MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 16, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Talking Points on Public Opinion re EEO Matters

While I do not have specific polling data at hand, I have the general impression that the polls uniformly reveal (a) widespread opposition to quotas and (b) widespread support for affirmative action.

If I read this sentiment correctly, the public is saying something pretty close to what we propose to do, indeed have already done in the form of various DOJ speeches, testimony, case filings, etc.

It seems to me that a good way of focusing the question is to ask those who support affirmative action a series of questions which seek to get at what they mean by affirmative action -- E.g., Should affirmative action include special employment opportunities for minorities/women? Even if it means that a non-minority/male may be excluded from that same opportunity? Would you support a court order or government regulation which said that for every non-minority/male hired, X percent of minority/females must also be hired? Are you for or against affirmative action if it means that someone may lose his job in order to make room for someone of minority/female status?

Such phraseology is obviously loaded and would have to be cleaned up before going into the field, but you will get back nothing useful unless the veil of affirmative action is pierced. What do people really think about when they hear the phrase? My hunch is that they're for it because it's the right thing to be for, but that they do not want it carried so far as to give special preferment, and in particular they do not want it to go so far as to cause someone else to lose a job or job opportunity. In short, I think the great majority of people are for affirmative action right up to the point where helping X along interferes with Y, who is himself innocent of any wrongdoing.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 16, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Letter to Paul Weyrich re Political Action Committees

Attached is a revised draft of the President's letter, to be forwarded to Darman.

As recommended by Fielding, I have deleted the final sentence and the language in paragraph 7 supporting an increase in individual contribution limitations. I have incorporated Whittlesey's suggested language for paragraph 4, and I have incorporated Fuller's suggestions, except those mooted out by Fielding's recommended deletions. In response to Duberstein's comments, I have changed the sentence concerning Obey-Railsback to parallel the President's earlier language in his June 1981 letter to Weyrich.

Dear Paul:

Thank you for your letter concerning congressional efforts in the 98th Congress to restrict the activities of political action committees and individuals who participate in the electoral process. I share your conviction that the freedom of all Americans to express their views in the electoral process is among the most precious of our rights as American citizens.

Apparently, some who disagree with my view are making an effort in the 98th Congress to restrict the ability of groups of citizens to participate effectively in the electoral process. You ask my view now of legislation to limit the amount of money that groups of citizens can give to candidates, to limit the amount that candidates can receive from such groups, to begin taxpayer financing of congressional campaigns, and to restrict independent expenditures by voluntarily supported organizations.

Overregulation of citizen involvement is a serious danger to an open and free democratic process. I have stated my firm opposition to any legislation similar to the Obey-Railsback bill, which failed to pass the 96th Congress. I will certainly oppose any such legislation in the future.

Intrusive limitations on our freedom to engage in political, electoral speech must be avoided. Whether the issue concerns contributions to a candidate, or independent political activity, the essence of a free society with a republican form of government is for citizens to be free to work together voluntarily to express their views. How else can they hope to guide the government toward the course they prefer?

I believe that the attention of our legislators in this area should focus on <u>improving</u> the opportunities of people to participate openly and honestly in the political process without harrassment from a federal bureaucracy.

Our election laws today are too complex. They give too many opportunities for regulators to trip up even the most careful candidates. It would be too easy for selective enforcement to target any candidate or committee based on technical violations. True reform would simplify our election laws, not further complicate them.

I appreciate your support for improving our democratic process and opposing any efforts to overregulate our elections.

Sincerely yours,

Ronald Reagan

ADVISORY COMMITTEE CHARTER

FOR

ADVISORY COMMITTEE ON WOMEN VETERANS

A. Committee's Official Designation: Advisory Committee on Women Veterans

B. Objectives and Scope of Committee: The Committee will advise the Administrator, and the Administrator shall consult with the Committee as appropriate, on needs of women veterans with respect to health care, rehabilitation benefits, compensation, outreach programs and other programs administered by the Veterans Administration.

C. Period of Time Necessary for Committee to Carry Out Its Purposes: This Committee performs a continuing service unrestricted as to time except as bi-annual review of its functions shall indicate that these functions are no longer needed and contingent upon renewal of this charter by appropriate action prior to its expiration.

D. Agency Official to Whom Committee Reports: The Administrator through the Chief Medical Director.

E. Agency Responsibility for Support to Committee: Veterans Administration Department of Medicine and Surgery.

F. Duties and Functions of Committee: The Committee will advise the Administrator of Veterans' Affairs, through the Chief Medical Director, regarding: the needs of women veterans with respect to health care, rehabilitation, compensation, outreach and other programs administered by the Veterans Administration; and the activities of the Veterans Administration designed to meet such needs. It will make recommendations (including recommendations for administrative and legislative action) to the Administrator regarding such activities. The Committee shall make a written report at least once yearly to the Administrator regarding its activities during the preceding year.

G. Estimated Annual Operating Costs and Staff Years:

Dollars: $30,000

Staff Years: 1

It is expected that this Committee will have approximately 18 members.

H. Estimated Number and Frequency of Committee Meetings: The committee will meet at least annually and twice in the first year.

I. Committee's Termination Date: Unless renewed by appropriate action prior to its expiration, the Committee will terminate two years from the date below.

J. Date Charter is Filed: May 16, 1983

Infanticide: Attitudes of Physicians

To make our case successfully for actively protecting handicapped children, our greatest need is to set forth hard facts about the extent of the problem.

The most compelling evidence is found in surveys of physician attitudes, cited in the report of the President's Commission on Medical Ethics.

A 1977 article in Pediatrics journal gives the results of a survey of 270 doctors in the surgical section of the American Academy of Pediatrics (the same group that filed suit against our handicapped infant regulation earlier this year).

- 76.8% said they would acquiesce in a decision by parents not to consent to surgery in a Down's Syndrome infant with intestinal atresia (a fatal problem routinely correctible by surgery, just as the esophageal atresia in the Bloomington Baby).

- Only 3.4% said they would get a court order in such a case to provide the necessary treatment. (Even the report of the President's Commission, which was lax in some respects, said a hospital should get a court order in such a case.)

- 23.6% said they would encourage undecided parents not to consent to surgery if their Down's Syndrome child had intestinal atresia.

- By contrast, 78.3% said that if parents refused consent for surgery out of religious beliefs, they would get a court order. (Obviously, respect for parental wishes is not the absolute some doctors have claimed.)

- In a question that illuminates the underlying personal attitude of the doctors, the survey asked, If you were the parent of a Down's Syndrome infant with intestinal atresia, would you consent to surgery? 27% said "yes"; 66.7% said "no".

Additional surveys taken in California and Massachusetts produced similar results: disturbingly large majorities of pediatricians will go along with parental decisions for passive euthanasia of Down's Syndrome infants.

These surveys contrast with recent public statements of medical groups, such as the American Academy of Pediatrics, that Down's Syndrome should never be grounds for denying treatment.

Our handicapped infants regulation will make clear that we are protecting Down's Syndrome and other survivable handicapped children, not hopelessly ill or inevitably dying infants.

Office of Policy Development
May 20, 1983

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 24, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: School Prayer

Senators Thurmond, Grassley, and Hatch appear adamant in preferring a silent prayer amendment over the President's amendment.

It appears that Legislative Affairs will recommend phone calls from Ed Meese to the three Senators today. We have prepared the attached analysis and talking points for these phone calls.

Analysis and Talking Points Re School Prayer

We have major trouble in the Senate Judiciary Subcommittee on the Constitution, concerning the President's school prayer amendment. As of Friday morning, Senators Hatch, Thurmond, and Grassley were prepared to report out of Subcommittee a substitute amendment that would merely allow for a "moment of silence" at the beginning of public school classes and also require that "equal access" be given to all student groups.

We persuaded the Senators to postpone their markup until this Thursday. At a meeting with staff this morning, however, Steve Markman for Hatch and John Maxwell for Grassley appeared adamant in favor of their silent prayer/equal access amendment. D. Lide for Thurmond was more open to the possibility of reporting out the President's amendment to give the school prayer coalition a chance to lobby the full committee, and simultaneously push for an equal access statute. But Lide says the Senators are unlikely to back off their silent prayer amendment unless the President talks to them personally.

Our discussions with Morton Blackwell and advocates of school prayer convince us that a silent prayer/equal access amendment is a very bad idea:

- Most groups still favor the President's amendment and are opposed to any amendment that is too watered down.

- Writing silent prayer and equal access into the Constitution seems silly; the Supreme Court has never ruled against either of these concepts.

- An equal access statute would be a real accomplishment (the President has endorsed this concept, and most school prayer groups supported it enthusiastically); but proposing it as an amendment merely plays into the ACLU argument that equal access is unconstitutional.

Senator Grassley has said that he desperately wants something that will turn back the tide of secularization in the public schools. Senators Thurmond and Hatch seem to agree, but we need to convince them that, even if the President's amendment cannot muster enough votes in Judiciary, that is not a reason to take a leap in the dark with a silent prayer amendment. All three Senators should be open to the equal access statutory concept, but Hatch's and Grassley's staffers do not seem to give it serious credence.

Our best course of action is to ask the Senators to give our amendment a chance in full Judiciary Committee, and simultaneously to support an equal access bill.

Talking points for phone calls from Ed Meese to Senators Thurmond, Grassley, and Hatch:

- Thank you for your help in postponing the markup on school prayer so we can have some much-needed discussions.

- We want to work closely with you to devise a strategy that can give us a victory.

- But we don't see nearly enough support for a silent prayer amendment to make it worth pushing.

- An equal access statute appears far more promising, and the President has already endorsed this concept.

- At the same time, the President would like his amendment to have a chance in full committee.

- Can we work together to agree on wording for an equal access bill to bring to a vote in full committee, and will you vote the President's amendment out of subcommittee?

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 26, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: School Prayer

This memo from Steve and Morton gives the essential background on the school prayer situation for today's management meeting. Gary Bauer says we need to give some high level attention to the three Senators, and I tend to agree.

THE WHITE HOUSE

WASHINGTON

May 26, 1983

MEMORANDUM FOR FAITH RYAN WHITTLESEY
EDWIN L. HARPER

FROM: MORTON C. BLACKWELL
STEPHEN H. GALEBACH

SUBJECT: School Prayer

As you requested, we have been preparing a proposed strategy for advancing the President's program on the issue of school prayer. We have been working with legislative affairs as this issue has heated up on the Hill, and have made liaison with leaders in the school prayer coalition.

This morning, Senator Hatch postponed markup on the President's amendment, in the Senate Judiciary subcommittee on the Constitution, until two weeks from today.

I. The Issue in Senator Hatch's Subcommittee

Senator Hatch strongly favors an amendment that would allow a moment of silence at the beginning of the school day and would require schools to give equal access for all student groups. He is openly hostile to the President's amendment, and launched into a tirade against the Administration on this issue today.

A silent prayer/equal access amendment is an ill-considered idea with severe political drawbacks:

- There is no need for such an amendment, since the Supreme Court has never said anything against a minute of silence or equal access.

- Few school prayer advocates will work for a constitutional amendment that will only give them the right to be silent; most key groups oppose this amendment -- e.g., Pat Robertson says he would publicly oppose on his CBN TV program.

- Advocates of an equal access statute believe that putting it into amendment form is unnecessary and counter-productive.

- The most likely outcome of reporting such an amendment out of subcommittee will be to throw our side into internecine warfare and neutralize our school prayer constituency as a political force.

II. Problems With Pushing President's Amendment Only

Senators Thurmond, Grassley, and Hatch now believe that our amendment cannot pass. Thurmond and Grassley may be less adamant than Hatch, but their basic position is as follows:

- We must pass some measure that will start "turning back the tide of secularization in the public schools" (Grassley's words), and the votes are not there for the President's amendment.
- Silent prayer is not subject to the same objections as the President's amendment.
- By adding equal access to a silent prayer amendment, we improve its chance of passage.

Staff members for these Senators do not appear moved by our survey (attached) showing widespread opposition to the silent prayer amendment from school prayer advocates. They also are not persuaded by evidence that advocates of equal access oppose the amendment approach. (Why concede an amendment is appropriate when a statute is sufficient and far easier to pass?)

This evidence should be of concern to the Senators themselves, but we have not yet presented it to them directly.

III. Proposed Resolution of Problem

Most advocates of school prayer believe that an equal access statute would be a big victory. There are strong reasons for us to push such a bill, though not as a substitute for the President's amendment:

- It would accomplish the goal of Senators such as Grassley to pass something that will "turn back the tide."
- A broad constituency could be mobilized behind such a bill, drawing especially on religious groups that work with students.
- The President has already endorsed the general idea of an equal access bill (at the NAE convention).
- We have already had discussions with Justice and Education, and there is general agreement on the principle of an equal access bill, though differences remain over the best wording.

We could simultaneously push for approval of an equal access bill in full Judiciary Committee (where Denton's equal access bill is now pending) and seek to have Senator Hatch's Constitution Subcommittee report out the President's amendment so that it has a chance in full committee.

IV. Recommendation

Push President's amendment and an equal access statute, but do not commit to specific wording for statute at this time.

- o Send letter to Senator Thurmond, urging his support for this strategy.

- o Call Senators Grassley and Thurmond directly to request their support. If they are favorable, request support of Senator Hatch.

STATEMENT OF: NATIONAL CHRISTIAN ACTION COALITION

The NCAC much prefers the President's language and would hope, at a minimum, that the full committee will have an opportunity to consider it in mark-up.

STATEMENT OF: THE BACK TO GOD MOVEMENT

The National Back to God Movement would only support a Silent Prayer Amendment as a last resort. We strongly support the President's language and hope it will be reported out of the full Committee.

STATEMENT OF: Martha Roundtree, President
LEADERSHIP FOUNDATION

The matter of voluntary school prayer is a matter of Constitutional rights of the States to decide what kind of prayer they want, if any. The only thing that Congress could legislate would be to re-affirm the Bill of Rights which states unequivocally, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or for the people."

STATEMENT OF: Phyllis Schlafly, President
EAGLE FORUM

Eagle Forum stands with the President's School Prayer Amendment. Our polls show that his School Prayer Amendment is supported by the overwhelming majority of the American people.

STATEMENT OF: Pat Robertson
CHRISTIAN BROADCASTING NETWORK

Supports the President's Amendment and would use his TV program to oppose silent prayer amendment.

POSITION OF: Forest Montgomery,
NATIONAL ASSOCIATION OF EVANGELICALS

As long as there is a continued push of the Denton-Hatfield Equal Access Statute, they would support the Grassley-Thurmond-Hatch. If it was dropped, then they would have to reconsider their position.

POSITION OF: Bob Nolte,
MARANATHA MINISTRIES

Does not want silent prayer. Would support Equal Access provision.

POSITION OF: Connie Marshner,
FAMILY FORUM

Silent prayer would not achieve same objective as having vocal prayer in schools. Would oppose.

POSITION OF: Jerry Falwell
MORAL MAJORITY

Does not think silent prayer good enough and would NOT support until good faith effort made in Congress to pass the President's Amendment.

POSITION OF: Paul M. Weyrich
COMMITTEE FOR THE SURVIVAL OF A FREE CONGRESS

Silent prayer gives weak sisters an opportunity to squish-out on school prayer.

POSITION OF: Howard Phillips
CONSERVATIVE CAUCUS

Silent prayer too watered down. Supports the President's Amendment. Would prefer limiting Federal Court jurisdiction.

POSITION OF: James Swaggart
THE JIMMY SWAGGART MINISTRIES

Silent prayer too weak. Would support silent prayer only if effort to permit vocal prayer fails.

STATEMENT OF: Marilyn Lundy, President
CITIZENS FOR EDUCATIONAL FREEDOM

There is nothing in the Constitution that prohibits prayer in public places. Certainly our forefathers intended freedom FOR religion not just freedom FROM religion. Therefore, Citizens for Educational Freedom supports the original Prayer Amendment.

STATEMENT OF: John Beckett, President
INTERCESSORS FOR AMERICA

Intercessors for America has serious reservations about, and cannot endorse a silent Prayer Amendment for the following reasons:

1. A Silent Prayer Amendment takes the issue out of a historic Judeo-Christian perspective of prayer which has included vocalizing, "calling upon the name of the Lord" and a vocalized offering of "supplication, petition, and intercession," and places "prayer" exclusively in an especially Eastern and occult silent "meditative" religious discipline.

2. Christian "meditation" is the pondering of scriptural precepts and/or the person of Christ. Eastern occultic "meditation" is actually defined by the Bible and by orthodox Christians to be false religion and the conjuring of demonic powers.

3. A Silent Prayer Amendment would positively rule out the predominant and traditional form of Judeo-Christian prayer.

STATEMENT OF: Gary Jarmin,
CHRISTIAN VOICE

While Christian Voice will not publically oppose a Silent Prayer Amendment, it leans strongly against it for two major reasons:

1. Christian Voice prefers the President's language, or at least a modified version which retains the right of vocal prayer; and

2. Christian Voice believes a Silent Prayer Amendment may not stand any better chance of passage than the President's language because opponents will correctly condemn it as being moot/unnecessary and some hard-core supporters of vocal prayer may also vote against it.

THE WHITE HOUSE

WASHINGTON

May 27, 1983

MEMORANDUM FOR FAITH RYAN WHITTLESEY
EDWIN L. HARPER

FROM: MORTON C. BLACKWELL
STEPHEN H. GALEBACH

SUBJECT: Follow-Up to Our Memo on School Prayer

Attached is a draft letter for the President to send to Senator Thurmond requesting his support for our strategy on school prayer, as recommended in our memo of yesterday on this topic.

DRAFT PRESIDENTIAL LETTER TO SENATOR THURMOND RE SCHOOL PRAYER

May 27, 1983

Dear Strom:

I want to thank you for your leadership on the school prayer issue. I appreciate the fine hearings you have held, both on the constitutional amendment I transmitted to Congress and on the equal access statutory approach.

I am aware of the discussion among advocates of school prayer over the best means to restore freedom of religious expression to the schools. I believe we all share a strong desire to do something effective to reverse the trend of excluding all religious forms of speech from the public schools.

The constitutional amendment we have introduced would undo the damage by reversing the Supreme Court's school prayer decisions of the early 1960s. Polls continue to show broad support for returning prayer to the schools, and we have reason to hope that the amendment can pass as our fellow citizens make their views known to their elected representatives.

A survey of leaders of most major groups wanting to restore voluntary school prayer was taken after your hearings. These leaders overwhelmingly prefer our proposed amendment over any suggested lesser alternative. I think we must keep the faith with these supporters by bringing our amendment before the full Senate.

Your hearings have also called public attention to the need for a bill to guarantee nondiscrimination toward religious student groups in federally assisted public schools. There is nothing in the Constitution or Supreme Court decisions to warrant discrimination against student groups just because the content of their speech is religious in nature. A bill along the general lines of those already introduced by Senators Denton and Hatfield could go far to end such discrimination.

I hope that both our school prayer amendment and an equal access bill can be voted quickly out of committee, and that a floor vote in the Senate can be held as soon as possible after Labor Day, giving ample time for public discussion and expression of citizens' views to their representatives, before a national decision is made on this most important matter.

Thank you for your commitment and assistance in helping to restore voluntary religious expression to our public schools.

Sincerely yours,

The Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 6, 1983

FOR: EDWIN MEESE III
EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Dispute Between OMB and DOJ on Attorney Fee Cap Bill

At OMB's request, Senator Hatch has promised to substitute the Administration's fee cap bill for his own proposal and to hold hearings on this legislation on June 16th.

The Administration draft bill must be put through the A-19 process as soon as possible so that it can be transmitted to the Hill before the June 16th hearings.

DOJ has reexamined the Administration's draft bill and wants to make two changes that are opposed by OMB.

(1) Fee Cap Level. The original bill set the cap at $53.85/hour -- the hourly rate paid a GS 15, step 5, plus an add-on for overhead and benefits. This is the normal salary for senior attorneys who litigate DOJ cases. The rationale was that, since most fee-shifting statutes are premised on the theory that people who sue the government for public benefit purposes are acting as "private attorneys general", the fees awarded them should be consistent with those paid the public attorneys general.

DOJ wants to increase the cap to $75/hour -- the same as the fee cap set by Congress under the Equal Access to Justice Act, which provides for attorneys fees for individuals and small business who sue the government.

DOJ Argues:

- o $75 is more defensible as consistent with EAJA.
- o $75 is high enough to head off efforts in Congress to add an amendment authorizing judges to use multipliers and bonuses.
- o $75 is a more realistic level, closer to what Congress will probably agree to in the end.

OMB Argues:

- o $75 is arbitrary; a lower figure has a rational basis.
- o Better strategy to start at a lower figure.

- o EAJA is not a good analog because it precludes an award even where the government loses the case if the government's action is "substantially justified." Statutes with lower hurdles should have lower award levels.

(2) Salaried Attorneys. Where litigants use in-house attorneys, and the $53.85 cap level is "significantly greater" than the litigant's actual attorney fees costs (salaries plus overhead), then the original bill would limit the litigant to actual costs. The rationale is that attorneys fees awards should be related to actual costs and should not confer a windfall.

Although DOJ agrees that this is a good provision in principle, it thinks it should be deleted mainly on political grounds.

DOJ Argues:

- o The provision would appear like an effort to "defund-the-left" and generate excessive controversy.
- o Groups could circumvent the limitation with relative ease by restructuring the way they litigate.
- o The provision could stimulate Congressional discussion of including multipliers and bonuses to account for the "risk factor" in litigation.

OMB Argues:

- o The limitation is essential to stop abuses on part of public interest groups.
- o We should welcome controversy over magnitude of attorneys fees because issue will cut in our favor if properly handled.
- o Last week the Supreme Court granted cert. in a case where a legal aid lawyer 1 1/2 years out of law school was awarded a fee of $150/hour. Cert. was sought by New York's liberal AG, Robert Abrams, who argues that awards should be based on salary plus overhead.

Recommendation: A meeting should be held to resolve this difference ASAP.

OMB strongly urges circulating the draft bill (with the $53.85 figure in it) today and working on these questions during the process with the benefit of the views of other departments. DOJ is opposed to circulating the draft bill prior to resolution of these issues because of the possibility of a leak.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 7, 1983

FOR: ROGER B. PORTER

FROM: STEPHEN H. GALEBACH

SUBJECT: Hafen Article on the Law of Marriage and Family

Attached is (1) a draft letter to Bruce Hafen, (2) a memorandum abstracting his article and extracting those points most helpful for an address on the family, and (3) a short piece by Chester Finn, which I just discovered in passing, and which contains interesting commentary on the most controversial aspects of the public debate over policy toward the family.

THE WHITE HOUSE

WASHINGTON

June 7, 1983

Dear Bruce:

Thank you for the copy of your outstanding law review article on law and the family. You certainly bring clarity and organization to an area of the law in which recent trends can appear at first glance to be rather confusing.

It is encouraging to read your conclusion that Supreme Court decisions, by and large, appear to be maintaining the uniquely favored position of marriage and kinship. We have been engaged in some legal battles, as I'm sure you know, over attempts to chip away at family authority -- our litigation to uphold parental notice for federally subsidized distribution of contraceptives being a case in point. You deserve high praise for showing why the privileged status of the family should be maintained. We need to keep in mind the peril involved in any attempt to divorce individual liberty from a context of strong families as a nurturing and mediating institution.

In a broader way, our work on federal policy concerning the family parallels one of the aspects of family law that you describe. We constantly confront the problem of how to accomodate the realities and human needs generated by breakup of families, without weakening the institution of the family. Courts, as you say, are faced with this problem in the illegitimacy cases, among other areas. We face the same generic problem in structuring the safety net for dependent children and single mothers who are often victims of a weakened family structure.

Obviously, we face a common challenge in seeking the best approach in this area of policy. I appreciate your excellent work.

Warmest regards,

Roger B. Porter
Deputy Assistant to the President
for Policy Development

Bruce C. Hafen
President, Ricks College
Rexburg, Idaho 83440

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 7, 1983

FOR: ROGER B. PORTER

FROM: STEPHEN H. GALEBACH

SUBJECT: Hafen Article on the Law of Marriage and Family

I. Overview

This is an exceptionally well-written article which accurately summarizes the Supreme Court's jurisprudence in areas of law related to the family, and gives a philosophical analysis of the proper position of family interests, as opposed to individual autonomy interests, in American law.

Hafen's basic conclusions are first empirical and second prescriptive:

- His review of Supreme Court decisions concludes that the Court has not committed itself to protecting sexual privacy for the unmarried or to disturbing the preferred legal status given to formal marriage and kinship: "Marriage and kinship still remain in a uniquely favored position."

- He says the role of the family should be recognized by the judiciary as an essential institution in a democratic society, a buffer or "mediating structure" between the individual and state power: "The formal family aids our quest for long-run liberty; that is why the Constitution does and should protect it."

These are "hot" issues in the legal world today. In 1980, the Harvard Law Review devoted an entire issue to developments in the law of the family, arguing for a view of total individual autonomy rather than legal regard for the role of the family. Hafen's article is a helpful contribution to the more traditional side of the debate.

II. Best Uses For This Article In OPD

The major points of this article are difficult to boil down into an issues paper, simply because of the complexity and abstract nature of this form of legal analysis. I recommend that we be alert for a specific concrete instance that highlights basic questions about the role of the family in constitutional law. We could then make some of the broader legal and philosophical points in a context that makes them easier to digest and present.

We can definitely draw from this article for an address on the role of the family in American society and governmental policy. I have listed the most useful points from the Hafen article below, with page citation to the reprint of the article from Michigan Law Review.

III. Points From Hafen's Article

I have extracted the following points as those most useful to formulation of federal policy toward the family.

- Illustration of the difficulty today in arriving at agreement about what a "family" is -- "At the Baltimore session of the 1980 White House conference on the family, one delegate asked the conference to define the family as 'two or more persons who share resources, responsibility for decisions, values and goals, and have commitment to one another over time.' This proposal lost by only two votes among 761 delegates." (page 464)

- "The relationships historically protected by American law are limited to those that arise from kinship, adoption, or heterosexual marriage. Thus, unmarried couples are not regarded as families for the many purposes addressed by state and federal laws. American legal institutions -- particularly the judiciary -- have begun over the last several years to recognize a few exceptions that would once have been denied by a very rigid legal and social policy of reinforcing formal family relationships. Generally, however, the law remains quite certain about what a family is for the most fundamental purposes." (pages 464-465)

- Statistics concerning weakening of family structure:

  -- Between 1960 and 1978, the divorce rate increased 157%.

  -- The number of unmarried couples increased an estimated 157.4% between 1970 and 1980, with the actual number increasing from 523,000 to 1,346,000.

  -- The illegitimacy ratio tripled in the two decades prior to 1975, so that by 1977, 15.5% of all children -- and 51.7% of all black children -- born in the United States were illegitimate.

- Hafen argues that, in judicial decisions, "the failure to distinguish between a formal family and an informal relationship overlooks and finally undermines the family's ability to perform these functions," as "our most fundamental moral and social institution." (page 471)

- The crucial role of the family: "A stable environment is crucial to the developmental needs of children." (page 472)

  -- Empirical studies establish beyond question "the need of every child for unbroken continuity of affectionate and stimulating relationships with an adult." (page 474, quoting psychological study)

  -- "Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development." (page 474, again quoting)

- "Findings such as these have begun to raise substantial doubts about the value of the dominant governmental service strategies of the past twenty years, whose planners have assumed that many family functions could be better performed by outside agencies." (page 474)

  -- Example: Report of the Carnegie Counsel on Children in 1977 "rejected the proposition that education could ensure equal economic opportunities and argued generally that public policies related to children should give higher priority to the qualitative influence of parents and home life." (page 474)

- Quote from key Supreme Court decision on the family, Pierce v. Society of Sisters (1925): "[T]hose who nurture [the child] and direct his destiny have the right, coupled with a high duty, to recognize and prepare him for additional obligations." (page 475)

- Our tradition of respecting the role of the family is an essential prerequisite to our traditional respect for the liberty of the individual. "Through the commitments of marriage and kinship, both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine form." (page 476)

- Mediating structures such as neighborhoods, families, churches, schools, and voluntary associations give a sense of "belonging" to a "little platoon," in the midst of a mass society.

- "The basic process of cultural transmission, without which the traditions and the fundamental values of the society are not passed on, depends on the family." (page 478)

- Quote from Berger and Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy (1977) -- The family is "the major institution within the private sphere, and thus for many people the most valuable thing in their lives. Here they make their moral commitments, invest their emotions, plan for the future." (page 480)

- Our social system of pluralism and diversity presupposes a system of family units, not just isolated individuals. (page 480)

- Despite the growth of government services, "the amount of social care that families provide for their elderly and handicapped members far exceeds the amount of social care provided by the state." (page 482, quoting article by Zimmerman in Social Casework (1978))

- "Legal marriage is more likely than is unmarried cohabitation to encourage such personal willingness to labor and 'invest' in relationships with other people, whether child or adult. That is perhaps one reason why marriage has been constitutional protection and cohabitation has not." (page 486)

- The Supreme Court has described marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization or progress." (page 491)

- Review of Supreme Court decisions overall shows that, despite a few aberrant exceptions, the cases are generally consistent "in not protecting sexual privacy for the unmarried and not disturbing the preferred legal status given to formal marriage and kinship." (page 535)

- "One of the most productive sources of maintaining the dynamic link between liberty and duty in our culture has been our understanding of mutual reciprocity between the family tradition and the individual tradition . . . in the long run, the maintenance of that reciprocal link is a critical need for those who seek to 'establish Justice, ensure domestic Tranquility, . . . and secure the Blessings of Liberty' not only 'to ourselves,' but also to 'our Posterity.'" (page 574)

Jewish community: those among the earlier immigrants who had never abandoned the values and traditions of piety and learning that flourished in Eastern Europe; some of their more Americanized counterparts, largely in the Young Israel movement; refugees from the Holocaust and their children; the offspring of Hasidic families; and, finally, children of committed "modernists" who, in a strange amalgam of rebellion and conformity, have found prolonged study in a right-wing yeshiva to be an instrument through which they can at once chastise their parents for "laxity" and, at the same time, fulfill their parents' religious commitments.

All of this, moreover, has come about in an era of unparalleled prosperity and opportunity, enabling young men to study for extended periods of time before establishing themselves professionally or entering the business world. This, one might say, has been the "American" contribution to the success of Orthodoxy. Also helpful in the advance of right-wing Orthodoxy has been the new pluralism of American life generally and the increased appreciation for ethnic distinctiveness in particular.

ONE might think, then, that ultra-Orthodoxy has a rosy future ahead of it. It is certainly true that Orthodox "modernists" are currently on the defensive, while the movement's right wing displays striking élan. The strength of the Orthodox educational system, the rise in individual affluence, the palpable growth of community pride—all seem to point upward.

This portrait, however, may be a deceptive one. While the "modernists" may be on the defensive, it is equally true that the authoritarian temper which the yeshiva both needs and tends to foster in its disciples is under an ongoing challenge from contemporary trends in American life—its permissiveness, the wide field of professional and economic opportunity it offers, its spirit of secularism, and its cultural and social egalitarianism. Furthermore, the archaism and the insularity of right-wing Orthodoxy, preoccupied as it is with ritual, intolerant of outsiders, subject to bouts of internecine warfare within, and unresolved in its attitude toward the "secular" state of Israel, may turn out to be as costly for the right wing as the struggle with modernity has been for those in Orthodoxy's liberal camp.

The yeshiva in the last century has come to serve, along with the family, as the last refuge of Orthodox Jews. As the authority of Halakhah in Jewish life has declined, the yeshiva has become an instrument for fighting off the threats of modernity. Whether so fragile an institution can serve so large a purpose, or whether the yeshiva will in the end have done little more than create the illusion of renaissance, is a question time alone will answer.

What Children Need

IN DEFENSE OF THE FAMILY. By RITA KRAMER. *Basic Books. 263 pp. $15.50.*

Reviewed by CHESTER E. FINN, JR.

ANYONE who remembers the White House Conference on Families that took place during the Carter era, or the publication in 1977 of *All Our Children* by Kenneth Keniston and the Carnegie Council, will recall them as major events in the evolution of a pair of peculiarly contemporary doctrines. According to the first of these doctrines, the term "family" may be properly affixed to practically any aggregation of more than one person gathered, at least for the nonce, under a single roof. It matters not, in this understanding, whether a couple are, were, or perhaps one day will be married to each other, whether they are of the same or different gender (or "sexual orientation"), whether their association is fleeting or durable, affectionate or vengeful. So long as there are two or more persons domiciled together, they are legitimately regarded as a family and entitled to all rights and privileges pertaining thereto.

These rights and privileges are not insignificant, for they include —this is the second doctrine—the right of any children who may be part of any family to be looked after by the society as a whole. The rearing of one's biological offspring, according to this view, is not exclusively or even primarily the responsibility of oneself, one's spouse, or the adults resident in one's "household." Rather, "all our children" are everyone's responsibility, to be fed, clothed, taught, loved, disciplined, and given character through the magic of public policy.

I exaggerate, but not very much. Certainly one major drift of "progressive" opinion in recent years has been toward a loose and accepting definition of the family, combined with firm and insistent demands on the larger society to assume responsibility for the well-being of children. This has had a number of damaging consequences, of which much the worst is the increase in social dependency, especially within what sociologists term the "underclass," where today one commonly finds a majority of youngsters born out of wedlock and raised by a single parent—or in an "extended family"—with the assistance of diverse public-welfare programs. Though this tangle of social pathology has many strands, one cannot reasonably doubt that there would be less aggregate dependency if the society were less tolerant of illegitimacy and less willing to underwrite the associated costs.

In the middle classes, too, we find unfortunate correlates of the slackening of social pressure on adults to marry (and stay married to) other adults of the opposite sex and to shoulder primary responsibility as parents for the nurturing and training of their progeny. We find anxiety bordering on guilt among a number of women who in fact stay home to look after their children rather than "going back to work" at occupations with higher cultural approval ratings. We find a growing child-care industry, ever more professionalized, ever more heavily regulated by the state, running programs and institutions that are ever less like "home." We find a swelling demand for the schools to assume such responsibilities as the transmission to children of values, morals, and correct behavior.

Enter Rita Kramer. At once stern

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and affectionate, she harbors what many will deem old-fashioned views, namely, that an authentic family consists of husband, wife, and children, and that raising the children is the foremost responsibility of the parents, not something to be done for them by public or private agencies while the adults engage in other pursuits. Her book, however, is not an exercise in finger-wagging or tradition-mongering. Rather, Mrs. Kramer's image of the proper ordering of family and society is grounded in her understanding of child development, of human psychology, and of the requisites for the emergence of an autonomous young adult as a responsible and productive member of democratic society who will in time become a competent parent of the next generation.

TO STATE her thesis simply, the successful development of the child requires the sustained and active involvement of both parents. This does not mean entrusting the child to the care of well-chosen professionals; it means looking after the child oneself. And those doing the looking-after must act like his parents, not his buddies. "Only in a stable family with strong and affectionate parents," Mrs. Kramer writes,

> does a child grow up with the sense of being protected in a world that makes sense. Such a beginning provides the basis for the flexibility of response that will help him learn and overcome difficulties in later life. Such parents are able to let the child go little by little as he indicates a need and an ability to move out on his own. They instill conscience rather than dependency. The paradox is that only by remaining strong authority figures can they help their child become independent. He learns from what they are, what they do, what it is to be an adult.

The centrality of the parents and the stability of the family have several corollaries. Formal institutions, notably the schools, are to play supporting rather than leading roles in the drama of child-rearing. If parents attend to their child's values and character, if they assume responsibility for sex education and moral development, the schools can concentrate on cognitive skills and subject matter. This is desirable, both because intellectual development is something that schools can do well (and that parents seldom can) and because the controversies surrounding such curricular and pedagogical matters are far less fractious than those involving issues of faith and morals.

Mrs. Kramer is firmly of the view that parents cannot successfully carry out their responsibilities, particularly toward very young children, unless one of them stays home with the youngsters, and she does not hesitate to assert that this should ordinarily be the mother (she stops short of making it a universal rule). Mrs. Kramer seeks to assuage whatever feelings of guilt or incompleteness beset the woman who elects to stay home and be a mother rather than to pop her toddler into a day-care center and go off (or back) to paid employment—and there can be no doubt that this book will have such an assuaging effect on a woman who takes it seriously (perhaps even on her husband as well), just as it will infuriate those who for whatever reasons turn over their youngsters to the care of others and salve their consciences with the notion that they are being modern.

Speaking of Mrs. Kramer's enemies, they will also include the professional child-care industry, most of the education establishment, radical feminist and homosexual activists, and all those individuals in our society who have organized their private and work lives around values that presuppose the governmentalization of child-rearing and the steady growth of "family policy." Yet the objective reader will see that Mrs. Kramer has worked her way through these issues and is confident—I think justly so—of her conclusions.

More troublesome is the problem posed by the growing number of families and quasi-families found in the underclass, households so severely disrupted and parents so manifestly incompetent as essentially to rule out the possibility of successful child-rearing along the lines Mrs. Kramer envisions. She acknowledges this problem, and does not pretend to solve it. Indeed, the very image she creates of proper child-rearing accentuates the gravity of the situation of those who cannot realistically attain it. Nor can public policy successfully step into the breach. Government can transfer resources, thereby easing some of the direct economic hardship of the underclass family, and it can supply certain social services—all the while risking increased dependency—but it cannot substitute for parents.

APART from its limited applicability to such families, Mrs. Kramer's splendid volume has (to my mind) only relatively minor shortcomings. First, she barely touches on the subject of birth control and never mentions abortion. Second, a number of couples do appear successful in splitting the duties of parenthood along lines somewhat more varied than the traditional model—mother as omnipresent comforter, father as breadwinner and authority figure—that Rita Kramer sketches. Finally, Mrs. Kramer scants the single-parent, middle-class family in which an increasing number of youngsters live, as well as the more complicated arrangements of step-parents and adoptive parents that envelop the child whose biological parents were once married to each other but are now married to (or cohabiting with) others.

Yet while *In Defense of the Family* addresses these latter situations only indirectly, its message is clear and fully applicable to them: a child needs two resident parents, a stable home environment, and a great deal of attention. Being parents is a serious responsibility, and it is not one that can be transferred to others, least of all to government. Raising children is the proper business of the family; indeed, it is the defining characteristic of the family. What is remarkable is that we should live in a time when it is necessary for someone to come to the defense of such a family.

THE WHITE HOUSE

WASHINGTON

May 20, 1983

MEMORANDUM FOR STEPHEN H. GALEBACH

FROM: ROGER B. PORTER RBP

SUBJECT: The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests

A copy of a recent article by Bruce C. Hafen on "The Constitutional Status of Marriage, Kinship, and Sexual Privacy - Balancing the Individual and Social Interests" which appeared in the Michigan Law Review is attached. I have not yet had an opportunity to read the article in depth but I know Bruce Hafen is an excellent scholar.

I would appreciate very much you reviewing this article for me and providing a brief summary of its principal points. I have two purposes in mind. First, it may provide some useful material for a one-page issues paper for the weekly issues luncheons. Secondly, it may prove helpful in providing ideas for the address we are working on with respect to the family and the role of government in American socity.

I would appreciate if you could provide me with a summary of this article by COB on Wednesday, May 26, along with your suggestions for a possible issue paper and for the address on the family we are working on.

Thank you very much.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 7, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Request for Approval of Speaking Engagement

Steve Galebach would like permission to say remarks at a Centennial celebration for the St. Joseph's Hospital in his home town of Lancaster, Pennsylvania. This hospital is well known locally for providing free services to handicapped infants from needy families and third world countries, and was closely involved in a conference with Dr. Koop earlier this year that highlighted the hospital's efforts.

A Presidential message is being sent on the occasion of the hospital's 100th anniversary on June 18. I recommend Steve be given approval to read the message at the Centennial festivities in Lancaster on the 18th (a Saturday) and make appropriate remarks about the hospital's service to the community.