Report, P.L. 95-341 Federal Agencies Task Force Report, (U.S. Dept. of the Interior, August 1979), appendices.

in free exercise law pertaining to Native Americans in *Employment Division of Oregon v. Smith, supra,* and *Lyng v. Northwest Indian Cemetery Association, supra,* which essentially stripped all Native people -- and especially Indian prisoners -- of the ability to defend their right to worship from unnecessary government infringements:

1. *Abraham v. State of Alaska,* 585 P.2d 526 (Alaska, 1978): Issue: Whether incarceration for Eskimo was cruel and unusual punishment when Eskimo did not speak English, ate only Native food, and whether failure to have rehabilitation program in Yupik violated plaintiff's constitutional right to rehabilitation. Held: Plaintiff entitled to rehabilitation but not to native diet.

2. *Capoeman v. Reed,* 754 F.2d 1512 (9th Cir. 1985): Forcible cutting of Indian prisoner's hair violated his First Amendment rights but did not make guards liable for damages.

3. *Cole v. Flick,* 758 F.2d 124 (3rd Cir. 1985): Prison hair regulations did not violate Cherokee prisoner's First Amendment rights.

4. *Mathes v. Carlson,* 534 F.Supp. 226 (W.D., 1982): Evidence showed that federal prison provided Indian prisoners with a reasonable opportunity to practice their tribal religion.

5. *Native American Council of Tribes v. Solem,* 691 F.2d 382 (8th Cir. 1982): Allegation that prison allowed Christian families to attend inmate religious services but denied same access for families of Indian inmates to attend Native religious ceremonies stated a claim for violation of the First and Fourteenth Amendment upon which relief can be granted.

6. *Reinhart v. Haas,* 585 F.Supp. 477 (S.D., Iowa, 1984): Preliminary injunction issued to allow Indian prisoners to wear headbands and religious medals under the First and Fourteenth Amendments.

7. *Indian Inmates of the Nebraska Penitentiary v. Gunter,* 660 F.2d 394 (8th Cir. 1987): Prison practice of providing Indian prisoners with access to only one Indian medicine man violated a prisoner's First Amendment rights and a prior court order by denying the prisoner access to medicine men of his choice.

8. *Sample v. Borg.*, Civ.No. S-85-0208-LKK (E.D., Ca, Order of Feb.25, 1987): Indian religion recognized by California Department of Corrections and Folsom Prison as entitled to protection under the First and Fourteenth Amendments on a parity comparable to that of other religions: access to medicine men or spiritual

leaders, sweat lodge, sacred objects, pipe ceremony, traditional hair styles, medicine bags, tobacco offerings.

9. *Fairbanks Correctional Center Inmates v. Smith,* Case No. 4FA-83-2146 (Sup.Ct., 4th Jud.Dis., Order of Jun.12, 1984): Native spiritual, religious and cultural activities allowed, including "potlatch" ceremony, Native foods, spiritual advisors, and possession of religious objects.

10. *Walking Elk Shadow v. Denton,* Case No. C-2-79-999 (S.D., Ohio, Memorandum and Order of Nov.14, 1978): Cheyenne\Arapaho prisoner had right to wear traditional hairstyle under the First Amendment.

11. *Sharp v. Nix,* Civ.No. 84-689-A (S.D., Iowa, Order of Dec.3, 1987): Court enjoined prison from prohibiting two Indian prisoners from participating in tribal religious ceremonies.

12. *Standing Bear v. Carlson,* No.CV. 85-6632-DT(Px), (C.D.,Ca., Judgement of Aug.18, 1986): Prison ban against headbands upheld.

13. *Weaver v. Jago,* 675 F.2d 116 (6th Cir. 1982): Upheld Cherokee prisoner's First Amendment right to wear long hair for religious purposes under the "compelling state interest" test.

14. *Battle v. Anderson,* 457 F.Supp. 719 (E.D. Ok., 1978): Prison officials ordered to afford Native prisoners with same opportunities to exercise their religion and culture as that afforded to inmates of other races.

Thus, even though religion has always been considered to be "an essential element" in rehabilitation by corrections administrators and the Supreme Court in *Cruz v. Beto, supra,* admonished that minority religions are entitled to reasonably equivalent treatment in prisons under the Equal Protection clause, Indians have inordinately had to litigate extensively on a national basis to bring themselves and their tribal religions within the ambit of religious freedom for incarcerated Americans. Without litigation, it is clear that Native people would not be able to worship. These cases and numerous other unreported negotiations were generally able to protect the First Amendment rights of Indian prisoners in meritorious instances, because the "compelling government interest" balancing test safeguarded against unwarranted infringements by prison authorities for spurious or unproven reasons. The well-known "compelling government interest" test required prisons to justify rules infringing upon prisoner worship as follows:

> "asserted justifications of such restrictions on religious practices based on the State's interest in maintaining order and discipline must be shown to outweigh the inmates' First Amendment rights," and "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." [citation omitted]. We are of the opinion that the state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health, safety in order to establish that its interests are of the "highest order."

Weaver v. Jago, supra, 675 F.2d at 119.

B. <u>The O'Lone Era (1987-1993)</u>

In 1987, the Supreme Court seriously weakened First Amendment rights of prisoners in the area of prison law by carving out an exception from the "compelling government interest" balancing test for prisons. That strict scrutiny test was abandoned in prison religion cases in *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987), which involved a prison regulation that prohibited Muslim prisoners from attending a weekly congregational service (Jumu'ah) of central religious importance to their Islamic faith.

Instead of applying the "compelling government interest" test to balance the alleged state interest behind the prison rule, as had been done by the federal courts for decades, the Supreme Court fashioned a new, lenient test granting judicial deference to prison administrators. The Court cited a prison case decided by it seven days earlier which began the watering down process of prisoner constitutional rights, *Turner v. Safley,* 482 U.S. 78 (1987) - involving prison restrictions on correspondence and the right to marry, and stated:

> To ensure that courts afford appropriate deference to prison official, we determined that prison regulations alleged to infringe upon constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental rights. . .. [citation omitted] We recently restated the proper standard: "When a prison regulation impinges on inmates' constitutional rights, **the regulation is valid if it is reasonably related to legitimate penological interests.**" *Turner v. Safley,* ante at 89, 96 L.Ed.2d 64, 107 S.Ct. 2254.

482 U.S. 349. [bold emphasis supplied] Virtually <u>anything</u>, however, can be construed to be "reasonably related" to a penological objective as subsequent cases demonstrate. With the new test, the Supreme Court abandoned incarcerated Americans to our Nation's most authoritarian institutions without supplying them with any adequate means or objective criteria to safeguard

their constitutional rights. Relieved of the requirements of the "compelling government interest" test (which was later abandoned for the rest of society by the Supreme Court in its 1990 decision in *Unemployment Division of Oregon v. Smith, supra,*) prison wardens became able to restrict religious liberty with only a general, conclusory allegation that the restriction is "reasonably related" to a penological interest.

The serious weakening of prisoner constitutional rights caused by *O'Lone* and *Turner* in 1987 led to a drastic retreat of First Amendment caselaw protections for Indian prisoners and rendered their minority religious liberty especially vulnerable as lower courts applied the new watered down test to determine whether prison rules limiting freedom of religion pass muster under the First Amendment.

Some of the post-*O'Lone* Indian cases overturn earlier, well-established Indian religious freedom rights. For example, in *Iron Eyes v. Henry,* 907 F.2d 811 (8th Cir. 1990), the court relied upon *O'Lone* and *Turner* to deny the right of a Sioux Indian to wear his hair in the traditional manner - a First Amendment right previously upheld in that Circuit in *Teterud v. Burns,* 522 F.2d 357 (8th Cir. 1975). The *Iron Eyes* court stated:

> To support his position, Iron Eyes relies primarily upon *Teterud v. Burns,* 522 F.2d 357 (8th Cir. 1975), in which we held that a prison hair regulation impermissibly infringed upon a Native American's first amendment right to freely exercise his religious beliefs . . . . While *Teterud* has not been expressly overturned, we have limited it to its facts . . . . Further, the least restrictive means test we applied in *Teterud* has been rejected by the Supreme Court. *See O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct. 2400, 2405, 96 L.Ed.2d 282 (1987); *Turner,* 482 U.S. at 89, 107 S.Ct. at 2261.

907 F.2d at 813. Thus, the Eighth Circuit in *Iron Eyes* was forced to deny a previously well-established First Amendment protection to a traditional Indian with sincerely held tribal religious beliefs[5] under the more lenient test of *O'Lone* and *Turner*, because there was "a

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[5] As noted by the Court of Appeals at 811, there was no question that the rule infringed upon tribal religious beliefs and practices that were sincerely held by Iron Eyes:

> Iron Eyes was born on the Standing Rock Reservation in Fort Yates, North Dakota, and is an enrolled member of the Standing Rock Sioux Tribe. He was raised in the ways of the Sioux culture and has followed the traditional practices of Sioux religion since his youth. Iron Eyes identifies his religion as the pipe

(continued on Page 17)

rational nexus between the short hair regulation and the valid neutral penological concerns behind it," *Id.* at 814, stating with regret at 816 that:

> Although we recognize how important the growing of his hair is to Iron Eyes, we simply cannot, under the *Turner* factors, justify striking the short hair regulation.

The harsh result of the decision under the new test was underscored by the fact that while the prison hair rule may have passed the lenient "reasonableness" test, the rule only marginally affected any demonstrable penological needs or objectives:

> The hair-length regulation we review today . . . infringes on religious practice and has little to do with the necessary or even reasonable ordering of prisons. The reasons offered in support of hair-length regulations are long-standing penological myths, and the defendants introduced no actual evidence to support their claims.

Id. at 823 (Judge Heaney's Dissenting Opinion). The same result was reached in other post-*O'Lone* Indian prison decisions, such as *Pollock v. Marshall,* 845 F.2d 656 (6th Cir. 1988); *Holloway v. Pigman,* 884 F.2d 365 (8th Cir. 1989); *Thomas v. Gunter,* 32 F.3rd 1258 (8th Cir., 1994); *Standing Deer v. Carlson,* 831 F.2d 1525 (9th Cir. 1987); *Cano v. Lewis,* 917 F.2d 566 (9th Cir. 1990); *Escalanti v. Lewis,* 1991 WL 83900 (9th Cir. 1991) (unpublished opinion); *Allen v. Toombs,* 827 F.2d 563 (9th Cir. 1987).

In *Mosier v. Maynard,* No. 90-6199 (10th Cir., Slip Opinion filed July 5, 1991) at 9-10, the Tenth Circuit remanded an Indian prisoner hair-length case back to the district court for consideration of the Indian's claim under the new *Turner* and *O'Lone* double-standard for prisoners, noting:

> What might be viewed as an unreasonable infringement of a fundamental constitutional right were it to occur outside of prison may be valid in prison as long as the

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religion. Among the tenets of his religion are the pipe ceremony, the sun dance, the ghost dance, and the use of the sweat lodge. These last two tenets are prohibited at Farmington. Iron Eyes also follows other traditional practices of his religion, including the wearing of long hair.

> . . . He believes that his hair is a gift from the Great Spirit, and he considers cutting his hair, except to symbolize grief for the loss of a loved one, to be an offense to the Creator. Iron Eyes has had his hair cut five times during his twenty-seven years. The first three times he cut his hair by choice, mourning for the loss of a loved one, consistent with the Sioux religion. The last two times his hair has been forcibly cut because of a Missouri prison grooming regulation.

infringement is reasonably related to legitimate penological objectives, which include rehabilitation, deterrence and security.

The right to wear traditional hairstyle for religious purposes is not the only First Amendment right for Indian prisoners which was parred back in the post-*O'Lone* cases. In *Standing Deer, supra,* the court held that a prison regulation banning religious headgear did not violate the First Amendment rights of Native American prisoners stating that under the new test, "to ensure that we afford appropriate deference to the judgment of prison officials, we restrict our inquiry to considering whether the challenged regulation is **logically connected** to legitimate penological concerns." 831 F. 2d at 1528.

Moreover, in other areas of worship, the increasing trend of prisons to restrict, without constitutional accountability, Indian prisoner access to Native American religious ceremonies and programs is being sanctioned by the courts. For example, in Oregon the District Court upheld prison searches of medicine pouches, restrictive procedures for pipe ceremonies and limited times for sweat lodge ceremonies under the new "reasonableness" standard in *Clark v. Peterson,* Civ.No. 85-6559-PA (D.Ore., Opinion dated August 22, 1988). In *Allen v. Toombs, supra,* the court permitted Indian prisoners in maximum security to be restricted from access to sweat lodge and limited in their pipe ceremonies. Similarly, in *Holloway v. Pigman, supra,* a prison's denial of possession by an Indian prisoner, while confined in maximum security, of his sacred objects such as sage, sweet grass and sacred tobacco was permitted under the "reasonableness" standard of *O'Lone* and *Turner.* And in *McKinney v. Maynard,* No. 89-7105 (10th Cir. Slip Opinion dated Dec. 23, 1991), the Court remanded an Indian religion prison case to the District Court to consider the following, now familiar facts in the Oklahoma prison system -- a penal system which has repeatedly been sued for violating First Amendment rights of Native Americans -- under the new lenient standard:

> Upon his incarceration at Mcleod, a minimum security facility, Mr. McKinney [a Potawatomi Indian] was ordered to turn in his medicine bag [a small leather pouch containing sacramental tobacco]. When his hair grew longer, prison officials ordered him to cut it and denied his request for an exemption from the grooming code. Later, in response to his desire to participate in a sweat lodge ceremony, Mr. McKinney met with the warden who permitted him to submit plans for constructing the sweat lodge. Mr. McKinney supplied the drawings and materials list which included willow poles, canvas squares, firewood, and rocks. However, the warden summarily denied the request stating the materials were unavailable, and the sweat lodge is a security risk. Despite Mr. McKinney's desire to worship as a Keeper of the Pipe, his suggested

alternatives were ignored. After his administrative appeals were exhausted, he filed this suit.

Id. at 3. Indian cases of this nature in the *O'Lone* era were further hampered by two additional Supreme Court decisions involving Indian religion of non-incarcerated Natives, which left it clear that imprisoned Indians had no hope of receiving constitutional protection for their right to worship in the manner of their ancestors:
the *Smith* (1988) and *Lyng* (1990) cases.

Lyng, supra, and *Smith, supra,* denied First Amendment protections for fundamental tribal religious practices, based upon rationale that stripped Indian tribal religions of any constitutional or statutory protections for the free exercise of religion under American law.[6] These cases have created a "loophole" in the First Amendment for First Americans and a human rights crisis in Indian country.[7] The impact of these decisions on Indian prisoners is particularly serious and pronounced.

Smith held that all criminal statutes and civil laws or regulations of general application that are not hostile against religion **are exempt from the reach of First Amendment limitations altogether.** 108 L.Ed.2d at 885-7. This decision drastically limited First Amendment guarantees for free citizens and has led to a huge outcry by non-Indian society as reported in Time (Dec. 9, 1991) at 68:

> For all the rifts among religious and civil-libertarian groups, this decision brought a choir of outrage singing full voice. A whole clause of the Bill of Rights had been abolished, critics charged, and the whole concept of religious freedom was now imperiled. "On the really small and odd religious groups," said University of Texas' [Professor of Law, Douglas] Laycock, "it's just open season."

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[6] In *Lyng*, the Court held that the First Amendment provided no bar to the U.S. Forest Service's decision to build a logging road through a mountain area sacred to three tribes, despite the fact that the road would "virtually destroy the Indians' ability to practice their religion." 485 U.S. 439, 452-53 (1988). In *Smith*, the court denied First Amendment protection for an adherent of the Native American Church's sacramental use of peyote, in light of a neutral employment regulation banning drug use.

[7] *See, e.g.*, Echo-Hawk, "Loopholes in Religious Liberty: The Need For A Federal Law To Protect Freedom Of Worship For Native People," 16 Native American Rights Fund Legal Review No.2 (Summer 1991) at 6.

For prisoners, who were already vulnerable under the toothless test of *O'Lone* and *Turner* as shown in the above Indian inmate cases, the complete exemption of civil regulations of general applicability from the protective reach of the Free Exercise Clause done in *Smith* effectively stripped this class of citizens of any freedom of worship safeguards under the U.S. Constitution. Thus, in this period of American history, an entire class of American society went without the fundamental human right of worship. As the Seventh Circuit stated in a prison case denying Muslim prisoners their religious tenet against eating pork, *Hunafa v. Murphy,* 907 F.2d 46, 48 (7th Cir. 1990):

> *Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison cases are founded. No one suggests that the defendants are serving pork in order to offend Jews and Muslims; they serve it because it is cheap and nutritious; their practice may therefore be the equivalent of a general, secular regulation that just happens to interfere with the free exercise of religion by a minority group whose religious preferences are ignored in the shaping of general regulations. *Employment Division v. Smith* may give the defendants a good defense; and this is an issue to be explored on remand.

In the Eighth Circuit, the Court dryly noted the additional impact of *Smith* in a Muslim prisoner case entitled *Salaam v. Lockhart,* 905 F.2d 1168, 1171 n.1 (8th Cir. 1990):

> We do not believe that the Supreme Court's recent decision in *Employment Div., Dept. of Human Resources v. Smith,* __ U.S. __, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), affects our analysis. *Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners.

For Indian prisoners, however, *Smith* virtually guaranteed that this class of prisoners would not be protected, because *Smith,* like *Lyng,* involved tribal religions; and this harsh reality is reflected in all of the Indian inmate cases of this period and in the congressional testimony of 1992-93.

During the *O'Lone* period, NARF received many requests for help from prisoners but no legal protections were available to them under American constitutional law. This intolerable situation, which is difficult for most Americans to imagine, led Indian country to embark upon a civil rights movement in the 103rd Congress for the passage of new laws to

protect the religious liberty of the First Americans, including increased federal protection for Native prisoners.

C. The RFRA and the Post-O'Lone Era (1993-present)

During the 103rd Congress, Native people pressed for comprehensive legislation to protect their free exercise of religion, which was made necessary by Supreme Court rulings in *O'Lone, Lyng* and *Smith.* This civil rights movement met with partial successes and failures, on an issue-by-issue basis.

For example, Congress failed to pass comprehensive legislation to protect free exercise issues of grave concern to Native people, such as the Native American Free Exercise of Religion Act (S.1021) which would have protected sacred sites, religious use of peyote, eagle feathers and animal parts, prisoner rights and to reinstate the "compelling government interest" test as the legal standard in a private cause of action. However, Congress did enact the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. 1996a, to overturn the *Smith* decision and protect the religious use of peyote by Indians.[8] Congress also passed the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq. (hereinafter "RFRA"), to overturn *Smith* and restore the "compelling government interest" test as the legal standard in litigation to protect the free exercise of religion of all citizens.

RFRA provides that government may "substantially burden" a person's exercise of religion only if it demonstrates that the burden is (1) in furtherance of a "compelling government interest;" and (2) is the least restrictive means of furthering that interest. This law brings the nation back to the pre-*O'Lone* era, but RFRA is not self-enforcing and much of the *O'Lone* era caselaw remains in effect with its bad precedents allowing infringements upon the religious liberty of Native prisoners. Thus, since the passage of the RFRA in 1993, NARF and many organizations have continued to receive voluminous requests for legal assistance from Native American prisoners to protect their religious freedom, which indicates that this human rights issue has not abated despite the passage of the RFRA. Thus, there is a need to develop a national litigation strategy to implement RFRA protections for Native American prisoners, who have suffered deprivations of their religious liberty for almost a decade across

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[8] In Administrative action, President Clinton signed a directive on April 28, 1993, streamlining the federal system which allows the religious use of eagle feathers by Indians for religious purposes.

the country during the *O'Lone* era, and to overturn many adverse decisions on this issue which were decided under the *O'Lone* standard which has now been repudiated by RFRA. For example, the Ninth Circuit has rendered four adverse decisions applying *O'Lone* to free exercise claims of Indian inmates, which must be overturned under the new law.

Five cases have applied RFRA to decide free exercise claims of Native American prisoners. In *Werner v. McCotter,* 49 F.3rd 1476 (10th Cir., 1995), the court applied the RFRA to a Cherokee inmate's free exercise claim to a sweat lodge, medicine bag and access to a Cherokee spiritual leader. The court ruled that RFRA overturned *O'Lone* and prohibits a "substantial burden" upon the free exercise of religion unless justified by evidence of a "compelling government interest" which cannot be furthered by a less restrictive means. Taking judicial notice of the religious importance of sweat lodges to Indians,[9] the court remanded the case back to the district court for consideration of the sweat lodge and sacred objects claim under the RFRA.

In *Hamilton v. Schriro,* 863 F.Supp. 1019 (W.D. Mo., 1994), plaintiff Indian inmates sought protection for: (1) the right to wear traditional Native hairstyles for religious purposes; (2) access to a sweat lodge; and (3) possession of numerous sacred objects. The Missouri prison, relying upon caselaw rendered under the *O'Lone* test, refused to grant the Indians access to these fundamental religious practices. In ruling in favor of the Indians, the District Court noted the change in legal tests mandated by RFRA:

> Under caselaw prior to the enactment of the RFRA, an inmate's exercise of religion could be restricted if the restrictions were reasonably related to prison security . . . Prison officials had to produce evidence that the restriction placed on an inmate's freedom was in response to a security concern. At that point, the burden shifted to the inmate to show by substantial evidence that the prison official's response was exaggerated . . .
>
> After enactment of the RFRA, plaintiff must show that the prison regulation and practices place a substantial burden on the exercise of his religion. The burden then shifts to corrections personnel to show the regulations and practices further a compelling state interest and that the regulations and practices are the least restrictive

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[9] The court cited *Thomas v. Gunter,* 32 F.3rd 1258 (8th Cir., 1994); *Allen v. Toombs,* 827 F.2d 563, 565 nn. 4,5 (9th Cir., 1987); and *McKinney v. Maynard,* 952 F.2d 350 (10th Cir., 1991) for judicial notice of this fact.

means of furthering the compelling state interest.

Id. at 1022. To justify their infringements, defendant prison officials in *Hamilton* gave the standard minimal justifications for denying the sweat lodge, sacred objects and long hair, which were rejected by the Court under RFRA:

> . . . The Court finds that the regulations and policies at issue in this lawsuit with regard to plaintiff's practice of his Native American religion substantially burdens plaintiff's exercise of his religion. Although safety, security and cost concerns may be shown to be compelling governmental interests in the prison setting, defendants have not shown that the regulations and practices used by the Missouri Department of Corrections are the least restrictive means of furthering that interest. Defendants have not even shown a willingness, after enactment of the statute [RFRA], to implement less restrictive means in the absence of a court order to do so. Thus, plaintiff's attorney is entitled to attorney fees. Defendants take substantial steps to accommodate Christians, Jews and Muslims in providing facilities and opportunities to meet and pray. They reluctance to do the same for Native Americans is based upon lack of information, speculation, exaggerated fears and post-hoc rationalizations, not on real evidence of problems.

Id. at 1024.

Hamilton was reversed on appeal. The Eighth Circuit Court of Appeals held that prison officials did not violate the inmates right to free exercise of religion or RFRA. *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). This case may be subject to further appeal.

In *Abordo v. Hawaii,* 902 F.Supp. 1220 (D. Haw., Aug. 25, 1995), 1995 WL 555375, a Native American prisoner filed suit alleging *inter alia* that the prison rule forbidding long hair infringed upon his religious exercise in violation of the RFRA. The Court upheld the constitutionality of the RFRA and denied the prison's motion to dismiss this claim, even though that federal court had previously rendered an opinion in an earlier 1989 case upholding the prison hair rule under the *O'Lone* standard. Thus, the court in *Abordo* set the issue for trial under the RFRA. Similarly, in *Besh v. Bradley,* 47 F.3rd 1167 (6th Cir. 1995) (Unpublished Disposition), 1995 WL 68774, death row prisoners sought access to sacred objects, ceremonies and a sweat lodge for religious purposes. The District Court dismissed this case under the *O'Lone* standard, but the Court of Appeals reversed the dismissal under the RFRA and remanded the case back to the District Court to consider the case under the RFRA.

Contrary to the successful *Werner* case, in *Diaz v. Collins,* 872 F.Supp. 353 (E.D. Tex., 1994), a Native prisoner filed a *pro se* action claiming that his religious practice was abridged by Texas prison policies denying long hair and headbands, and access to the sacred pipe and medicine pouches. Relying upon a pre-RFRA case, the Magistrate rejected the claims under the "compelling government interest" test in the particular facts of that case. *Diaz* illustrates the need for legal counsel to be deeply involved in cases of this nature to furnish sound legal advice and to provide expertise necessary to avoid making bad caselaw under the new statute.

NARF is aware of many free exercise claims and requests from Native prisoners from all over the country, including a number of pending administrative grievances, *pro se* actions and other litigation. *See, e.g., Limbaugh v. Thompson,* CV. No. 93-D-1404-N (M.D. Alabama); *Armijo, et. al. v. Texas Dept. Criminal Justice,* No. A-95-CV-222-JN (D. Tex.); *Schrock v. Lewis,* Civ. 95-1857-PHX-EHC (BGS) (D. Az.). In this rapidly developing area of RFRA law, it is critical that meritorious Native prisoner cases be won and that good, precedent-setting caselaw be established under the new law through the filing of well-placed impact litigation done pursuant to a national, law development litigation strategy. NARF is presently developing such a strategy and calls on all members of the federal Indian bar and legal practitioners to participate in prisoner representation in such cases. *See,* Recommendations Nos. 1 and 2, *supra.*

IV. LEGISLATIVE, ADMINISTRATIVE AND OTHER INITIATIVES

Historically, Natives have looked to the courts to protect their human, political and property rights. Similarly, in the area of corrections, litigation has historically served as the principal tool relied upon to protect the human right of worship by Native American prisoners in the United States, without which no such rights would exist. However, litigation should not be viewed as the sole vehicle to accomplish these protections. Indeed, litigation is expensive, time-consuming and burdensome. Prisoners do not have resources to litigate, nor do many legal groups exist to provide such representation. Furthermore, sometimes the law changes, as happened in the *O'Lone* era, and courts fail to serve their classic constitutional function of vigorously protecting the rights of even the weakest among us.

Thus, litigation should not be viewed as the exclusive means to protect the free exercise of religion by Native prisoners. For example, some states such as Arizona, Colorado and New Mexico have enacted legislation to protect the religious liberty of Native American prisoners. However, it would be an enormous and burdensome task to accomplish legislation on this subject in all 50 states and the District of Columbia. On the federal level, bills have been introduced to protect the religious freedom of Native prisoners, such as Title III of the Native American Free Exercise of Religion Act (S. 1021), which was marked up by the Senate Indian Affairs Committee near the end of the 103rd Congress, but failed to advance any further. Prospects of such legislation in the 104th Congress are not good, given the hard conservative bent and anti-prisoner backlash that is the hallmark of the present Congress. Thus, while legislation is definitely helpful in some instances, this avenue of remedial relief can be burdensome and subject to political vagaries and fashions.

In addition, another little explored avenue is to develop a dialogue between tribal and correctional leaders and organizations, such as the American Correctional Association ("ACA"), to develop standards and voluntary changes in corrections practices for the purpose of better accommodating Native American religious practices in the correctional setting. *See,* Recommendation No. 7, *supra.*

A. Attorney General Directive

In light of the growing need to protect the religious liberty of Native American prisoners, the National Congress of American Indians ("NCAI") passed Resolution SPK-95-043 June of 1995, declaring an "emergency need to protect the free exercise of religion of Native American prisoners and afford them with equal protection of the law" and urging the President and Attorney General of the United States to issue an Executive Order or Attorney General Directive to protect such free exercise and equal protection rights as a critical human rights priority in 1995.

The emergency NCAI resolution coincides with the formation of the NNAPRAC in the Spring of 1995. The NNAPRAC is composed of many local, regional and national Native organizations, most of which work in the field of corrections. The purpose of the NNAPRAC, which is co-chaired by the Presidents of the Navajo Nation and the National Congress of American Indians and coordinated by the Navajo Nation Corrections Project, is to secure Administrative relief from the Clinton Administration to protect the free exercise of religion by Native American prisoners. The NNAPRAC membership list is attached and it includes many Native American correctional workers of many local groups, as well as concerned national groups, such as, the National Congress of American Indians (NCAI), NARF, the Association on American Indian Affairs ("AAIA") and the Native American Church of North America.

During the Summer of 1995, the NNAPRAC developed a proposed Attorney General Directive to protect the free exercise and related equal protection rights of Native American prisoners. The Directive, which is attached hereto, is patterned closely upon Title III of the Native American Free Exercise of Religion Act (S. 1021) (NAFERA) regarding prisoner rights, which Title was supported by the Justice Department in the 103rd Congress. Like Title III of S. 1021, the proposed Directive would protect the equal protection rights of Native prisoners through various provisions intended to protect their free exercise rights and to afford them with the opportunity to practice traditional Native American religions comparable to that which is afforded to prisoners of other faiths. The intent of the Directive is to obviate unnecessary litigation by clarifying the free exercise and equal protection rights of Native prisoners to practice little understood traditional tribal religions. The provisions of the Directive which protect aspects of Native religious liberty and prohibit discrimination on the

basis of religion are primarily applicable to the Federal Bureau of Prisons under the supervision of the Attorney General, but would also apply to state and local prisons which house federal prisoners. The Directive also mandates a 12 month study of Native American free exercise problems in federal, state and local prisons done in consultation with Native representatives and would establish a special litigation section responsible for bringing actions to protect Native free exercise rights.

Led by its tribal leader co-chairs -- the Presidents of the Navajo Nation and the National Congress of American Indians -- the NNAPRAC proposal will be submitted to the Attorney General in the Fall of 1995 as a major Native American human rights initiative.

The Attorney General has the constitutional authority to issue a Directive of this nature to carry out equal protection and free exercise mandates, including affirmative steps to implement the RFRA on behalf of Indian people to whom a federal trust duty is owed. For example, legislation to accommodate or protect free exercise values is by no means novel, because Congress has passed many laws in this area.[10] In *Gillette v. United States,* 401 U.S. 437, 453 (1971), the constitutionality of this type of legislation was upheld as not violating the Establishment Clause:

> Quite apart from the question of whether the Free Exercise Clause might require some sort of exemption [footnote omitted], it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy traditions" of "avoiding unnecessary clashes with the dictates of conscience." [citation omitted]

Indeed, when the Supreme Court withheld First Amendment protection for Indians in *Smith,* it specifically tossed the ball to other Branches of the Federal Government to protect them, stating:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society

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[10] *See, e.g.,* 5 USC 5550a (1978) [compensatory time off for federal employees for religious observances]; 26 USC 1402 (h) [tax exemptions granted from certain taxes to accommodate religious beliefs and practices]; 50 USC 456 (j) (1967) [exemptions from military service to accommodate religious training and belief]. In Indian affairs, Congress routinely legislates to accommodate or protect Indian free exercise values. *See, e.g.,* American Indian Religious Freedom Act, 42 USC 1996-1996A; Native American Graves Protection and Repatriation Act, 25 USC 3001 (1990 Supp.); 16 USC 668(a) [exempted Indian religious use of eagle feathers from eagle protection law to accommodate Indian free exercise values]; and many other statutes.

> believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster dissemination of the written word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. . . It may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred . . .

108 L.Ed.2d at 893. *See, also, Lyng,* which stated that any accommodation for Native American religious freedom is "for the legislatures and other institutions." 485 U.S. at 452-53. Thus, Attorney General has the power to issue a directive to protect free exercise rights of prisoners.

Moreover, the fact that the Directive deals solely with Native American religious practices in prisons likewise does not offend the Establishment or Equal Protection Clauses, for three reasons:

> **First**, the Directive merely removes known barriers on the free exercise of Native prisoners which have been experienced on a widespread national basis. The purpose of the Directive is not to disadvantage other religions, but to protect a minority religion which is currently threatened by insensitive prison officials.
>
> **Second**, the Directive merely grants Native American prisoners equal access to the practice of their religions on a regular basis comparable to that access afforded to prisoners who practice Judeo-Christian religions, which is in line with the Equal Protection dictates of the Supreme Court in *Cruz v. Beto, supra,* 405 U.S. 319, 322 (1972) [minority religious practitioners in prisons must be afforded, "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts" under the Equal Protection Clause.]
>
> **Third**, because of the unique legal position of American Indians in federal law pursuant to the treaty and trust relationship, "legislation that singles out Indians for particular and special treatment" is constitutional "so long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari,* 417 U.S. 535, 555 (1974). The religion area is "rationally related to the legitimate governmental objective of preserving Native American culture . . . [which] is fundamental to the federal government's trust relationship with tribal Native Americans." *Peyote Way Church of God v. Thornburgh,* 922 F.2d 1210, 1216-1217

(5th Cir. 1991). In addition, the United States government owes a separate trust responsibility to tribal communities and their members in order to preserve them as viable cultural entities, and to take appropriate steps to ensure that when Native American human resources return from prison they are contributing members of the culture.

Recommendation No. 3, *supra,* states the need for the Attorney General to issue a Directive along the lines of that proposed by the NNAPRAC and calls for support from Indian Tribes.

B. The Prisoner Backlash in the 104th Congress

The passage of the RFRA in 1993 was hailed by American legal scholars, religious leaders and civil libertarians who were deeply concerned about the need to protect American religious liberty which had been seriously eroded by the *Smith* case. The *Smith* decision was strongly denounced and repeatedly repudiated in the Senate and House of Representatives during the legislative process and by the President upon signing the measure, as bad law that was highly repugnant to our basic traditions and religious heritage. The RFRA applies to all Americans without exception, including those in prison, where RFRA protections are perhaps most direly needed. However, there was a movement on the floor of the Senate to offer an amendment which would have excluded prisoners from the protections of the law and rendered prisoners the sole class of citizens without meaningful legal protections for worship in the United States. That amendment, which was prompted by State Attorneys General and prison wardens who had grown used to running prisons under the lax *O'Lone* standard, was defeated by a close 58-41 vote.

In the present 104th Congress, there exists a disturbing prisoner backlash toward restricting the legal rights of prisoners and their ability to seek protections in federal court.

For example, several anti-prisoner bills are pending. The Religious Freedom Restoration Act of 1993 Amendment Act of 1995 (S. 1093) would exclude prisoners from the RFRA protections. Senator Reid justified his bill upon introduction, stating:

> Have we become so concerned with prisoner rights that we have forgotten the rights of society? Remember these people are in jail because they have been convicted of

> felonies. They are not there because we are trying to check to find out if they are good or bad. They are felons. And we are spending 40 percent of the court's time on this trash.

Cong. Rec. (July 28, 1995) at S. 10895 (Remarks of Senator Reid).

The Legal Services Appropriations Act (H.R. 2076) prohibits legal services attorneys from providing prisoners with any representation whatsoever in litigation. The so-called Stop Turning Out Prisoners Act (S. 400 and H.R. 667) limits the power of federal courts to remedy prisoner rights and would terminate favorable consent decrees previously entered into by prisons and inmates. These harsh measures would strip greatly needed rights from powerless people.

I view these measures with great caution. These bills are noteworthy because they represent a resurgence of intolerance and frightening trend toward the restriction of civil liberties in the United States. History shows that when the fundamental human rights of one group are taken away, the rights of others soon follow. *See,* Senator Daniel K. Inouye, "Discrimination and Native American Religious Rights," 18 NARF L REV. No. 2 (Summer 1993). Prisoners may live behind prison walls as convicted felons; however, they remain human beings, they are citizens and they will be returning to American homes and families. The treatment of prisoners is a reflection of society's true feelings about human rights. Thus, the rights of prisoners cannot lightly be ignored, cast aside or made politically expedient without serious repercussions to our constitutional liberties and human rights ideals.

Moreover, human rights problems cannot be tolerated, ignored or forgotten simply because Native prisoners are locked away from the public mind. Though separated by prison walls, these citizens are still members of our society and will be returning to free, tribal communities, hopefully as contributing members and not as persons who have been alienated by unchecked totalitarian treatment at the hands of the state. As stated by ex-Justice Brennan in his dissent against the toothless standard of the majority in *O'Lone*:

> Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that dimly enters our awareness. They are members of a "total institution" that controls their daily existence in a way that few of us can imagine . . . It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however,

> that the society that these prisoners inhabit is our own. Prisons may exist on the margin of that society, but no act of will can sever them from the body politic. When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.

482 U.S. at 355.

V. CONCLUSION

Pronounced need exists for an Attorney General Directive and a national litigation strategy to protect free exercise rights of Native American prisoners, with strong support from Indian Tribes and practitioners of federal Indian law. As no other segment in American society, Indian prisoners are acutely subject to government restrictions on freedom of worship. Their right to worship in totalitarian prison environments is the most heavily regulated civil liberty in the United States. Further, a host of criminal justice studies should be performed to better understand the needs of these forgotten Americans and to develop appropriate criminal justice programs.

National Survey of State and Federal Prison Policies and Procedures Regarding the Religious Freedom of Native American Inmates

Summary of Responses

Prepared by Sally Mier, Paralegal,
for the Native American Rights Fund
December 11, 1992

Introduction

In October of 1992, the Native American Rights Fund conducted a survey of state and federal correctional department policies and procedures to determine what provisions, if any, allowed Native American inmates access to their traditional religious practices while incarcerated. Twenty-three state departments of correction, the Federal Bureau of Prisons, and the District of Columbia Department of Corrections provided written religious policies and procedures that were general in nature and did not adequately address the religious needs and practices of Native American inmates. Four state correctional departments provided no written religious policies at all. Ten states did not respond to the survey. Only thirteen state departments of correction submitted written policies and procedures that specifically address Native American traditional religious practices and allow, to some extent, access to traditional religious leaders, sacred objects, and traditional Native religious facilities (Sweat Lodge) within the correctional setting.

Among those states having no formal, written religious policies concerning Native American spiritual practices, a few do permit access to religious objects, traditional spiritual leaders, and traditional Native religious facilities, but this access is not guaranteed. In most cases where the policies were "faith-neutral," it could not be determined whether Native American inmates were afforded access to their traditional religious practices at all; or if access was allowed, it was not clear whether it was given on a basis comparable to that afforded to inmates of other religions.

With few exceptions, policies on hair length and the wearing of headbands for religious purposes were not incorporated into religious program policies, even those that were specifically directed to Native American religious practices.

The following is a narrative summary (by state) of the information NARF received from the survey respondents. A tabular summary of the same data is also presented.

Alabama Department of Corrections

Did not respond to the survey.

Alaska Department of Corrections

Did not respond to the survey.

Arizona Department of Corrections

The Arizona Department of corrections provided written policies specific to traditional Indian religion. Under these policies and procedures, Native American inmates are allowed access to traditional religious leaders under general rules applying to visitations by outside clergy. Sweat Lodges operate on a published schedule within a secured area and are subject to searches with the provision that care be taken not to violate sacred objects or space. Sacred objects (such as Pipe and Drum) approved by the Adminstrator of Pastoral Activities are maintained in special storage areas by the institutional chaplain. Inmates may have personal religious items (subject to visual inspections by staff and other restrictions) including shell, sage, sacred stones, medicine bag, animal parts (wing talon, small bone), eagle feather. Native Americans confined to disciplinary isolation are granted access to religious tobacco (kinnikinnick) and a sacred pipe. Up to four headbands are allowed (black, red, yellow, green, blue or white colors only are permitted) and may be worn at any time. No specific written provisions regarding hair length was included in the policies submitted.

Arkansas Department of Corrections

The Department's guidelines for religious activities were not provided in response to the survey and it is not known whether the Department has specific policies regarding the free exercise of Native American religions. According to Chaplain Herbert Holley, the Department's policy generally is to provide inmates with the greatest amount of religious freedom as is consistent with the safety and secure operations of the correctional facility.

California Department of Corrections

California's written policies regarding the religious freedom of Native American inmates cites, among other authorities, Public Act 95-341 (American Indian Religious Freedom Act of 1978). The Department's policy regarding the religious practices of Native American inmates is set forth in their Operations Manual under section 53050. Under these policies and procedures, Native American prisoners are allowed access to traditional spiritual leaders, sweat lodge ceremonies in traditional facilities, religious artifacts, personal items of religious significance, and ornamental objects under specified guidelines, rules and restrictions. Policy requires the sanctity of the Sweat Lodge and the

designated area in which the Sweat Lodge is located to be observed by inmates and staff alike. Searches of the Sweat Lodge are to be conducted with dignity and respect and, when practical, in the presence of the Chaplain or Native American Spiritual Leader. Medicine bag and Sacred Pipe and Bag searches may not be conducted without "reasonable cause" and searches are to be limited to visual inspection with the items being handled only by the owner and/or the designated pipe holder unless there is reason to believe they may contain unauthorized items or substances.

Colorado Department of Corrections

In May of 1992, the General Assembly of the State of Colorado enacted a law to protect the religious freedom of American Indians who are incarcerated in correctional facilitities in Colorado by granting them access to traditional spiritual leaders, items and materials utilized in religious ceremonies, and access to traditional religious facilities on a basis comparable to that afforded to inmates who practice Judeo-Christian religions (CRS 17-42-102).

The Department of Corrections Administrative Regulation 800-7 (latest revision 2/14/92) specifically addresses the religious practices of Native American inmates and is currently being updated and revised. Administrative Regulation 800-7 establishes guidelines for the identification, authorization and practice of American Indian/Alaskan Native religious ceremonies and customs within the correctional setting. Within these guidelines:

Hair may grown to any length desired by the American Indian/Alaskan Native inmate,

Religious items which may be used in ceremonies include: pipes, tobacco, buffalo skull, eagle feathers, eagle fans, string and cloth material of various colors for tobacco ties, corn pollen, corn meal, sage, and cedar. These objects are consecrated and are subject to visual inspection only; further inspection must be based on "reasonable cause" and approved by the Warden. Access to sacred objects, other than for sweat lodge use, are subject to rules developed by the Religious Program Coordinators to the extent consistent with sound security practices.

A traditional spiritual counselor may perform specific ceremonies or advise and counsel Native American inmates, conduct the Sweat Lodge ceremonies, and be the caretaker of all the sacred objects which are stored in a secured area when not in use.

A sweat ceremony is permitted once a week, or by special arrangement with the Warden and may accomodate up to twenty people. If a spiritual counselor is not available, a sweat ceremony may be held by the inmates with approval of the Warden. The Sweat Lodge, which is located in a secured area, is not to be entered by any person other than the participants in the ceremony, nor is the ceremony to be interrupted once it has begun. The ceremony normally requires eight to eight and one-half hours.

Security Measures - Security staff may search the sweat lodge before and after a ceremony, "but shall show proper respect for the sacredness of the Ceremony and the sacred objects used in the Ceremony." Inmates are to be searched prior to and following the sweat ceremony. Only an emergency situation shall permit a "shakedown" in the area of a sweat lodge or count of participants during a ceremony. In that event, "staff shall consider it a sacred area where the Spiritual Counselor, or other designated American Indian/Alaskan Native representative, should be present during the shakedown."

Non-discrimination - All Native American inmates "participating in their authorized religious practices are to be given the same respect and courtesies as any other participants of any organized religion."

Staff Training - Native American culture and spiritual awareness training shall be made available to all correctional operations personnel.

Connecticut Department of Corrections

There are no provisions for sweat lodges, hair length exemptions, or access to ceremonies or traditional religious leaders or facilities in Administrative Directive 10.8, Religious Services, March 17, 1992 which was submitted in response to the survey. The extent to which Native American practices are recognized and addressed is a reference that headbands, medicine pouches, beads and medallions are recognized religious articles which are authorized by the Department. The letter from Rev. James R. Cook to Walter Echo-Hawk dated October 8, 1992 indicated that the directive is not specific to any religion and that the Department hires, contracts, or uses volunteers to provide inmates the opportunity to practice their religious beliefs.

Delaware Department of Corrections

Delaware does not have a specific policy allowing Native American inmates to practice Native American religions. The Department of Corrections has a general statement about the free exercise of religion for all inmates, but the statement was not provided in response to the survey.

District of Columbia Department of Corrections

There are no specific provisions for Native American prisoners under Department Order number D.O. 4410.1B (effective October 15, 1991) which establishes a uniform religious policy throughout the District of Columbia Department of Corrections "to provide inmates with the opportunity to enjoy the most extensive freedom to practice religion" consistent with existing laws and the security interests of the institution.

Florida Department of Corrections

Chaplaincy Services Rule 33.3-014, provided in response to this survey, is of a general nature and not specific to any religious group. The Department's policy is to extend to all inmates the greatest amount of freedom and opportunity for pursing individual religious beliefs and practices consistent with the security and good order of the correctional facility. Because Native American inmates in Florida come from different tribes with different religious practices, they are asked to work with the institutional chaplain to determine which practices can be allowed within the correctional setting. No procedures were provided.

Georgia Department of Corrections

The Rules of Board of Corrections, Chapter 125-4-7, sections .01 and .02 were submitted in response to the survey. This rule, governing religious program administration, contains no specific provisions for Native American inmates. Commissioner Whitworth stated in his October 22, 1992 letter that there are a very small number of Native American inmates in the Georgia prison system, but that Native American religious groups are treated in the same manner as other religious groups in the correctional system. He stated that, generally, religious practices are allowed that do not create an "unreasonable hardship" on the system and do not compromise prison security. Questions and issues concerning any particular religious activity are referred to the legal department and decided on an individual basis.

Hawaii Department of Corrections

Did not respond to the survey.

Idaho Department of Corrections

The Department submitted Policy and Procedure Manual, section 403-C, "Religious Practices," (revised 4/14/87) in response to the survey. Also provided were religious program Field Memorandum from Idaho's largest institution. The Department's general policy is that "all inmates have the opportunity to adhere to the requirements of their respective religious faiths, including access to religious publications, to representatives of their faiths, and to religious counseling, so long as those religious practices do not conflict with the secure operation of the correctional facility."

Section 403-C of the Policy and Procedure Manual addresses the religious practices of Native American inmates. These procedures allow Native American inmates to possess medicine bags, cedar, sage, and sweet grass subject to certain restrictions. Headbands may be worn in all areas where hats or other headgear may be worn. Participation in a sweat lodge ceremony is permitted on a weekly basis. A pipe ceremony is allowed in conjunction with the sweat lodge ceremony or for prayer

offerings. These ceremonies are subject to "reasonable limitation and control" by the institution.

Field Memorandum 403-02-C, "Religious Program," 9/30/91, details the special considerations given for Native American inmates' religious needs as agreed to in the "Brown Consent Decree," and in Department Policy 403-C. It describes the personal articles of worship that are allowed to be kept in inmates cells, the use of cedar and sweetgrass, and permits the pipe carrier to keep the ceremonial pipe and other related items in his cell.

The Idaho Department of Corrections attempts to educate and sensitize correctional personnel to the religious practices of Native Americans as part of their in-service training.

Illinois Department of Corrections

Department of Corrections Rule 425 governs the exercise of religious freedom within the state correctional facilities. No provisions for Native American religious practices are stated in this rule.

Indiana Department of Corrections

The Department is currently acting under the guidelines of Executive Directive 88-13 of August 5, 1988 which extended equal opportunity to Native American inmates to practice their religion and provided that limitations of religious practices be based only upon "security issues, department resources and rehabilitation objectives." In addition, the Executive Directive mandated Native American access to Pipe Ceremony on a schedule consonant with that of other faiths' worship schedules, access to ceremonial tobacco, access to Native American spiritual advisors and elders through the visiting clergy and religious volunteer procedures. The Executive Directive is to be implemented in accordance with the Administrative Procedures that apply to all faith groups generally.

Iowa Department of Corrections

According to Paul A. Muller, Assistant Deputy Director of Institutions, the courts ordered the Iowa State Penitentiary to provide a "Native American consultant" to meet with Native American inmates on a quarterly basis to provide for their spiritual and cultural needs. The state has since extended that policy to other correctional institutions, four of which have a Native American spiritual consultant contractually "on call." Mr. Muller states that Native American inmates have access to sweat lodges on "at least a weekly basis." Headbands may be worn and certain religious articles carried on his/her person. Muller provided a copy of the DOCs Policy No. IN-V-102, Religious Services, Inmate Activity (Aug. 1980) which does not specifically address Native American religious practices or any other groups religious practices.

Kansas Department of Corrections

Kansas Administrative Regulation 44-7-113 covers religious activity in Kansas correctional facilities. Under this regulation, clergy from recognized religious faiths may hold services in the facilities; any group of two or more inmates of a common religious faith who are without benefit of clergy may appeal to the administrator to hold religious services among themselves. This general regulation does not specifically provide for Native American religious practices.

The correctional facilities at Lansing and Hutchinson, however, provide for a Sweat Lodge Ceremony to be conducted once a month under LCF General Order 23-103 and HCF General Order 23-103. The sweat ceremony is carried out under the supervision of the Pastoral Care Administrator or his designee. The ceremony may be conducted by a Medicine Man. Ceremonial objects permitted may include: pipe, tobacco, sage, cedar, medicine bag, small bones, towel, leather, sweet grass, drum, buffalo skull, feather from sacred birds, eagle fan, tobacco ties, and other artifacts approved by the administrator of Pastoral Care.

Kentucky Department of Corrections

None of the regulations which were provided in response to this survey contained any specific provisions for Native American religious ceremonies and practices. The Department's policy allows inmates to practice their faith as long as their practice does not compromise or violate the security of the institution. At the time of the survey, it was believed there was only one Native American inmate in a Kentucky correctional facility.

Louisiana Department of Public Safety and Corrections

Louisiana has no specific policy directed toward Native Americans inmates or inmates any other religious affiliation.

Maine Department of Corrections

Maine has no specific policies or procedures concerning the religious practices of Native American inmates. In the past, chaplains at the state's two major institutions arranged for Native American religious training through the Central Maine Indian Association and would continue this practice on a voluntary basis if the funds for the program were available. Policies and Procedures, Chapter 23, Religious Services, provided in response to this survey are general and faith-neutral.

Maryland Division of Correction

Copies of the Department's policies and procedures were not provided in response to this survey. Commissioner Richard A. Lanham reported that a detailed proposal submitted by inmates at the Eastern Correctional

Institutions is currently being reviewed at the institutional level. Furthermore, at the Maryland Penitentiary, about 15 inmates attend a weekly Native American pipe ceremony and a weekly study. The group is supported by one volunteer who sometimes brings approved guests with him. All inmates are permitted up to five religious items in addition to religious audio-tapes.

Massachusetts Department of Correction

Massachusetts does not have specific policies or procedures governing the religious ceremonies and practice of Native American inmates. The general religious programs and services regulations apply to all religious groups equally. It is the general policy of the Department not to deny any inmate the free exercise of his/her religious beliefs as long as those practices do not threaten the safety and security operations of the institution.

Michigan

Did not respond to the survey.

Minnesota Department of Corrections

Minnesota submitted the written policies of three of the state's major correctional institutions which allow all Native American inmates to participate in their religious traditions. These policies allow Indian inmates access to traditional religious leaders, sacred objects, and traditional Indian religious facilities (Sweat Lodge). The Department's policy is to allow all inmates to participate in the religious services of their choice. It appears that the opportunities for participating in their traditional religious practices are given to Native American inmates on a basis comparable to that given to inmates of other religions.

Mississippi Department of Corrections

Does not have a specific Native American religion policy due to the small number of Native Americans incarcerated in Mississippi correctional facilities. In general, the Department's stated policy is to allow as much religious freedom as possible to all inmates, regardless of race or creed, consistent with the safety and security interests of the institution.

South Mississippi Çorrectional Institution

Does not have a specific Native American religion policy due to the small number of Native Americans incarcerated in Mississippi correctional facilities. In general, the Department's stated policy is to allow as much religious freedom as possible to all inmates, regardless of race or creed, consistent with the safety and security interests of the institution.

Missouri Department of Corrections

Missouri has no specific policy addressing the religious rights of any one particular faith group. All faith groups are covered under Procedure Number IS17-1.1, "Religious Programs and Activities" which is of a general nature.

Montana Department of Corrections and Human Services

Provided was a policy statement from the Montana State Prison, MSP 23-001, "Religious Activities Center Guidelines" (Revised September 1989). These guidelines are of a general nature and do not specifically address Native American religious ceremonies and practices. According to Chaplain William Wohlers, the Department allows weekly sweat lodge ceremonies and four seasonal spiritual gatherings for Native American inmates at the Montana State Prison. No official policy was submitted regarding the traditional Indian ceremonies and religious practices.

Nebraska Department of Corrections

The Native American religious coordinator is currently developing a policy and procedure handbook for a Native American religious program. The Department employs a Native American Spiritual Advisor who coordinates the religious program in five adult institutions and two work release centers. Native American religious instruction is provided at all adult institutions. All adult institutions have sweat lodge facilities and sweat lodge ceremonies are conducted twice a week. The Department funds four medicine man visits per institution per year. The Native American Church ceremony is available upon request, but no peyote or all-night cermonies are permitted.

A portion of Administrative Regulation 208.1, "Religious Services,"was provided which contained a reference to Indian Inmates v. Vitek CV72-L-156 (Consent Decree 10/31/74). Under the Consent Decree, the Department agreed to: (1) permit traditional hairstyles; (2) provide access to medicine men and to a prorata percentage of Department funds to be spent on Indian religious activities; (3) permit the formation of a spiritual and cultural club of Indian inmates; (4) take affirmative action in hiring Indian employees; (5) allow Indian inmates to participate in choosing movies to be shown at the Penitentiary; (6) establish courses in Native American studies at the Penitentiary.

Nevada Department of Corrections

Administrative Regulations AR 809, "Native American Religious Activites" was provided in resonse to this survey. This regulation gives Native American inmates access to Native American religious ceremonies, rituals and materials including access to sweat lodge ceremonies, pipe ceremonies, outside spiritual leaders and religious items subject to the same security and control considerations that apply to the activities for all other religious groups.

New Hampshire Department of Corrections

Letter from the Commissioner Powell to Walter Echo-Hawk stated that Native American religious ceremonies led by local Native American religious leaders are held weekly in both the men's and women's prison. The regulations provided in response to this survey are general and do not contain specific Native American religious practice policies.

New Jersey Department of Corrections

The New Jersey Administrative Code subchapter on "Religion" and "Institutional Chaplaincy" has no provisions for Native American religious practices. Letter from Robert W. Henninges, Coordinator of the Chaplaincy Services, to Walter Echo-Hawk stated that in the past ten years no request from the Native American community for Native American religious services for inmates was ever submitted to the Chaplaincy. He does not think there are any Native Americans incarcerated in the New Jersey correctional system.

New Mexico Corrections Department

In 1978, New Mexico legislature passed the Native American Counseling Act (33-10-1, 33-10-2 NMSA 1978) for the purpose of providing a program of counseling for Native Americans confined in penal institutions. Because the state legislature did not provide the budget to implement the Act, all Native American Indian projects are based on volunteer assistance. It is the policy of the corrections department to develop and operate religious programs for Native American inmates. Under CD-101100, Native American inmates have access to a Navajo Medicine Man, Sweat Lodge, religious artifacts and paraphernalia including corn pollen, corn meal, sage, cedar, tobacco, arrowhead, and feather.

New York Department of Corrections

The Department provided copies of policy directives #4200, "Functions of the Division of Ministerial and Family Services," and #4202, "Religious Programs and Practices." These policy directives inadequately address Native American religious practices.

North Carolina Department of Correction

There are no department-level policies that specifically address access to Native American religious practices. The Department is preparing to file new rules with the state's Office of Administrative Hearings that are "faith-neutral" concerning inmate religious practices and will permit a variety of ceremonies, including Native American ceremonies.

North Dakota State Penitentiary

Chapter entitled, "Religious Programs" from the Policies and Procedures Manual of the North Dakota State Penitientiary (NDSP) was provided in response to this survey. This chapter is of a general nature and does not contain any faith-specific references. Chaplain Jim Stenslie states there are three sweat lodges: one at the main Prison, one at the Minimum Security Unit, and one at the Missouri River Correctional Center. There are four sweats per week at NDSP, including one for women. At MSU and MRCC, there are sweats once a week. Each Lodge has its own Pipe and inmates who are Pipe Carriers are allowed their own Pipes. Outside spiritual leaders are admitted to the prison to conduct ceremonies when funds are available, otherwise an inmate oversees the Native American religious practices and provides a weekly period of instruction for male inmates. Written procedures for the Native American religious practices were not provided.

Ohio Department of Corrections

Did not respond to the survey.

Oklahoma Department of Corrections

The Department provided a portion of their Policy and Operations Manual entitled, "Religious Programs." This is a faith-neutral policy with no specific provisions for Native American religious practices. While the policy states that all inmates shall have the right to practice "any recognized religion," it directs the individual institution to develop procedures to implement the programs. The Department is not obligated to fund access to religious leaders of all faith groups represented in the inmate population. "Religious observances requiring arrangements beyond those needed for regularly scheduled events" are subject to special procedures. Inmates may have personal religious items including feathers, fans, beads, gourds, drums, and head wear. Any conflict between "a legitimate religious interest" and "a facility interest" shall be resolved by "using a process of balancing these two interests " and making reasonable effort to "accommodate the religious practice." The Department has formed the Native American Cultural Committee to address the cultural needs of Native American inmates in Oklahoma. Native American employees of the department volunteer their time to this program. No written material pertaining to this Committee or program was provided.

Oregon Department of Corrections

The Department did not provide written policies, procedures, or guidelines regarding Native American religious practices. The written policy entitled, "Religious Activities (Inmate)" applies to all religious groups and contains no specific provisions for Native American spiritual practice. According to Fr. Michael W. Sprauer, each of the state's facilities has a sweat lodge conducted by a religious leader from

the outside community, a Sacred Pipe Ceremony is regularly scheduled in each facility, and Native American inmates are authorized to possess prayer feathers and medicine bags.

Pennsylvania Department of Corrections

Did not respond to the survey.

Rhode Island Department of Corrections

Protestant Chaplain, Rev. John H. Miller, is responsible for helping Native American inmates gain access to their religious ceremonies. The department has no formal written policies addressing Native American religious ceremonies, but Rev. Miller asserts that ceremonies can be arranged as long as they can accomodate the security requirements of the institution.

South Carolina Department of Corrections

Did not respond to the survey.

South Dakota Department of Corrections

The Department has written policies specifically addressing Native American religious practices. "Traditional Lakota Cermonial Religious Activities," p. 7 of SDSP Policy #5F.1 provides for a weekly Sacred Pipe Ceremony in the Chapel/Audiorium led by an authorized inmate Pipe Keeper. A Sweat Lodge Ceremony is conducted in the Sweat Lodge. Yuwipi may be arranged and may be conducted by a recognized and authenticated Medicine Man. Medicine Men may receive donations for expenses incurred in visiting the institution and conducting the ceremonies. Sacred items such as the Sacred Pipe, tobacco ties, sweat grass, sage, and cedar may be kept in the inmate's cell. Drum is allowed during recreation periods and scheduled ceremonies. Peyote is not allowed at any time.

SDSP Policy #5F.3, "Native American Sweat Lodge" outlines the procedures by which men and women inmates are allowed access to the Sweat Lodge ceremonies. The Springfield facility also abides by Policy 5F.3 for sweat lodges.

Tennessee

The Administrative Policy on "Religious Programs" is to "ensure access to religious resources to all inmates" but contains no specific written provisions for Native American traditional religious and practices. Assistant Commissioner Charles B. Bass indicated that to date the issue of Native American inmate religious freedom within the Tennessee correctional system had not arisen, but if it ever did, the DOC would make accomodations "in accordance with the standards set by policy and American Correctional Association."

Texas Department of Corrections

Administrative Directive AD-07.30, "Religious Policy Statement" is generic and non-specific to Native American religious practices.

Utah Department of Corrections

Did not respond to the survey.

Vermont Department of Corrections

Did not respond to the survey.

Virginia Department of Corrections

Written policies were not provided. Letter states DOC has no formal policy regarding Native American religious practices, but has disseminated information to all institutions about this religion including guidelines for religious practices within a secure, correctional setting. The state's penal institutions generally provide inmates with access to meeting space and articles of faith as appropriate with security regulations and unit operational procedures.

Washington Department of Corrections

The Department has a written policy regarding the Native American Sweat Lodge and religion. Native American inmates may participate in weekly Sweat Lodge and Pipe ceremonies, retain medicine bags and other personal religious items. Searches of religious items and sacred objects are subject only to visual inspection by the staff. Native American inmates have access to traditional religious leaders and the Department employs at least three Native American "Chaplains" or advisors who oversee and assist with the Native American religious program. The DOC has a publication entitled, Handbook of Religious Beliefs and Practices which gives a detailed description of the spiritual practices of the religious groups represented among the inmate population.

West Virginia Division of Corrections

WV DOC Policy Directive 654.01, Religious Services, and 654.02, Religious Programming and Rights were provided in response to the survey but contain no policies or procedures specifically directed toward Native American religious practices.

Wisconsin Department of Corrections

A work group consisting of members of the Native American community and the DOC has been established to review the Department's procedures concerning Native American religious practices. The Department's current guidelines for Native American religious

practices allow for access to traditional Sweat Lodge, sacred objects, personal religious items, ceremonies with drum, weekly meetings and Pipe Ceremony, annual Pow Wow and Ghost Feast. The Department works with and encourages the participation of outside religious leaders and volunteers. It appears that Native American inmates are given opportunity to practice their religion on a bsis comparable to that of inmates of other religions.

Wyoming Department of Corrections

Did not respond to the survey.

Federal Bureau of Prisons

The Federal Bureau of Prisons submitted a written general policy statement entitled, "Religious Beliefs and Practices of Committed Offenders." The Bureau's stated policy is to "provide inmates of all religious faiths with reasonable and equitable opportunities to pursue individual religious beliefs and practices, within the constraints of budgetary limitations and the security and orderly running of the institution and the Bureau of Prisons." The policy allows institutional staff to contract with representatives of faith groups in the community and to work with volunteers in assisting inmates in their religious practices. Inmates must initiate a request from the Warden for observance of a religious holiday or ceremony. Written policy allows inmates to have some personal religious items, including medicine pouches, religious headbands, and beads.

Aside from the official policy, the Federal Bureau of Prisons published a handbook in April of 1992 entitled, American Indian Spirituality: Beliefs and Practices which was a report of the Chaplaincy Work Group. In addition to providing a detailed description of Native American spiritual beliefs and practices, the handbook presents a list of resources to assist institutional staff in implementing traditional Indian religious programs within the correctional setting.

Tabular Summary of State and Federal Prison Policy Survey

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL
1. Did System respond to the survey?	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
2. Does System have a written policy specific to traditional Indian religion or a general Policy that is faith neutral?			Specific	U	Specific	Specific	General	U	General	General	General		Specific	General
3. Did System Provide written Policy?			Yes	No	Yes	Yes	Yes	No	Yes	Yes	Yes		Yes	Yes
4. Does Policy guarantee Indians access to traditional religious leaders on a basis similar to that afforded to inmates of other religions?			Yes	U	Yes	Yes	n/a	U	n/a	n/a	n/a		n/a	n/a
5. Does Policy allow access to sacred objects?*			Yes	U	Yes	Yes	Yes	U	n/a	n/a	n/a		Yes	n/a
6. Does Policy allow Indian access to traditional Native religious facilities?			Yes	U	Yes	Yes	n/a	U	n/a	n/a	n/a		Yes	n/a
7. Does Policy allow traditional hair length for religious purposes?			n/a	U	n/a	Yes	n/a	U	n/a	n/a	n/a		n/a	n/a
8. Does Policy allow wearing of headbands for religious purposes?			Yes	U	Yes	Yes	n/a	U	n/a	n/a	n/a		Yes	n/a

Key to Survey Responses

* No System allows unrestricted access to sacred objects. The "yes" response includes those Systems whose written or quoted policies allow limited access to sacred objects.

U = Unknown. Policy was not provided or did not provide information responsive to the question.

Unclear = The written or quoted Policy was unclear.

‡ = Policy is currently under review, revision, or development.

n/a = Policy does not address this issue.

Tabular Summary of State and Federal Prison Policy Survey

	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	S. MS	MO	MT
1. Did System respond to the survey?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
2. Does System have a written policy specific to traditional Indian religion or a general Policy that is faith neutral?	Specific	General	Specific	General	General	General	‡	General		Specific	General	General	General	General
3. Did System Provide written Policy?	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes		Yes	Yes	Yes	Yes	Yes
4. Does Policy guarantee Indians access to traditional religious leaders on a basis similar to that afforded to inmates of other religions?	Yes	n/a	Unclear	n/a	n/a	n/a	Unclear	n/a		Yes	n/a	n/a	n/a	n/a
5. Does Policy allow access to sacred objects?*	Yes	n/a	Yes	n/a	n/a	n/a	Unclear	n/a		Yes	n/a	n/a	n/a	n/a
6. Does Policy allow Indian access to traditional Native religious facilities?	n/a	n/a	Yes	n/a	n/a	n/a	Unclear	n/a		Yes	n/a	n/a	n/a	n/a
7. Does Policy allow traditional hair length for religious purposes?	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a		n/a	n/a	n/a	n/a	n/a
8. Does Policy allow wearing of headbands for religious purposes?	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a		n/a	n/a	n/a	n/a	n/a

Tabular Summary of State and Federal Prison Policy Survey

	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC
1. Did System respond to the survey?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	No
2. Does System have a written policy specific to traditional Indian religion or a general Policy that is faith neutral?	‡ Specific	Specific	General	General	Specific	General	‡	General		General	General		General	
3. Did System Provide written Policy?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes		Yes	
4. Does Policy guarantee Indians access to traditional religious leaders on a basis similar to that afforded to inmates of other religions?	Yes	Yes	n/a	n/a	Unclear	n/a	n/a	n/a		Unclear	n/a		n/a	
5. Does Policy allow access to sacred objects?*	Yes	Yes	n/a	n/a	Yes	n/a	n/a	n/a		Yes	n/a		n/a	
6. Does Policy allow Indian access to traditional Native religious facilities?	Yes	Yes	n/a	n/a	Yes	n/a	n/a	n/a		n/a	n/a		n/a	
7. Does Policy allow traditional hair length for religious purposes?	Yes	n/a	n/a	n/a	n/a	Yes	n/a	n/a		n/a	n/a		n/a	
8. Does Policy allow wearing of headbands for religious purposes?	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a		n/a	n/a		n/a	

Tabular Summary of State and Federal Prison Policy Survey

	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	FED
1. Did System respond to the survey?	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	No	Yes
2. Does System have a written policy specific to traditional Indian religion or a general Policy that is faith neutral?	Specific	General	General			General	Specific	General	‡ Specific		General
3. Did System Provide written Policy?	Yes	Yes	Yes			No	Yes	Yes	Yes		Yes
4. Does Policy guarantee Indians access to traditional religious leaders on a basis similar to that afforded to inmates of other religions?	Unclear	n/a	n/a			U	Yes	n/a	Yes		n/a
5. Does Policy allow access to sacred objects?*	Yes	n/a	n/a			U	Yes	n/a	Yes		Yes
6. Does Policy allow Indian access to traditional Native religious facilities?	Yes	n/a	n/a			U	Yes	n/a	Yes		n/a
7. Does Policy allow traditional hair length for religious purposes?	n/a	n/a	n/a			U	n/a	n/a	n/a		n/a
8. Does Policy allow wearing of headbands for religious purposes?	n/a	n/a	n/a			U	n/a	n/a	Yes		Yes

NARF PRISON SURVEY - HAIR LENGTH

Arizona DOC	Hair length to touch top of shoulder must be worn tied back in ponytail or bun.
Arkansas DOC	No standard hair length or style required.
District of Columbia DOC	Hair may be worn to desired length.
Florida DOC	Must wear hair cut short to medium length with no part of the ear or collar covered.
Idaho DOC	Hair may be worn to any length.
Illinois DOC	May have any length of hair.
Indiana DOC	At time of intake, all male prisoners have hair cut. After that, they may wear hair to any length.
Kansas DOC	No specific policy regarding hair length for Native American inmates.
Kentucky DOC	An inmate may choose the length of hair.
Louisiana DOC	Hair styles are restricted to "standard" styles. Any means of demonstrating "group identification" through hair styles will not be permitted.
Maine State Prison	May wear hair to any length.
Maine DOC	No restrictions on hair length.
Massachusetts DOC	(Policy is missing.)
Minnesota DOC	"... inmates are permitted freedom of personal grooming..."
Missouri DOC	Hair may not be longer than the base of the collar. There are no exceptions.
Montana DOC	The policy that was provided does not address hair length.
Nevada DOC	May wear hair at chosen lengths.

Nebraska DOC	May wear hair to any length, subject to the DOC's requirements for safety, security, identification.
New Hampshire DOC	No hair length requirement.
New Jersey DOC	No regulation regarding hair length of Native American inmates.
New York DOC	May wear hair to desired length.
North Carolina DOC	No official policy on hair length.
North Dakota State Penitentiary	May wear hair to desired length.
Oklahoma DOC	Hair may not touch shirt collar. (Their entire grooming code exemption process is under review.)
Oregon DOC	No policy restricting hair length.
Rhode Island DOC	May grow hair to desired length. No formal policy regarding hair length.
South Dakota DOC	Hair may be worn to any length.
Tennessee DOC	Hair may be worn to desired length.
Texas DOC	Must keep hair trimmed up the neck and head. No exceptions granted for religious tradition.
Virginia DOC	No restrictions on hair length for Native American inmates.
Washington State DOC	May wear hair to desired length.
West Virginia DOC	Hair may not touch ears or shirt collar, and shall not exceed three inches in length.
Wisconsin DOC	No rules governing hair length.

ATTORNEY GENERAL DIRECTIVE

Providing for the Free Exercise of Religion by Native American Prisoners

Introduction: While American prisons, since their founding, have provided inmates with access to religion as an important part of rehabilitation and as mandated by free exercise principles, the denial of equal protection has often occurred for prisoners of minority, little understood religious faiths. Native American citizens, who are incarcerated in Federal, state and local prisons in significant numbers that are highly disproportionate to the composition of Native Americans in the general population, are one clear and consistent example of this equal protection problem.

Many Native American prisoners practice traditional Native American religions that are unique, unwritten and little understood by the public, including many prison authorities who may define the concept of religion in ways which do not accurately reflect traditional Native American cultural spirituality. There is a need, which should be addressed in order to meet demands of the Equal Protection Clauses of the Fifth and Fourteenth Amendments, for correctional institutions to better understand and accommodate such practices in order to safeguard the free exercise of religion by Native American prisoners to the extent afforded by prison authorities to inmates who practice better known and understood religious faiths. This need was documented in the record of several Senate and House oversight and legislative hearings held in the 103rd Congress regarding the free exercise of religion problems experienced by Native American citizens.

As reflected in Administration and Departmental support for the passage of the Religious Freedom Restoration Act of 1993 and the American Indian Religious Freedom Act Amendments of 1994, the Federal interest in safeguarding fundamental free exercise and equal protection rights of all citizens, including incarcerated citizens, to the fullest extent allowed under the Constitution and existing laws is strongly supported by this Administration and Department. This policy and constitutional interest is compatible with existing policies of the Federal Bureau of Prisons Program Statement on Religious Beliefs and Practices of Committed Offenders (P.S. 5360.05), dated December 14, 1984, and the historically important role that religion has played in rehabilitation since the inception of correctional institutions in the United States.

The Bureau of Prisons has made commendable efforts in recent years towards understanding the free exercise needs of Native American prisoners through, for example, the development of a guide for corrections staff entitled American Indian Spirituality: Beliefs and Practices, Federal Bureau of Prisons, Report of Chaplaincy Work Group (April, 1992). Yet, as made clear in the hearings of the 103rd Congress, further progress is needed. It is the intent of this directive to further implement that understanding and to better define the meaning of P.S. 5360.05 as it relates to the free exercise rights of those Native American prisoners who practice traditional Native American religions. Further, it is the intent of this directive to avoid unnecessary free exercise and equal protection litigation by better clarifying such rights as related to Native American prisoners.

Pursuant to the American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996, the federal trust relationship with Indian tribes, and the responsibilities and duties created by the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act of 1993, and the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution and various federal laws implementing these provisions, as well as the policy of this Administration and Department to accommodate Native American religious freedom to the fullest extent possible under existing law, the Attorney General hereby directs the Bureau of Prison and other affected Justice Department agencies or Divisions as follows:

Section 1. **Equal Access Provisions:** Native American prisoners confined in Bureau of Prison institutions who adhere to a traditional Native American religion shall have, on a regular basis comparable to that access afforded prisoners who practice Judeo-Christian religions, access to --

(A) Native American traditional religious leaders who shall be afforded the same status, rights and privileges as religious leaders of Judeo-Christian faiths, including access to prisoners confined in segregation;

(B) Subject to Section 5 (A), items and materials utilized in traditional Native American religious ceremonies as may be identified by a Native American traditional leader, including traditional ceremonial foods, which shall be treated by prison authorities in the same manner as religious items and materials utilized in ceremonies of the Judeo-Christian faiths; and

(C) Native American religious facilities, which includes sweat lodges and tepees, and access to other secure, out-of-doors locations within prison grounds if such facilities are identified by a Native American traditional religious leader to facilitate a ceremony.

Section 2. Hair: Native American prisoners who desire to wear their hair according to the religious customs of their Indian tribes may do so under the provisions of the Bureau of Prisons Grooming Policy 5230.04.

Section 3. Discrimination Prohibited: No Native American prisoner shall be penalized or discriminated against solely on the basis of Native American religious beliefs or practices, and all prison and parole benefits or privileges extended to prisoners for engaging in religious activity shall be equally afforded to Native American prisoners who participate in Native American religious practices.

Section 4. Supplemental Training and Regulatory Provisions Necessary to Implement this Directive: In order to implement Sections 1 and 3 --

(A) The Chaplain's Office of the Bureau of Prisons, in consultation with Native American traditional leaders, is directed to establish a system-wide training program for federal corrections and parole board personnel regarding the nature and unique needs of traditional Native American religion to be incorporated as one of the mandatory training requirements for such personnel.

(B) Within 60 days, the Bureau of Prisons shall begin consultations with traditional Native American leaders to identify whether improved ways or procedures can be developed for Native American prisoners and outside spiritual advisors to possess, handle, care for or store authorized Native American religious objects (such as sacred pipes, tobacco, herbs, and medicine pouches) that are consistent with institutional security and Native religious sensibilities and religious tenets governing such objects. In the event that improved, compatible solutions are identified through such consultations, the Bureau of Prisons shall promulgate regulations to implement improved procedures and standards for Native American religious objects.

Section 5. Scope of This Directive:

(A) Section 1 shall not be construed as requiring prison authorities to permit (nor prohibit them from permitting) access to peyote or traditional Native American sacred sites located on public, private or Indian lands outside of institutional grounds.

(B) The requirements of Sections 1-3 shall pertain to institutions operated by the United States Bureau of Prisons and to any non-federal institutions where Native American prisoners, who are under the jurisdiction and control of the Bureau of Prisons, shall be housed pursuant to contracts.

Section 6. Attorney General Investigation:

(A) The Attorney General shall investigate, in consultation with Native American traditional leaders and ex-offenders with corrections experience as may be recommended by Indian tribes and Federal and State prison administrators, the conditions of Native American prisoners in the Federal and State prison systems with respect to their ability to engage in the free exercise of Native American religions.

(B) Not later than 12 months after the date of this Attorney General Directive, the Attorney General shall submit to the President a report containing --

(i) an assessment of problems, prohibitions or punishments, recognition, protection and enforcement of the rights of Native American prisoners to practice their traditional Native American religions in Federal and State prisons where Native American prisoners are incarcerated; and

(ii) specific recommendations for the promulgation of regulations or other administrative action or proposed legislation necessary to protect the free exercise of Native American prisoners.

Section 7. Civil Rights Division Directive: The Civil Rights Division of the Justice Department is hereby directed to establish a section responsible for bringing litigation to protect the free exercise of religion of Native American prisoners incarcerated in state and local prisons or institutions. Said section shall consult and coordinate with the Office of Tribal Justice as to the filing of appropriate actions and submit an annual report to the Attorney General and the President regarding its activity.

Section 8. Justice Department Mediation: The Office of Tribal Justice within the Department of Justice is hereby directed to offer assistance, when requested by Native American prisoners, in mediating disputes between such prisoners and Federal, state or local correctional institutions regarding the free exercise of religion and related equal protection rights. The Office of Tribal Justice shall also mediate disputes between Native American prisoners incarcerated in a Bureau of Prisons institution regarding alleged violations of any provision in this Directive.

The Attorney General

Date: _____, 1995

Aboriginal Uintah Nation of Utah
American Indian Center - St. Louis, MO
American Indian Family Healing Center - Oakland, CA
American Indian OIC/Walks Tall Program of Minneapolis, MN
Association of American Indian Affairs
Barbara L. Creel, Attorney
Chi-Hui-Ca-Hui - Fort Leavenworth, KS
Cu-Nalso Religious Freedom Project - Boulder, CO
Indian Law Clinic
Dale N. Smith, Advocate
David Ayala, Advocate
Debra Pebbles, Advocate
Dennis Banks, National Field Director - American Indian Movement
Eagle Associates - Hayward, WI
Heart of American Indian Center - Kansas City, MO
Indian Alcoholism Treatment Service - Wichita, KS
International Indian Treaty Council - San Francisco, CA
Lava Creek Spiritual Group - Tucson, AZ
Leonard Peltier Defense Committee - Lawrence, KS
National Congress of American Indians - Washington, DC
National Xicallo Human Rights Council - Denver, CO
Native American Church of North America
Native American Council - Rockport, IN
Native American Justice Center - Indianapolis, IN
Native American Public Broadcasting Consortium, Inc. - Lincoln, NE
Native American Religious Service - Yuma, AZ
Native American Rights Fund - Boulder, CO
Native Lands Institute: Research & Policy Analysis - Albuquerque, NM
Navajo Inmate Spiritual/Social Development - Gallup, NM
Navajo Nation Corrections Project - Window Rock, AZ
Ohio Center for Native American Affairs - Columbus, OH
Peace House Association - Oklahoma City, OK
Red Road Ministry - Olympia, WA
Red Tail Alliance, Inc.
Robert T. Miller, Attorney
Saint Mark's Union Church - Kansas City, MO
Sarah Ann Ryland, Advocate
Sisters of Sacred Circle - Bainbridge, IN
Southern Christian Leadership Conference of Greater Kansas City
Spiritual Alliance for Native Prisoners, Inc. - Oklahoma City, OK
Susan Irwin-Savage, Advocate

TESTIMONY OF WALTER ECHO-HAWK ON BEHALF OF THE NATIVE AMERICAN RIGHTS FUND BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS ON BARRIERS TO NATIVE FREE EXERCISE OF RELIGION

Field Hearing, Portland, Oregon

March 7, 1992

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I. INTRODUCTION

Good afternoon, Mr. Chairman and members of the Committee. I am Walter Echo-Hawk, a staff attorney for the Native American Rights Fund ("NARF"). Thank you for the invitation to offer testimony at this important hearing. I am pleased to offer testimony on behalf of NARF on the need for federal legislation to remove barriers to the free exercise of religion by Native American citizens.

A. Summary of Testimony: Mr. Chairman, the paramount human rights problem facing America's Native people in 1992 is one that began in 1492: Religious discrimination and intolerance by non-Indian persons or officials against indigenous tribal religions. Instead of improving as American society has matured in the 500 years since Columbus introduced European religious intolerance into this Hemisphere, this problem has worsened: **according to the Supreme Court, Native Americans have no constitutional protection for their right of worship under the United States Constitution and laws.**

In a sweeping retreat from established legal precedent, recent Supreme Court decisions have held that the First Amendment does not protect traditional worship by First Americans. These decisions have not only eroded religious liberty for all Americans, but have created a frightening "loophole" in the Bill of Rights for Native Americans in particular, leading to a human rights crisis in Indian country that is seen, for example, in a recent felony prosecution in Oklahoma[1] and in the destruction of irreplaceable tribal sacred sites by federal agencies.[2]

Thus, as we celebrate an unprecedented resurgence of freedom and individual liberty around the world with the fall of communism and the Berlin Wall, here in our own country tribal people are being driven underground in the wake of these decisions in order to worship. Even though the United States Government adopted an Indian policy to "protect and preserve" tribal religious freedom in the 1978 passage of the American Indian Religious Freedom Act, 42 USC 1996, ("AIRFA"), it has become clear that policies alone are inadequate when basic human rights are at stake. It is therefore time for Congress to put "teeth" into its policy, since the Executive and Judicial Branches have failed or refused to implement it in the last 13 years.

From a legal standpoint, two factors make the need for such legislation clear: 1) The weakening of American constitutional rights by the Supreme Court in Indian religion cases;

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[1] In State of Oklahoma v. John Kionute, CRF91-80 (6th Jud.Dis., Okla., filed 1991), an elderly, life-long member of the Native American Church is being prosecuted for felony possession of the sacrament peyote - a practice earlier courts had held was protected by the First Amendment.

[2] The U.S. Forest Service alone is presently threatening various development in National Forests that will destroy the Native American sacred sites in the name of logging, mineral exploitation and tourism, in the following areas: Enola Hills, Oregon; Medicine Wheel, Wyoming; Mt. Graham, Arizona; Mt. Shasta, California; Badger Two Medicine, Montana; Bear Butte, South Dakota; Red Arizona; Black Hills, South Dakota.

and 2) the administrative policies and practices of federal agencies over the past thirteen years in failing to implement Congress' AIRFA policy and to curb unnecessary interference with the exercise of Indian religious freedom. Ample legal authority and statutory precedent exists for Congress to pass a law to protect Native American religious freedom; and, amendments to the AIRFA provide the appropriate mechanisms for Congress to accomplish this objective.

B. Interest of the Native American Rights Fund: NARF is a national, non-profit Native-interest legal organizations that provides legal representation to Indian tribes, Alaska Natives and Native Hawaiians on important issues affecting America's Native communities. NARF is deeply concerned about the Supreme Court's First Amendment trend. Religious freedom is a basic human right of Native Americans that is important to whole communities, Tribes and Indian Nations, because religion is the underpinning for Indian culture itself. Tribal religion pervades the way of life of traditional Native communities even more so than the Amish in Wisconsin v. Yoder, 406 U.S. 205, 216-17 (1972). For Indians, religion and culture are "inseparable" as Congress correctly found in the AIRFA "findings clauses" in 1978.

Because religion is the glue that holds Native communities and cultures together, religious freedom is a NARF priority issue that cuts across many of its litigation priorities, such as tribal existence, sovereignty, and human rights. As a result, NARF has litigated extensively to protect First Amendment rights of Native Americans in may areas, such as, the religious rights of students[3], prisoners[4], members of the Native American Church[5], tribal reburial and repatriation rights[6], and to protect sacred sites[7]. Since Native American religious

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[3] See, New Rider v. Bd. of Education, 480 F.2d 693 (10th Cir. 1973), cert. denied, 414 U.S. 1097 (1973) [right of Pawnee students to wear traditional hair styles]; Pokrywka v. Weld County School Bd., No. 24786 (D. Weld Cty., Colo., Memorandum Decision, Feb. 26, 1974) [right of Indian students to wear long hair].

[4] See, Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) [Right to wear traditional hairstyle for religious purposes]; Gallahan v. Hollyfield, 670 F.2f 1345 (4th Cir. 1982) [right to wear long hair] (Amicus only); Ross v. Scurr, No. 80-214-A (C.D. Iowa, Order of Mar.3, 1981)[access to sweat lodge]; Marshno v. McManus, No. 79-3146 (D.Kan., Order of Nov. 14, 1980) [access to Indian religion granted--sweat lodge, medicine men, ceremonies and sacred objects]; Frease v. Griffin, No. 79-693-C (D.N.M., Order of Dec.3, 1980) [sweat lodge and traditional hairstyle]; Bear Ribs v. Carlson, No.77-3985-RJK (C.D. Ca., Order of Nov.14, 1979) [sweat lodge]; Little Raven v. Crisp, No. 77-165-C (E.D. Ok., Order of Nov.8, 1978) [access to Indian religion--medicine men, sacred objects, ceremonies]; Crow v. Erickson, No.72-4101 (S.D., various orders) [sweat lodge, traditional hairstyle, religious leaders]; Bender v. Wolff, No.R-77-0055-BRT (D.Nev., Order of July 5, 1977) [traditional hairstyle]; Indian Inmates of the Nebraska Penal Complex v Vitek, No.72-L-156 (D.Neb., various orders) [sweat lodge, traditional hairstyle, access to religious leaders]; Calflooking V. Richardson, No. 1591-73 (D.D.C., Order of Feb.24, 1974) [access to spiritual advisor]; Brown v. Arvae, No. HC 2490 (4th J.Dis., Idaho, 1987) [access to Indian religion granted].

[5] NARF filed amicus briefs and helped in the oral argument in Employment Div., Dept. of Human Resources, Oregon v. Smith I and II.

freedom affects basic cultural survival of Indian Tribes, NARF believes that American law and social policy must provide adequate legal protections.

The purpose of my testimony is to provide a legal background on the need for a new federal law to protect Native American religious freedom, covering three areas to:

1) review of Supreme Court cases which created the loophole in religious freedom for Native Americans;
2) summarize Congress' legal power to pass law protecting Native American religious freedom--an area where Congress has passed many laws in the past; and
3) discuss the failure of the Executive Branch to implement existing federal Indian religion policy established in 1978 by the American Indian Religious Freedom Act, 92 Stat. 469, 42 USCA 1996 ("AIRFA"), a law which provides the foundation for further legislation to restore Native American free exercise protections.

C. **Religion in American Society and the Constitution:** Most Americans take freedom worship for granted, because this pillar, upon which this nation was founded, has always been given a preferred and fundamental status in American concepts of individual liberty. In Braufield v. Brown, 366 U.S. 599, 612 (1961), the court acknowledged that religious freedom "has classically been one of the highest values of our society," that holds "an honored place ... in our constitutionally hierarchy." In Sherbert v. Verner, 374 U.S. 398, 413 (1963), former Justice Stewart stated:

> I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth.

Colonists, early settlers and immigrants -- persecuted in Europe for following their dictates of conscience -- came to the United States in search of religious freedom; and the First Amendment shields our society's religious diversity as an integral part of American cultural heritage. As stated in Cantwell v. Connecticut, 310 U.S. 296, 310 (1939):

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[6] For NARF's litigation and legislative activity in this First Amendment areas, See, Robert M. Peregoy, "The Legal Basis, Legislative History and Implementation of Nebraska's Landmark Reburial Legislation," 23 Arix.St.L.J. ___ (In Press, 1992); Jack Trope and Walter Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 23 Ariz.St.L.J. ___ (In Press, 1992).

[7] Lyng v. Northwest Indian Cemetery Ass'n, 485 U.S. 439 (1988) (amicus and oral argument assistance only); Badoni v. Higginson, 638 .2d 172 (10th Cir. 1980) (amicus only); Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980), cert. denied; Dedman v. Hawaii Bd. Nat. Res., 740 P.2d 28 (Haw., 1987); Northern Lights, Inc., (Project No. 2752-000), 27 FERC Para. 63,024, affirmed, ___ FERC Para. ___ (Order Affirming Initial Decision and Denying License, June 25, 1987).

> In the realm of religious faith and in that of political belief, sharp differences of opinion arise. In both fields the tenets of one man may seem the rankest error to his neighbor ... but the people of this nation have ordained in the light of this ... that ... these liberties in the long view are essential ... Nowhere is this shield more necessary than in our own country for a people composed of many races and creeds.

However, as a historical marker, the above principles have not applied to Indians. A short historical backdrop provides context for evaluating the cases discussed later in my testimony. From first contact between the Old and New Worlds, Europeans believed that indigenous religions of the Americas were inferior and should be stamped out so Indians could be converted to Christianity. A major European goal in colonizing the New World was religious conversion.[8] That pattern did not change after independence was achieved by British colonies. Instead, former colonies, such as the newly founded United States continued religious conversion through the machinery of its Indian policy, regardless of the values enshrined in the First Amendment for the rest of society.

To christianize Indians, the federal government appointed missionaries as Indian agents for over 100 years in charge of entire reservations and Indian Nations to separate Indians from their religious ways of life and make them into mainstream Americans. Federal laws, still on the books, provided Indian lands to church groups for the building of churches.[9] Federal troops and U.S. marshals were employed to stamp out the Ghost Dance Religion in the 1890s; and thereafter, until 1934, a complete government ban was placed on all Indian religions and ceremonies by the Bureau of Indian Affairs' Court of Indian Offenses.[10]

In 1978, Congress sought to reverse this continuing deplorable history of Government infringement upon Indian free exercise of religion, stating:

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[8] Columbus himself remarked on October 12, 1492, that Natives "would easily be made Christians, because it seemed to me that they had no religion." Sale, Conquest of Paradise, (Alfred A. Knopf, New York, 1990) at 97.

[9] See, 25 USC 280 (1922) [Directing Secretary of the Interior to issue patents of Indian land to religious organizations engaged in mission or school work on Indian reservations]; 36 Stat. 814 (Mar. 3, 1909) [Directing Secretary to issue patents of Indian lands to religious groups engaged in mission or school work on Indian reservations]; 25 USC 280a(1900) [Directing Secretary to issues patents of Indian land to religious societies]; 25 USC 348 (1887) [authorizing Secretary to convey Indian trust land to "any religious society" for "religious and education work among the Indians"]; Act of May 17, 1884, c.53, Sec. 8 (23 Stat. 26) [Directing Secretary to issue patents of Indian lands to religious societies]; Act of June 1, 1796, c.46 (1 Stat. 490) [Directing Surveyor General to patent Indian lands to Society of United Brethrens "for propagating the Gospel among the Heathen"]. Although facially violative of the Establishment Clause, Government use of public funds to establish religion among the Indians was upheld in Quick Bear v. Leupp, 210 U.S. 50 (1908).

[10] See, Fourth and Sixth Offenses, Regulations of the Indian Office, April 1, 1904 Secretary of the Interior (Washington: Government Printing Office, 1904) at pp. 102-03 [outlawing the "sun dance," "all other similar dances and so-called religious ceremonies" and the "usual practices of so-called medicine men"].

America does not need to violate the religions of her native people. There is room for and great value in cultural and religious diversity. We would all be the poorer if these American Indian religion disappeared from the face of the Earth.[11]

As a result, Congress enacted the American Indian Religious Freedom Act, supra, to establish a United States:

> **policy to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo Aleut and Native Hawaiians.**

Unfortunately, as discussed below, in the intervening 13 years, the Executive Branch has failed to implement the policy and the Judiciary has held that it "has no teeth."

II. IMPACT OF THE CHANGE IN FIRST AMENDMENT LAW BY THE NEW SUPREME COURT DOCTRINE ON NATIVE AMERICAN FREEDOM OF WORSHIP.

A. Lyng: Need for a law to protect sacred sites. All world religions share tenets and practices for worship at sacred sites. Pilgrimages to holy places are religious obligations in Judaism and Islam imposed upon whole communities[12] and Christians share a fundamental attachment to Christian holy places and sanctuaries.[13] In general, worship at holy places is a basic attribute of religion itself.

When thinking of holy places, most people think only of Middle Eastern sites, such as Mecca, Mount Sinai, Bethlehem, the Wailing Wall and other Judeo-Christian sites, where control over holy places in the middle east has always been of deep international concern, involving the Crusades, the Crimean War and numerous treaties. We **expect** the laws of those nations to strictly protect those irreplaceable sites. Israel's Protection of Holy Places Law of 5727 (1967), for example, provides that:

1. The Holy Places shall be protected from desecration and any other violation from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.

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[11] See, Committee Reports at H.R. Rep. NO. 1308, 95th Cong., 2d. Sess. 3 (1978); S. Rep. No. 709, 95th Cong., 2d. Sess. 3 (1978).

[12] See, Israel and the Holy Places of Christendom (Praeger Pub., New York/Washington, 1971) at 5.

[13] Id. at 36-37.

2. (a) Whosoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years.

(b) Whosoever does anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places shall be liable to imprisonment for a term of five years.[14]

Unfortunately, American law and social policy overlook the fact that our land contains holy places equally important to American Indian tribes that have served as the cornerstone of tribal religions since time immemorial. Former Representative Morris Udall decried this double standard on the floor of Congress in 1978:

> Mr. Speaker, this country is primarily a Christian country with a large Jewish population and substantial numbers of people practicing various other European and African religions. Were we to pass or consider legislation which adversely impacted upon these religions and infringed upon the first amendment right to the free exercise of religion, we would, from our own knowledge and background, be aware of that impact and would modify the legislation to eliminate the offensive language.
>
> But the traditional religions of Native American people are not our religions and we are unaware of practices, rites and ceremonials of these religions. We have in the past, enacted legislation where we have unknowingly brought about the infringement of the religious rights of Indians.
>
> ****
>
> It is stating the obvious to say that this country was the Indians long before it was ours. For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand that? Our religions have their Jerusalems, Mount Calvarys, Vaticans, and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these religious sites.
>
> Yet, Congress has in some cases passed legislation setting aside public lands as

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[14] Israeli regulations under the above law posted outside protected holy places provide "INSTRUCTIONS TO THE VISITING PUBLIC" as follows:

1. The visitor should dress and act in a manner appropriate to the holiness of the site.
2. Eating, drinking, smoking, bringing in animals, bearing arms, and creating a disturbance are forbidden.
3. It is forbidden to enter with babies.
4. The use of radio-transistors, loud conversation and creation of a disturbance are forbidden.
5. Strict attention to local authorities, in all that relates to proper behavior is obligatory.
6. Those who do not abide by these instructions will be asked to leave the premises.

Israel and the Holy Place of Christendom, supra at 104.

wilderness, parks, or National forests which have contained sacred sites for Indian tribes. This has been often unwitting but no less callous.[15]

Over the years, many lawsuits have been filed by Native American religious practitioners to protect Native American sacred sites located on aboriginal lands taken into public ownership from destruction by federal agencies. Even with the United States' AIRFA policy in place, however, lower courts have been consistently unable or unwilling to protect these American holy places under the First Amendment or any federal statute.[16]

Finally, in Lyng v. Northwest Indian Cemetery Ass'n, 485 U.S. 439, 452 (1988), the Supreme Court laid to rest any notion that the First Amendment protected Native worship at these holy places. In Lyng, the Forest Service sought to build a logging road through a mountaintop area containing ancient holy places of three Indian tribes. Even though the Supreme Court accepted the finding of the lower courts that the road would "virtually destroy the Indians' ability to practice their religion," it ruled that "the Constitution simply does not provide a principle that could justify upholding respondent's claim." Id. at 452-53. Denying the Indians constitutional protection, the Court stated that the task of accommodating their worship at sacred sites located on public lands "is for the legislatures and other institution." Id. at 452. As to Congress' AIRFA policy, the Court stated simply that, "Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." Id. at 454.

Former Justice Brennan dissented against the "astonishing conclusions" and the "cruelly surreal result" of the majority opinion, in which "governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion." Id. at 472. At 476-77, he pointed out the need for the federal law to protect this aspect of Native American worship:

> Today, the Courts holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in the manner recognized by the Free Exercise Clause. Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision " should be read to encourage government

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[15] Congressional Record - House (July 18, 1978) at H 6872.

[16] See, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) [Worship at Hopi and Navajo shrines impaired by U.S. Forest Service to make way for a ski lift]; Fools Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983) [Intrusions on Sioux vision questing by U.S. Park Service permitted]; Badoni v. Higginson, 638 F.2d 173 (10th Cir. 1980) [Destruction of Navajo sacred site and intrusions upon ceremonies by Park Service and BLM upheld]; Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980) [Cherokee sacred site flooded]. See also, U.S. v. Means, 858 F.2d 404 (8th Cir. 1988); Inupiat Community of Arctic Slope v. U.S., 548 F.Supp. 182 (D.Alaska, 1982); Havasupi Tribe v. U.S., 752 F.Supp. 1471 (D.Az. 1990), appeal pending; Dedman v. Hawaii Bd. of Nat. Res., 740 P.2d 28 (Haw. 1987).

> insensitivity to the religious needs of any citizen." [cite omitted] . . . The safeguarding of such a hallow freedom not only makes a mockery of the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions,'" (quoting AIRFA), it fails utterly to accord with the dictates of the First Amendment.

For the rest of society, the little-noticed Lyng decision began the Court's trend of narrowing Free Exercise Clause protections to be triggered only when the state action punishes citizen for practicing religion or forces them to violate their religion. For Indians, the decision meant that a basic cornerstone of tribal religion is unprotected, opening the door to unchecked Government destruction of tribal sacred sites. From an Equal Protection perspective, it is hard to tolerate the double standard evoked by the lack of constitutional protection: if this country contained holy sites considered important to the Judeo-Christian tradition, no one doubts that United States law and social policy would afford adequate legal protection, but, for Indians, no protection can be found anywhere in our legal system for American holy places.

Thus, from a legal standpoint, the need for sacred sites legislation is clear: unless Congress acts to incorporate the religious needs of indigenous people into our body of laws, these irreplaceable sites--now being destroyed by the Forest Service and other federal agencies--will disappear as a result of Government action just like the Ghost Dance and the associated Native religious beliefs and practices will be lost forever.

Such legislation is not novel. Other nations have legislated to protect aboriginal sacred sites within their territories, such as Israel, supra, and Australia.[17] In our own nation, California has passed a law to protect Native American sacred sites on some public lands[18], and Congress has passed many laws, on a piecemeal basis, to protect or return specific tribal sacred sites[19]. Thus, ample statutory precedent exists for Congress to overturn Lyng and

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[17] In order to protect sacred sites, The Aboriginal Land Rights (Northern Territory) Act of 1976 requires miners to enter into agreements with Aboriginal Land Councils before any exploitation of natural resources of aboriginal trust lands. In addition, the Act prohibits non-Aboriginal persons from entering sacred sites on lands within the Northern Territory. See, Aboriginal Land Rights (Northern Territory), Act of 1976, Sections 69-70. Similarly, Sections 33-35 of the Northern Territory Aboriginal Sacred Sites Act of 1989 prohibits non-Aboriginal persons from entering, remaining on, working on, or desecrating a sacred site.

[18] See, Native American Historical, Cultural, and Sacred Sites Act, CAL. [Pub.Res.] CODE Sections 5097.91 and 5097, which provides for a Native American Heritage Commission, and requires state and local agencies to cooperate with the Commission to protect sacred sites and a cause of action by the Commission to "prevent severe and irreparable damage to, or secure appropriate access for Native Americans, to a Native American ... place of worship, religious or ceremonial site, or sacred shrine located on public property ..." Id., Sec. 5097.94(g).

[19] **For access or protection of sacred sites located on specific federal lands, See:** 16 USC 4305 [notice to tribes of possible harm to sacred sites in the Federal Cave Resources Protection Act]; 16 USC 470cc [notice to tribes of possible harm to sacred sites affected by archeological permits in the Archaeological Resources Protection Act]; 16 USC 543f [access by Indians to lands covered by the National Forest Scenic-Research areas for religious

incorporate indigenous religious needs into our basic legal system.

B. **Smith: Need to protect the Native American Church** In 1990, the Supreme Court carried Lyng to its ultimate, final conclusion in another Indian religion case, Employment Div., Dept. Human Res., Oregon v. Smith, ___U.S.___, 108 L.Ed.2d 876 (1990). In Smith, the Court ignored established legal precedent and carved out an enormous exemption to the First Amendment for all criminal statutes and all civil statutes or regulations of general application that are not openly hostile against religion. Id. at 885-87. For good measure, the Court abandoned the well-settled "compelling state interest" balancing test,[20] because Justice Scalia was concerned that the test was too strict in protecting diverse American religious liberty, which he described as a "luxury" that a democratic society "cannot afford". Id. at 892.

For Indians, Smith leaves no doubt that tribal religious freedom has no protection under American constitutional law. In particular, the Court went to great length in the name of the Drug War to deny First Amendment protection for the Native American Church's religious use of peyote. The American Indian peyote religion is ancient; and its sacramental use of this cactus plant, as will be discussed by other witnesses in this hearing, is far removed from our nation's drug problems. Though protected by various statutory, administrative and judicially created exemptions from drug laws by the federal government and about 28 states, the Smith case places the survival of this religion in danger. In State of Oklahoma v. Kionute, supra, a life-long member of the Church faces a felony prosecution in the wake of Smith for possession of peyote--a constitutional right previously upheld in that state. There is a need to craft a law that clarifies and codifies existing federal administrative practices of the Federal Drug Enforcement Agency exempting the non-drug religious use of peyote by Indians for religious purposes, which has been in effort for almost 30 years, and make such religious exemption uniform. See, e.g., 21 CFR 1307.31 (1984):

> The listing of peyote as a controlled substance in Schedule 1 does not apply to the non-drug use of peyote in bona fide religious ceremonies of the Native American Church.

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purposes]; 16 USC 410ii-4 [Native religious uses allowed in the Chaco Canyon National Historical Park]; 16 USC 564uu-47 [Indian access to the El Malpais National Monument for religious purposes allowed, including temporary closures for worship ceremonies]; 16 USC 445c [Indian religious uses allowed at Pipestone National Monument]; 16 USC 410pp-6 [Zuni-Cibola National Historical Park may be closed for tribal worship]; 16 USC 228i(c) [access to Havasupi sacred sites on certain lands may not be prohibited]. **For conveyance of lands containing sacred sites to Indian tribes, See:** Pub.L.91-550 [sacred Blue Lake transferred to Taos Pueblo]; 92 Stat. 1679 [Lands containing six tribal religious sites and shrines returned to Zia Pueblo]; 92 Stat. 1672 [lands containing 14 religious sites and shrines returned to Santa Ana Pueblo]; 98 Stat. 1533 [conveyance of lands to the Zuni Tribe for religious purposes]; Executive Order No. 11,670 (May 23, 1971) [sacred site transferred to Yakama Tribe].

[20] The "compelling state interest" balancing test had been applied by the Supreme Court and all lower courts in constitutional law religion cases for years. The test is that Government may not limit worship unless it was necessary to serve a "compelling state interest" that cannot be protected in any "less restrictive manner." See, Hobbie v. Unemployment Commn, 480 U.S. 707 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

For larger society--including churches, private citizens and prisoners--the new Smith decision, which discarded established legal precedent and constitutional standards, seriously weakened religious liberty for all Americans and provoked cries of alarm and outrage. A recent Time cover story (Dec. 9, 1991) reported at 68:

> For all the rifts among religious and civil-libertarian groups, this decision brought a choir of outrage, singing full-voice. A whole clause of the Bill of Rights had been abolished, critics charged, and the whole concept of religious freedom was now imperiled.

Yet, prisoners--particularly Native American prisoners--who inhabit society's most authoritarian institutions are particularly vulnerable to unchecked government infringement upon their right to worship now made possible by Smith, as discussed next.

C. O'Lone: Native American Prisoner Religious Rights: Today, a highly disproportionate number of Native Americans are confined in American prisons.[21] Caused by factors such as federal jurisdiction over Indian country, alcoholism, poverty, social anomy of living in two worlds, inadequate legal representation, and discrimination, the incarceration rate is inordinarily high. These Native people represent significant human resources to Indian Tribes and communities who have federal trust relationship with the United States Government. For these Tribes and dependent communities, it is important that the thousands of tribal members who return home from prison are contributing, "rehabilitated" members of the tribal community and culture.

Prison inmates retain First Amendment rights, Pell v. Procunier, 417 U.S. 817 (1974), including those protected by the Free Exercise Clause. Indeed, from their beginnings, American prisons have emphasized the importance of religion as a correctional rehabilitation tool[22], and the courts have held that the prison practice of furnishing prisons with church

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[21] According to a 1991 survey of federal and 23 state prison systems, NARF obtained the following population data on Native American prisoners:

Federal Bur. Prisons, 974	Minnesota, 285	Oklahoma, 744
Hawaii, 831	Montana, 231	Oregon, 156
Alaska, 769	Nebraska, 90	South Dakota, 341
Arizona, 412	Nevada, 90	Utah, 59
California, 678	New Mexico, 100	Washington, 336
Colorado, 80	New York, 208	Wisconsin, 164
Idaho, 92	North Carolina, 421	Wyoming, 60
Kansas, 74		

[22] The Manual of Correctional Standards (American Correctional Association, 1971) states at 468:

> From its very inception in 1870, the American Correctional Association has recognized and emphasized the role of religion in the correctional process.

And at p. xxi of the ACA's Manual of Corrections (3rd.Ed., 1966) it states:

facilities, chaplains and religious objects at taxpayer expense does not violate the Establishment Clause.[23] Cruz v. Beto, 405 U.S. 319, 322 (1972), the Court admonished that under the First and Fourteenth Amendments, prisons must furnish a prisoner who believes in a minority religion, "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."

One of the principal problems faced by Native prisoners is the ability while confined to practice their traditional religions on a basis comparable to that afforded to prisoners of other, more well-known faiths. About forty religion cases have been filed since 1972 by Native American prisoners to protect their First Amendment rights, demonstrating the pervasive nature of this problem on a national basis.[24] These cases relied heavily upon the "compelling state interest" test of the First Amendment and were generally successful in protecting Native religious rights until the Supreme Court discarded that test in favor of a far more lenient, nearly toothless "reasonableness" test in O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

In O'Lone, the Court carved out an exception for the First Amendment for prisoners, stating that, for them the proper test is:

> To ensure that courts afford appropriate deference to prison officials, we determined that prison regulations alleged to infringe upon constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental rights ... "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to

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> Religion represents a rich resource in the moral and spiritual regeneration of mankind. Especially trained chaplains, religious instruction and counseling, together with adequate facilities for group worship of the inmate's choice, are essential elements in the program of a correctional institution.

[23] Abington School Dis. v. Schempp, 374 U.S. 203, 298-99 (1963); United States v. Kahane, 396 F.Supp. 687, 698 (E.D.N.Y., 1975), aff'd sub nom, Kahane v. Carlson, 527 F.2d 492 (2d.Cir. 1975).

[24] See, note 4, supra, for NARF litigation. See, also, Cano v. Lewis, 917 F.2d 566 (9th Cir. 1991); Mosier v. Maynard, ___F.2d___, No. 90-6199 (10th Cir. 1991); McKinney v. Maynard, ___F.2d___, No. 89-7105 (10th Cir., Dec. 23, 1991); Iron Eyes v. Henry, 907 F.2d 811 (8th Cir. 1990); Pollack v. Marshall, 845 F.2d 656 (6th Cir., 1988); Standing Deer v. Carlson, 831 F.2d 1525 (9th Cir., 1987); Allen v. Toombs, 827 F.2d 563 (9th Cir., 1987); Holloway v. Pigman, 884 F.2d 365 (8th Cir., 1989); Clark v. Peterson, No. 85-6559-PA (D.Or., Opinion of Aug. 22, 1988); Indian Inmates of the Nebraska Penitentiary v. Cunter, 660 F.2d 394 (8th Cir., 1987); Capoeman v. Reed, 754 F.2d 1512 (9th Cir., 1985); Cole v. Flick, 758 F.2d 124 (3rd Cir., 1985); Native American Council of Tribes v. Solem, 691 382 (8th Cir., 1982); Weaver v. Jago, 675 F.2d 116 (6th Cir., 1982); Sharp v. Nix, No. 84-689-A (S.D.Iowa, Order of Dec. 3, 1987); Sample v. Borg, No. S-85-0208-LKK (E.D.Ca., Order of Feb. 25, 1987); Standing Bear v. Carlson, No. 85-6632-DT(PX) (C.D.Ca., Order of Aug. 18, 1986); Reinhart v. Haas, 585 F.Supp. 477 (S.D.Iowa 1984); Battle v. Anderson, 457 F.Supp. 719 (E.D., Ok 1978); Walking Elk Shadow v. Denton, No. C-2-79-999 (S.D., Ohio, Order of Nov. 14, 1978);
Abraham v. State of Alaska, 585 P.2d 526 (Alaska, 1978); Fairbanks Correctional Inst. Inmates v. Smith, No. 4FA-83-2146 (Sup.Ct., 4th.Jud.Dis.Alaska, Order of June. 12, 1984).

legitimate penological interests." [citing Turner v. Safley, 482 U.S. 78 (1987).

Since the date that the Court seriously weakened prisoner First Amendment rights with the less restrictive O'Lone test, Native prisoners have not won any post-O'Lone religion cases cited in note 24, supra demonstrating a serious inability to protect their religious liberty. The Smith case compounds the problem for Native prisoners, because it dealt with Native religion and held that civil regulations of general applicability are not subject to First Amendment limitations, unless the regulation is openly hostile to religion. Thus the post-O'Lone cases are now forced to reverse previously existing recognized religious rights of Native prisoners and Smith guarantees that Native religious freedom in prisons
-- a widespread national problem -- will not be protected. This is an intolerable legal anomaly in a democratic nation.

Smith and O'Lone make the need for a few federal law to protect religious rights of Native prisoners clear. Though separated by prison walls, these Native citizens are still members of our society and will be returning to Native communities, hopefully, as contributing members of their tribal cultures. They are just as entitled to protection of their religious liberty as other citizens, as pointed out by Former Justice Brennan in his dissenting opinion against the toothless standard of the majority in O'Lone at 355:

> Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that dimly enters our awareness. They are members of a "total institution" that controls their daily existence in a way that few of us can imagine ... It is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own. Prisons may exist on the margin of society, but no act of will can sever them from the body politic. When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.

III. CONGRESS' POWER TO PROTECT NATIVE AMERICAN WORSHIP

A. Legal power exists to put teeth into the AIRFA Policy: Ample legal authority exists for Congress to pass a law to protect Native American religious freedom. Congress frequently legislates to accommodate or protect free exercise values.[25] In Gillette v.

[25] See, e.g. 5 USC 5550a (1978) [compensatory time off for religious observances]; 26 USC 1402(h) [exemptions from certain taxes to accommodate religious beliefs and practices]; 50 USC 456(j) (1967) [exemptions from military duty to accommodate religion]. In Indian affairs, Congress routinely legislates to accommodate or protect Indian free

United States, 401 U.S. 437, 453 (1971), the constitutionality of this type of legislation was upheld as not violating the Establishment Clause:

> Quite apart from the question of whether the Free Exercise Clause might require some sort of exemption [footnote omitted], it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy traditions" of avoiding unnecessary clashes with the dictates of conscience.

Indeed, in Smith (108 L.Ed.2d at 893) and Lyng (485 U.S. at 452-53), the Court referred the Indians to Congress for legislation to accommodate their religious practices. Even in the area of prisons, legislation to remove barriers to the free exercise of tribal religion and accord Native prisoners with access to their religion on a basis comparable with that afforded to prisoners who practice Judeo-Christian religions is in line with the First and Fourteenth Amendment holding of Cruz v. Beto, supra, 405 U.S. at 322.

Moreover, because of the unique legal position of American Indians in federal law pursuant to the treaty and trust relationship, federal legislation that singles out Native Americans for special treatment does not offend the Establishment or Equal Protection Clauses so long as the legislation "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. Morton v. Mancari, 417 U.S. 535, 555 (1974). And, the Indian religion area is one of those areas that is clearly "rationally related to the legitimate governmental objective of preserving Native American culture ... [w]hich is fundamental to the federal government's trust relationship with tribal Native Americans." Peyote Way Church of God v. Thornburgh, 922 F.2d 1210. 1216-17 (5th Cir. 1991).

B. AIRFA gives the context for the needed law: Congress already has an Indian policy of the United States to protect and preserve Native American religious freedom embodied in Section 1 of AIRFA:

> Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

In addition, Section 2 mandated a review and report to Congress of all federal practices interfering with Native religious freedom along with recommendations for administrative and legislative change necessary to remove federal impairment of Native American religious freedom. In the report to Congress that was submitted, 522 incidents were documented of

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exercise values. See, the many statutes regarding sacred sites in note 19, supra; and, Native American Graves Protection and Repatriation Act, 25 USC 3001 (1990); AIRFA, supra; 16 USC 668(a)[exemption to eagle protection law for Native religious use].

government infringements upon Native American religious freedom[26], 11 recommendations for administrative change were make (none of which were ever carried out by the Executive Branch)[27], and 5 legislative proposals were made (none of which were ever acted upon by Congress, except the one at 81 regarding sacred objects which was addressed in part by the Archaeological Resources Protection Act, supra, and the Native American Graves Protection and Repatriation Act, supra).

The above AIRFA policy, together with the recommendations made in the Report to Congress, form the basis for further legislation to correct free exercise problems caused by the new Supreme Court doctrine.

V. CONCLUSION

There is a need for our legal system to protect Native American religious freedom. We can only regret the enormous loss to our nation's heritage caused by a long history of government suppression of tribal religions. The challenge before Congress is to safeguard what little remains. After 500 years since the arrival of Columbus, the time is long overdue for society to grant respect and equal protection to the religious freedom of those who were here first.

Senator Inouye, your leadership in addressing this human rights crisis is greatly appreciated. Opportunities to correct social justice are rare; and your leadership will inspire other members of Congress to participate with you in restoring Native Americans to our rightful place with the Bill of Rights. Thank-you.

Respectfully submitted, Dated: March 4, 1992

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[26] American Indian Religious Freedom Act Report P.L. 95-341, Federal Agencies Task Force (U.S. Dept. Int., August 1979), appendices.

[27] Id. at 62-63, 71, 75, 81.

Summary

Hearing before the
Select Committee on Indian Affairs
United States Senate
One Hundred Second Congress
Second Session
Oversight Hearing on the Need for Amendments to the
American Indian Religious Freedom Act

March 7, 1992
Portland, Oregon

Vine Deloria, Standing Rock Sioux, Center for Studies of Ethnicity and Race, University of Colorado, Boulder, Colorado.

- Native American religion is inherently problematic in trying to centralize religion
- Not all ceremonies are alike, there is no centrality in Native American religion
- Native Americans can't be denied their religion because of this lack of centrality
- Native American inmates must prove that a ceremony is a "central belief" of religionwhere other religions don't have to

Walter Echo-Hawk, Pawnee, Attorney, Native American Rights Fund, Boulder, Colorado.

- Religion is important to all people because it is the mark of humanity
- The right to worship is fundamental to our constitution
- Religion is the glue that holds tribal communities and cultures together
- Federal Indian Trust Doctrine and treaty-trust relationship between the United tribes, include tribal religion and protection
- Congress has legal authority to pass laws that protect Native American religious freedom

Lenny Foster, Navajo, Spiritual Advisor, Director of Navajo Nation Corrections Project, Fort Defiance, Arizona.

- Federal and State prisons are committing First Amendment violations
- American Indian Religious Freedom Act of 1979 ("AIRF") has not assured religious freedom
- Native American worship is not being allowed on a consistent basis
- Spiritual Advisors need to be recognized on the same level as other clergy
- Spiritual Advisors are being harassed by prison officials

Tyler Barlow, Kalamath, Former Inmate, Bly, Oregon.

- Practicing Native American religion while incarcerated has helped him straighten out his life
- Religious ceremonies help Native Americans heal and become aware of their self-worth
- Native American inmates want the same privileges and recognition as those who belong to other religions
- Native American inmates want the freedom to worship in their own way
- Prisons restrict Native American inmates access to religious ceremonies and traditions

Alvin Pablo, Pima, Inmate, Arizona State Prison, Florence, Arizona.

- Conventional religions are cultivated, while non-conventional religions exist in limbo
- Religious articles are confiscated, not returned, and often destroyed

David Neal Pigg, Oklahoma State Prison, McAlester, Oklahoma.

- Freedom of religion is an inherent right which should be protected
- This proposal is greatly needed within the United States

John Pretty On Top, Crow, Facilities Manager, Crow Agency, Montana.

- Institutions have inconsistent hair-cutting policy; wardens or chaplains do what they want
- Prisons will often transfer all Native American inmates to other prisons, so they will have to comply with building a Sweat Lodge

Native American Inmates of Arizona State DOC, Florence, Arizona.

- Native Americans are being discriminated against for practicing their religion while incarcerated
- Native American religion is not treated equal to Judeo-Christian religion

Frank Spencer, Native American Spiritual Council at Western New Mexico Correctional Facility, New Mexico.

- Native American inmates need spiritual leader's guidance so they can re-enter society
- Prison officials do not understand Native American way of life

Leon Watchman, Co-Director, D. A. A. T. C., Fort Defiance, Arizona.

- Native American religion has helped in his own rehabilitation as an ex-offender
- Native American religion helps people to gain and maintain a positive attitude

Don Stow, Ojibway, Inmate, Arizona State Prison, Florence, Arizona.

- Deference is given to conventional religion, but is not given to other religions
- Arizona DOC Native American inmates are "lucky" to get two religious services per year as compared to Christian faiths, that get more services

Native American Group, F.C.I., El Reno, Oklahoma.

- Sweat Lodge has been in existence for 13 years and has been visited only twice by a medicine man
- Spiritual Advisors who visit aren't given the same respect and privileges as those of the Judeo-Christian faith

Daniel Deschinny, Navajo, Dinen Spiritual & Cultural Society of the Navajo Tribe of Indians, Arizona.

- ALL people are entitled to practice their religion

Wanbli Circala and Wallace Black Elk, Lakota Spiritual Teacher and Advisor.

- People in prison have lost their way because they never received spiritual training
- Traditional teachings will help guide inmates back to society

Hayden Fink, Coordinator of the Native American Program of Parents Anonymous, Phoenix, Arizona.

- Alcohol and drug addiction play a role in the criminal behavior of Native Americans
- AIRFA resolves the inalienable right of Native Americans to worship in traditional ways

Moses Headman, Oklahoma State Penitentiary, McAlester, Oklahoma.

- Those who practice Native American religion should be given the equal right to worship as those who practice other religions
- Native American religion is not just a religion, it is a way of life

Kathy Provost, Sister of the Four Winds, Native American Club at Oregon Woman's Correctional Center, Salem, Oregon.

- Prison officials disrespect and disregard of Native American religion
- Eagle feathers are improperly handled by prison staff
- Medicine Bags are not allowed, even though the prison handbook says they can be

November 12, 1992
Los Angeles, California

Isidro Gali, California Pitt River, DOC Chaplain, Davis, California.

- Native American inmates want to practice Native religion and will file lawsuits to do so
- In California it appears that Native Americans can practice their religion
- California has 24 prisons and not enough staffed Spiritual Advisors
- Staffed Spiritual Advisors are not given enough shifts to meet with the inmates

John Funmaker, Winnebago, Sundancer, Eagle Lodge, DOC Chaplain, Long Beach, California.

- Spiritual Advisors are given only one day a month to serve the prisons
- Inadequate time is given to Native American inmates when Spiritual Advisors can meet
- DOE does not employ enough Spiritual Advisors to serve Native American inmates
- When Spiritual Advisors are not present there is no opportunity to practice religion
- Native inmate's work schedule needs to be flexible so they can participate in ceremonies
- Sacred object are not available when needed
- Prison employees are disrespectful to Native American Spiritual Advisors

Joe Kalama, Nisqually, Red Road Ministry, DOC Chaplain, Olympia, Washington.

- Washington allows Sweat Lodges, but "pick on" Native American inmates
- Prison officials will allow positive activities, then later decide it's a security risk and deny it's use
- There is no consistency from institution to institution
- Educational materials are not utilized by staff
- Inmates who follow Native religion are being treated unequally
- Staff is insensitive and does not understand Indian sacredness
- Native American clergy is not being treated as equals with Judeo-Christian clergy

Gary Holy Bull, Cheyenne River Sioux, Traditional Medicine Man, Red Iron Community, Sisseton, South Dakota.

- Eagle feathers are important to Native American religion
- Eagle feathers are difficult to get in prison
- Native Americans can't hang eagle feathers in their cells, but Christians can hang crosses
- South Dakota allows only the chaplain to handle eagle feathers until a Spiritual Advisor arrives

Jim Archuletta, Pueblo/Karok, California Rehabilitation Center, Vocational Instructor, Norco, California.

- Native American Religion inmate participants become productive members of society
- ALL Americans have the right to pray in their own way

Jay B. Petersen, Directing Attorney of Oakland Field Office of California Indian Legal Services, Oakland, California.

- Case law precedence makes practicing of Native American religion difficult for prisoners
- Many prisons have no Native American chaplains to serve them
- Women receive no chaplain services

February 8, 1993
Scottsdale, Arizona

Thomas Charlie, Navajo, Former Inmate at Arizona State DOC, Tuba City, Arizona.

- Many Native Americans are in prison for alcohol-related crimes
- Traditional ceremonies and ritual observances are crucial for rehabilitation
- Following Native American religion makes prisoners accountable for their actions
- Prison officials use discriminating means to deny religious freedom to Native Americans
- Many problems occur when inmates try to conduct ceremonies
- Prison officials are desecrating scared objects
- Policy and procedures are inconsistent and keep Native inmates from religious services
- Prison administration and guards refuse to allow Native American culture
- Prison officials manipulate and circumvent policy to deny religion to Native Americans
- Unequal treatment between Native American religion and Judeo-Christian religion
- Spiritual Advisors are disrespected, harassed and discriminated against by prison staff
- Spiritual Advisors are turned away at the gate even after getting pre-approved gate passes

Rose Ann Kisto, Oneida, Works with Inmates in Arizona, Tucson, Arizona.

- Native Americans as an ethnic group face the highest rates of recidivism, suicidedisproportionate sentencing, alcohol-related crimes and receive inadequate legal help
- Religion is the only effective tool for rehabilitation for the Native American inmate
- In Arizona Native American religion and Judeo-Christian religion are treated unequally
- In Arizona Native American women are not allowed to have as many religious services as the men are
- Spiritual Advisors are turned away because gate passes can't be found
- Chaplains often refuse to comply with requests to provide advance copies of passes
- Spiritual Advisors are treated with disrespect and are sometimes threatened with arrest

Theresa Meyette, Yaqui, Former Inmate in Arizona and California, Phoenix, Arizona.

- Native American inmates are being subjected to jokes and disrespect
- Sacred items and plants are being desecrated by security guards as a retaliation measure
- Arizona has no Sweat Lodges at the women's facility, though policy exists which allows them
- When Native Americans go through the prison grievance system they face months of delay
- The Native American who files the grievance is often shipped off to another institution

Eldon Escalanti, Pipeholder, Inmate, Arizona State Prison, Florence, Arizona.

- Native American women are being denied the right to practice Native American religion
- Women are considered a special gift to Native Americans because they create life
- If a mother doesn't know her beginnings, children perpetuate the negative cycle

Cheryl Jackson, Arizona State Prison, Florence, Arizona.

- Female Native American inmates are not given equal religion rights compared to the men
- Men are allowed "Talking Circles" and "Sweat Lodge Ceremonies," while women are not

February 9, 1993
Albuquerque, New Mexico

Dolly Nez, Navajo, Former Inmate, Albuquerque, New Mexico.

- Prison officials don't understand Native American religion and need to be educated
- Some prison officials think sacred herbs--sage and sweet grass-- are used to "get high"
- Sweat Lodges aren't allowed because prison officials think they will be used to "get high"
- Christian religion is dominant and chaplains don't know about Native American religion
- Instead of trying to learn about Native American religion, the chaplains try to convert Native American inmates to Judeo-Christian religion
- In prison, religion is not for everybody like the First Amendment says it should be
- When you are locked up your name and loved ones are taken; religion shouldn't be taken
- Policy gets bent so Catholics are able to have things they consider sacred in their rooms
- Policy is strictly read so Native inmates aren't able to keep sacred items in their rooms

Ben Carnes, Choctaw, Spiritual Alliance for Native Prisoners, Former Inmate, Oklahoma City, Oklahoma.

- Many problems we face today are the result of historical United States-Tribal relations
- Prison officials lack sensitivity and education regarding Native American religion history
- Scared items are being desecrated by prison guards
- Committees that are set up by Oklahoma DOC to address these issues become side tracked
- In Oklahoma proposals to educate prison officials have been turned down
- Oklahoma prison guards are ignorant and have a racist attitude toward Native American inmates
- Native American prisoners are being denied the right to wear their hair long in Oklahoma
- "Sincerity" is being used subjectively to force Native inmates to cut their hair
- Guidelines need to be set to define vague standards such as sincerity
- Oregon State Penitentiary has allowed long hair for 25 years with no security problems
- Oklahoma DOC said twice that long hair did not pose a significant security issue

Robert Robideau, Turtle Mountain & Case Lake Anishinable, Former Inmate, Montana.

- Native American religion helps rehabilitate Native American inmates
- Oklahoma allows Native American inmates Sweat Lodge and possession of pipes, but bias and racism of chaplains and guards make confiscation a constant threat
- Officials see religious items as "privileges," not as tenets of Native American religion
- Full access to religion shouldn't be construed as a special privilege
- Spiritual Advisors deserve the same stature, respect and prisoner contact as is given to any of Judeo-Christian religion
- United States government has the opportunity and duty to uphold the constitution and grant all Americans the equal right to worship

Standing Deer, McAlester Prison, McAlester, Oklahoma.

- Native inmates must cut their hair "voluntarily" or guards will do it forcibly with violence
- Prison officials need more education about Native American religion
- Many Native American inmates won't admit their religious belief for fear of persecution and discrimination by prison guards
- Guards will impose their own religious beliefs and biases on Native American inmates

Eagle Spirit Society, Central New Mexico Correctional Facility, Los Lunas, New Mexico.

- Education about Native American culture and religion is crucial
- Native American inmates who follow Native religion have a higher recovery rate become productive members of society
- Materials for conducting ceremonies need to be available to Native American inmates
- Other inmates are allowed to possess bibles and crucifixes
- Native American inmates should be provided with the same services as other inmates
- Freedom to worship in traditional religious way is a basic human and civil right
- Prisons provide for Judeo-Christian religion; they should also provide for Native religion

Rose Banister, Blackfoot, Spiritual Advisor, Oklahoma State Prison, Talihina, Oklahoma.

- For some prisons in Oklahoma the practice of religion is a privilege and not a right
- Chaplains take their time in distributing needed religious supplies to Native inmates
- Chaplains and staff members tell Native American prisoners their beliefs are pagan and they will go to hell for their beliefs
- "Fundamental" staff chaplains are intolerant to Native American religion
- Native American religious activities must be channeled through "fundamental" chaplains
- Native American inmates must attempt to demonstrate "sincerity"
- The committee who decides "sincerity" often have different criteria: one person's criteria may be knowledge, while another person's criteria may be behavior
- Exemptions to wear hair long is being denied based upon moral judgment
- Exemptions to wear hair long that has been previously granted is often "lost"
- Committees that decide who can wear their hair long are made up of non-Indians
- Religious services other than mainstream religions must go through much bureaucracy
- It is difficult for Native American inmates to get eagle feathers in prison
- Prisons that have allowed Native American religion have not had security problems
- Spiritual Advisors have a difficult time in gaining admittance because they have no ordination papers or certification

Tony Hughes, Inmate, Bastrop, Texas.

- Prison officials don't understand Native American religion
- Each tribe/individual may have variations of ceremonies
- A problem with the educational sources prison officials use is that they try to apply the same materials to all ceremonies and people
- Native American people come from a broad range of cultural diversity

George Windhorse Walker, Oglala Sioux, Inmate, DOC, California.

- Native American religious services or sacred items are not offered or allowed at many California prisons
- Where services and sacred items are allowed, they are often desecrated
- Institutional appeals don't go anywhere, appeals are often sent back, not submitted or lost
- There are repercussions from prison staff, such as transfers and intimidation

Carl Welcome, Lakota Nation, Inmate, Folsom Prison, California.

- Native American religious ceremonies in process will often be interrupted by heavy equipment operation
- Prison officials will often make Native American inmates take a urine test for smudging sage
- Sacred items are denied to Native American inmates

March 8, 1993
Minneapolis, Minnesota

Ted Means, Heart of Earth Survival School Corrections Program, Wisconsin.

- Rules seem to change from institution to institution at the whim of those in control
- It is important that rules and regulations be uniform
- Sacred objects are often locked up in a cabinet and Indian people are not allowed access

Vernon Bellecourt, Heart of Earth Survival School Corrections Program, Wisconsin.

- Correctional systems are not consistent in allowing Native Americans freedom of religion
- Inmates who request services or try to correct inconsistencies often become targets of the administration and are transferred
- Ceremonial materials are not available to Native American spiritual practitioners
- Prison officials do not give Spiritual Advisors the same respect they give to other clergy
- Against the advice of the Native American community, phonies Spiritual Advisors are promoted
- This country was founded as a result of religious persecution, yet Native Americans must convince Congress of the need to protect their religious freedom
- Native Americans must be given the same access to religion that Judeo-Christians have
- Native American religion is a means of rehabilitation

John Poupart, Chippewa, Employee, Minnesota Department of Corrections, St. Paul, Minnesota.

- Religion is important to Native American inmates for rehabilitation
- Judeo-Christian religion has never fully accepted Native American religion
- Minnesota has developed policies to help Native Americans practice their religion
- AIRFA-initiated amendments can help many states that have not developed policies

Joseph Bresette, Executive Director Great Lakes Intertribal Council, Lac du Flambeau, Wisconsin.

- To encourage equity, prison officials need to be educated about Native American religion
- The system is set up so inmates have to deal with problems on a individual basis
- Equal religious opportunity is often ignored based upon budget problems
- Lack of national standards lets states get away with irregular religious procedures
- Federal answers are needed when states have difficulty addressing Native issues
- Recommendations given to DOC have generally been denied
- There is a need for Congress to provide a nationwide remedy

George Kaemmer, Winnebago, Wisconsin DOC Employee, Clinical Crisis Intervention Worker, Minneapolis, Minnesota.

- Native American spiritual/cultural ceremonies and teachings are vulnerable to DOC
- Current policies in Wisconsin allow for more institutional discretion than previous policies, yet do not increase the allowance of Native American religious ceremonies
- Discretion results in inconsistent applications of frequency and duration of ceremonies
- Native American inmates need to be guaranteed they can worship on a regular basis

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