



# Department of Justice

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TESTIMONY OF

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DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

OVERHAULING THE NATION'S PRISONS

PRESENTED ON

JULY 27, 1995

Mr. Chairman and Members of the Committee:

Thank you for giving me the opportunity to appear before you today to discuss the progress the Department of Justice has made and some of what we have learned over the past year in implementing The Violent Offender Incarceration and Truth in Sentencing Incentive Grants programs and related provisions of the Violent Crime Control and Law Enforcement Act of 1994. Please include my full written statement in the record.

As you know, last Fall the Attorney General asked me to assume overall responsibility for coordinating the Department's efforts to implement the 1994 Crime Act. I am proud of the Department's strong record of accomplishment in meeting the many related challenges it has faced in the past year. Like the Attorney General, I am confident that with your help, we can assure that timely federal assistance gets to the states that need it to help end revolving door justice.

As you know, Mr. Chairman, the Crime Act authorizes a total of \$9.7 billion in prison related assistance over six years, including \$1.8 billion to reimburse states for the costs of incarcerating criminal aliens and \$7.9 billion to help address the critical need to assist States in expanding correctional facility capacity to ensure adequate space for confinement of violent offenders. The aim of The Violent Offender Incarceration and Truth in Sentencing Incentive Grants is to ensure that violent offenders are not released early because of a lack of secure correctional space and that they remain incarcerated for substantial periods through the implementation of truth in sentencing laws.

The Justice Department already has made considerable progress in implementing the Violent Offender Incarceration and Truth in Sentencing Incentive Grants. We stand ready to provide immediate assistance to state and local correctional systems where facilities are bursting at the seams. The grant program under this existing law is designed to assist states -- and assist them quickly -- to assure that convicted predatory criminals remain incarcerated and incapacitated.

Because implementation of these grant programs is a high priority for the Justice Department, we created a new Corrections Program Office within the Office of Justice Programs to develop and administer these programs. The office is headed by a Director, Larry Meachum, who has more than 30 years' correctional experience and has led state correctional agencies in Massachusetts, Oklahoma, and Connecticut. The Deputy Director, Stephen Amos, is former Director of Research and Evaluation for the Oregon Department of Corrections. Director Meachum reports to Assistant Attorney General Laurie Robinson, who heads the Office of Justice Programs and in turn, reports to me.

Soon after the Crime Act's enactment, the Department began meeting with representatives from national criminal justice organizations, state and local criminal justice agencies, and others to determine how best to implement the new law so that programs were responsive to the needs of state and local communities. Our goal in implementing these prison grant programs is to forge a productive federal, state, and local partnership to strengthen the nation's criminal justice system's ability to effectively deal with career criminals and serious violent offenders.

Some states have made important progress in rejecting and reversing the anti-incarcerative policies that have contributed so heavily to the growth of crime in the past. Few states, however, have gone as far as the federal system in adopting necessary reforms, and it is clear that nationwide much more needs to be done. The prison grants programs of the 1994 Crime Act provide the essential incentives and assistance for adoption at the state level of these urgently needed measures to protect the public from violent criminals. In fact, we are encouraged many states have already taken steps to reform their sentencing laws already in expectation of qualifying for grants under the 1994 Act.

### Boot Camp Initiative

On March 1, the Office of Justice Programs issued program guidelines and application materials for the Boot Camp Initiative. For those not familiar with the boot camp concept, a boot camp is a residential correctional program for adult or juvenile offenders. Boot camps provide short-term confinement for nonviolent offenders. Boot camps are generally styled after their military namesakes, and require inmates to adhere to a regimented schedule that involves strict discipline, physical training, and work. Education, job training, and substance abuse counseling or treatment also are provided to help offenders prepare for a productive life in the community.

Research has shown that boot camp programs can reduce institutional crowding and costs, while improving offenders' educational level, employment prospects, and access to community programs. Evaluations of boot camps in New York and Louisiana have found that the programs resulted in reduced costs and reduced recidivism. Our Boot Camp Initiative is based on the results of these evaluations. Applicants were encouraged to incorporate into their programs strategies that were found to be successful in existing boot camps.

We're currently reviewing a total of 89 applications received from 42 states/territories and the District of Columbia. Thirty-nine applications are for boot camp construction, 32 are for planning grants, and 18 are for funds to renovate existing boot camps to increase bed space. More than half the applications are for boot camps for juvenile offenders.

We expect to award approximately 25 planning grants of up to \$50,000; about 5 grants of up to \$1 million will be awarded to jurisdictions to renovate existing facilities for use as boot camps, and another 5 grants or so of up to \$2 million each will be awarded for construction of new boot camp facilities.

### Violent Offender/Truth in Sentencing Programs

While we've been moving forward with the boot camp grant program, we've also made progress in developing the more complex Truth in Sentencing and Violent Offender Incarceration Grant Programs. These programs are scheduled to begin in October, with the start of Fiscal Year 1996.

The statute divides funding equally between the Truth in Sentencing Incentive program and the Violent Offender Incarceration program. Fifty percent of these funds are to be allocated for Truth in Sentencing Formula Grants for states that adopt truth in sentencing laws assuring that second time violent offenders serve at least 85 percent of their sentences. State allocations are based on their UCR rates for Part I violent offenses. The other 50 percent are to be allocated for Violent Offender Incarceration Grants to all states. To be eligible for funding, states must meet several assurances. Both programs require truth in sentencing, but the Violent Offender Incarceration Program is somewhat less stringent in its eligibility requirements.

Specifically, under the Violent Offender Incarceration Program, states must show that they have implemented or will implement truth in sentencing laws that ensure violent offenders serve a substantial portion of their sentences; provide sufficiently severe punishment for violent offenders; and incarcerate violent offenders for a period of time necessary to protect the public.

States must agree to work with local governments. They also must demonstrate that the rights of crime victims are protected. Much like the Byrne Memorial Grants which require state and local planning, states are also to engage in comprehensive correctional planning that includes local governments. We think this kind of comprehensive planning is essential to implementing an effective program and wisely spending federal dollars. Certainly, this is one lesson -- the need for planning -- that we learned from LEAA.

To be eligible for Truth in Sentencing grants, states must also show that they have in effect truth in sentencing laws that ensure that offenders convicted of a second violent crime serve not less than 85 percent of the sentence imposed or meet other requirements that ensure that violent offenders, and especially repeat violent offenders, remain incarcerated for substantially greater percentages of their imposed sentences. We believe that this is a workable and meaningful goal that

states can meet which appropriately targets dangerous career offenders and will measurably improve public safety.

These requirements were outlined in the Interim Final Rule published in the Federal Register last December. Since then, we've been working with state and local officials to solicit suggestions on how to best implement key elements of these programs.

Written responses have been received from governors' offices, departments of correction, sheriffs' departments, local jails, prosecutors and criminal justice organizations. Additionally, to help in formulating these programs we've held workshops with state and local corrections officials. We've also met to discuss related issues with, among others, representatives from offices of prosecutors, state attorneys general and governors, the National Governors Association and the National Criminal Justice Association.

The Department of Justice is committed to ensuring a realistic and workable response to violent crime and truth in sentencing that can provide states the prison beds they need to help assure that violent and predatory offenders are put away -- and put away for a long time. That's what the public wants, that's what the public deserves and we are moving rapidly ahead to deliver that through this program.

#### Reforms Relating To Prisoner Litigation

The Department also supports improvement of the criminal justice system through the implementation of other reforms. Several pending bills under consideration by the Senate contain three sets of reforms that are intended to curb abuses or perceived excesses in prisoner litigation or prison conditions suits.

The first set of provisions appears in title II of H.R. 667 as passed by the House of Representatives, and in § 103 of S. 3. These provisions strengthen the requirement of exhaustion of administrative remedies under the Civil Rights of Institutionalized Persons Act (CRIPA) for state prisoner suits, and adopt other safeguards against abusive prisoner litigation. We have endorsed these reforms in an earlier communication to Congress.<sup>1</sup> We also recommend that parallel provisions be adopted to require federal prisoners to exhaust administrative remedies prior to commencing litigation.

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<sup>1</sup> Letter of Assistant Attorney General Sheila F. Anthony to Honorable Henry J. Hyde concerning H.R. 3, at 17-19 (January 26, 1995).

The second set of provisions appears in a new bill, S. 866, which we have not previously commented on. The provisions in this bill have some overlap with those in § 103 of S. 3 and title II of H.R. 667, but also incorporate a number of new proposals. We support the objectives of S. 866 and many of the specific provisions in the bill. In some instances, we have recommendations for alternative formulations that could realize the bill's objectives more effectively.

The third set of provisions appears in S. 400, and in title III of H.R. 667 as passed by the House of Representatives, the "Stop Turning Out Prisoners" (STOP) proposal. The Violent Crime Control and Law Enforcement Act of 1994 enacted 18 U.S.C. 3626, which limits remedies in prison conditions litigation. The STOP proposal would amend this section to impose various additional conditions and restrictions. We support the basic objective of this legislation, including particularly the principle that judicial caps on prison populations must be used only as a last resort when no other remedy is available for a constitutional violation, although we have constitutional or policy concerns about a few of its specific provisions.

A. The Provisions in § 103 of S. 3 and H.R. 667 title II

As noted above, we support the enactment of this set of provisions.

The Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997e) currently authorizes federal courts to suspend § 1983 suits by prisoners for up to 180 days in order to require exhaustion of administrative remedies. Section 103(a)-(b), (e) of S. 3 strengthens the administrative exhaustion rule in this context -- and brings it more into line with administrative exhaustion rules that apply in other contexts -- by generally prohibiting prisoner § 1983 suits until administrative remedies are exhausted.

As noted above, we recommend that this proposal also incorporate a rule requiring federal prisoners to exhaust administrative remedies prior to commencing litigation. A reform of this type is as desirable for federal prisoners as the corresponding strengthening of the exhaustion provision for state prisoners that now appears in section 103 of S. 3. We would be pleased to work with interested members of Congress in formulating such a provision.

Section 103(c) of S. 3 directs a court to dismiss a prisoner § 1983 suit if the court is satisfied that the action fails to state a claim upon which relief can be granted or is frivolous or malicious. A rule of this type is desirable to minimize the burden on states of responding unnecessarily to prisoner suits that lack merit and are sometimes brought for purposes of harassment or recreation.

Section 103(d) of S. 3 deletes from the minimum standards for prison

grievance systems in 42 U.S.C. 1997e(b)(2) the requirement of an advisory role for employees and inmates (at the most decentralized level as is reasonably possible) in the formulation, implementation, and operation of the system. This removes the condition that has been the greatest impediment in the past to the willingness of state and local jurisdictions to seek certification for their grievance systems.

Section 103(f) of S. 3 strengthens safeguards against and sanctions for false allegations of poverty by prisoners who seek to proceed in forma pauperis. Subsection (d) of 28 U.S.C. 1915 currently reads as follows: "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." Section 103(f)(1) of S. 3 amends that subsection to read as follows: "The court may request an attorney to represent any such person unable to employ counsel and shall at any time dismiss the case if the allegation of poverty is untrue, or if satisfied that the action fails to state a claim upon which relief may be granted or is frivolous or malicious even if partial filing fees have been imposed by the court."

Section 103(f)(2) of S. 3 adds a new subsection (f) to 28 U.S.C. 1915 which states that an affidavit of indigency by a prisoner shall include a statement of all assets the prisoner possesses. The new subsection further directs the court to make inquiry of the correctional institution in which the prisoner is incarcerated for information available to that institution relating to the extent of the prisoner's assets. This is a reasonable precaution. The new subsection concludes by stating that the court "shall require full or partial payment of filing fees according to the prisoner's ability to pay." We would not understand this language as limiting the court's authority to require payment by the prisoner in installments, up to the full amount of filing fees and other applicable costs, where the prisoner lacks the means to make full payment at once.

#### **B. S. 866**

Section 2 in S. 866 amends the in forma pauperis statute, 28 U.S.C. 1915, in the following manner: (1) The authority to allow a suit without prepayment of fees -- as opposed to costs -- in subsection (a) is deleted. (2) A prisoner bringing a suit would have to submit a statement of his prison account balance for the preceding six months. (3) A prisoner would be liable in all cases to pay the full amount of a filing fee. An initial partial fee of 20% of the average monthly deposits to or average monthly balance in the prisoner's account would be required, and thereafter the prisoner would be required to make monthly payments of 20% of the preceding month's income credited to the account, with the agency having custody of the prisoner forwarding such payments whenever the amount in the account exceeds \$10. However, a prisoner would not be barred from bringing any action because of inability to pay the initial partial fee. (4) If a judgment

against a prisoner includes the payment of costs, the prisoner would be required to pay the full amount of costs ordered, in the same manner provided for the payment of filing fees by the amendments.

In essence, the point of these amendments is to insure that prisoners will be fully liable for filing fees and costs in all cases, subject to the proviso that prisoners will not be barred from suing because of this liability if they are actually unable to pay. We support this reform in light of the frequency with which prisoners file frivolous and harassing suits, and the general absence of other disincentives to doing so.

However, the complicated standards and detailed numerical prescriptions in this section are not necessary to achieve this objective. It would be adequate to provide simply that prisoners are fully liable for fees and costs, that their applications must be accompanied by certified prison account information, and that funds from their accounts are to be forwarded periodically when the balance exceeds a specified amount (such as \$10) until the liability is discharged. We would be pleased to work with the sponsors to refine this proposal.

In addition to these amendments relating to fees and costs, § 2 of S. 866 strengthens 28 U.S.C. 1915(d) to provide that the court shall dismiss the case at any time if the allegation of poverty is untrue or if the action is frivolous or malicious or fails to state a claim. This is substantially the same as provisions included in § 103 of S. 3 and title II of H.R. 667, which we support.

Section 3 of S. 866 essentially directs courts to review as promptly as possible suits by prisoners against governmental entities or their officers or employees, and to dismiss such suits if the complaint fails to state a claim or seeks monetary relief from an immune defendant. This is a desirable provision that could avoid some of the burden on states and local governments of responding to non-meritorious prisoner suits.

Section 6 provides that a court may order revocation of good time credits for federal prisoners if (1) the court finds that the prisoner filed a malicious or harassing civil claim or testified falsely or otherwise knowingly presented false evidence or information to the court, or (2) the Attorney General determines that one of these circumstances has occurred and recommends revocation of good time credit to the court.

We support this reform in principle. Engaging in malicious and harassing litigation, and committing perjury or its equivalent, are common forms of misconduct by prisoners. Like other prisoner misconduct, this misconduct can appropriately be punished by denial of good time credits.

However, the procedures specified in section 6 are inconsistent with the normal approach to denial of good time credits under 18 U.S.C. 3624. Singling out one form of misconduct for discretionary judicial decisions concerning denial of good time credits -- where all other decisions of this type are made by the Justice Department -- would work against consistency in prison disciplinary policies, and would make it difficult or impossible to coordinate sanctions imposed for this type of misconduct with those imposed for other disciplinary violations by a prisoner.

We accordingly recommend that § 6 of S. 866 be revised to provide that (1) a court may, and on motion of an adverse party shall, make a determination whether a circumstance specified in the section has occurred (i.e., a malicious or harassing claim or knowing falsehood), (2) the court's determination that such a circumstance occurred shall be forwarded to the Attorney General, and (3) on receipt of such a determination, the Attorney General shall have the authority to deny good time credits to the prisoner. We would be pleased to work with the sponsors to refine this proposal.

Section 7 of S. 866 strengthens the requirement of exhaustion of administrative remedies under CRIPA in prisoner suits. It is substantially the same as part of § 103 of S. 3, which we support.<sup>2</sup>

### C. The STOP Provisions

As noted above, we support the basic objective of the STOP proposal, including particularly the principle that population caps must be only a "last resort" measure. Responses to unconstitutional prison conditions must be designed and implemented in the manner that is most consistent with public safety. Incarcerated criminals should not enjoy opportunities for early release, and the system's general capacity to provide adequate detention and correctional space should not be impaired, where any feasible means exist for avoiding such a result.

It is not necessary that prisons be comfortable or pleasant; the normal distresses and hardships of incarceration are the just consequences of the offenders' own conduct. However, it is necessary to recognize that there is nevertheless a need for effective safeguards against inhuman conditions in prisons and other facilities. The constitutional provision enforced most frequently in prison cases is the Eighth Amendment's prohibition of cruel and unusual punishment. Among the conditions that have been found to violate the Eighth Amendment are excessive violence, whether inflicted by guards or by inmates under the supervision of indifferent guards, preventable rape, deliberate indifference to

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<sup>2</sup> However, there is a typographic error in line 22 of page 8 of the bill. The words "and exhausted" in this line should be "are exhausted."

serious medical needs, and lack of sanitation that jeopardizes health. Prison crowding may also be a contributing element in a constitutional violation. For example, when the number of inmates at a prison becomes so large that sick inmates cannot be treated by a physician in a timely manner, or when crowded conditions lead to a breakdown in security and contribute to violence against inmates, the crowding can be addressed as a contributing cause of a constitutional violation. See generally Wilson v. Seiter, 501 U.S. 294 (1991); Rhodes v. Chapman, 452 U.S. 337 (1981).

In considering reforms, it is essential to remember that inmates do suffer unconstitutional conditions of confinement, and ultimately must retain access to meaningful redress when such violations occur. While Congress may validly enact legislative directions and guidance concerning the nature and extent of prison conditions remedies, it must also take care to ensure that any measures adopted do not deprive prisoners of effective remedies for real constitutional wrongs.

With this much background, I will now turn to the specific provisions of the STOP legislation.

The STOP provisions of S. 400 and title III of H.R. 667 -- in proposed 18 U.S.C. 3626(a) -- provide that prospective relief in prison conditions suits shall extend no further than necessary to remove the conditions causing the deprivation of federal rights of individual plaintiffs, that such relief must be narrowly drawn and the least intrusive means of remedying the deprivation, and that substantial weight must be given to any adverse impact on public safety or criminal justice system operations in determining intrusiveness. They further provide that relief reducing or limiting prison population is not allowed unless crowding is the primary cause of the deprivation of a federal right and no other relief will remedy that deprivation.

Proposed 18 U.S.C. 3626(b) in the STOP provisions provides that any prospective relief in a prison conditions action shall automatically terminate after two years (running from the time the federal right violation is found or enactment of the STOP legislation), and that such relief shall be immediately terminated if it was approved or granted in the absence of a judicial finding that prison conditions violated a federal right.

Proposed 18 U.S.C. 3626(c) in the STOP provisions requires prompt judicial decisions of motions to modify or terminate prospective relief in prison conditions suits, with automatic stays of such relief 30 days after a motion is filed under 18 U.S.C. 3626(b), and after 180 days in any other case.

Proposed 18 U.S.C. 3626(d) in the STOP provisions confers standing to oppose relief that reduces or limits prison population on any federal, state, or local

official or unit of government whose jurisdiction or function includes the prosecution or custody of persons in a prison subject to such relief, or who otherwise may be affected by such relief.

Proposed 18 U.S.C. 3626(e) in the STOP provisions prohibits the use of masters in prison conditions suits in federal court, except for use of magistrates to make proposed findings concerning complicated factual issues. Proposed 18 U.S.C. 3626(f) in the STOP provisions imposes certain limitations on awards of attorney's fees in prison conditions suits under federal civil rights laws.

Finally, the STOP provisions provide that the new version of 18 U.S.C. 3626 shall apply to all relief regardless of whether it was originally granted or approved before, on, or after its enactment.

The bills leave unresolved certain interpretive questions. While the revised section contains some references to deprivation of federal rights, several parts of the section are not explicitly limited in this manner, and might be understood as limiting relief based on state law claims in prison conditions suits in state courts. The intent of the proposal, however, is more plausibly limited to setting standards for relief which is based on claimed violations of federal rights or imposed by federal court orders. If so, this point should be made clearly in relation to all parts of the proposal.

A second interpretive question is whether the proposed revision of 18 U.S.C. 3626 affects prison conditions suits in both federal and state court, or just suits in federal court. In contrast to the current version of 18 U.S.C. 3626, the proposed revision -- except for the new provision restricting the use of masters -- is not, by its terms, limited to federal court proceedings. Hence, most parts of the revision appear to be intended to apply to both federal and state court suits, and would probably be so construed by the courts. To avoid extensive litigation over an issue that goes to the basic scope of the proposal, this question should be clearly resolved one way or the other by the text of the proposal.

The analysis of constitutional issues raised by this proposal must be mindful of certain fundamental principles. Congress possesses significant authority over the remedies available in the lower federal courts, subject to the limitations of Article III, and can eliminate the jurisdiction of those courts altogether. In the latter circumstance, state courts (and the U.S. Supreme Court on review) would remain available to provide any necessary constitutional remedies excluded from the jurisdiction of the inferior federal courts. Congress also has authority to impose requirements that govern state courts when they exercise concurrent jurisdiction over federal claims, see Fielder v. Casey, 487 U.S. 131, 141 (1988), but if Congress purports to bar both federal and state courts from issuing remedies necessary to redress colorable constitutional violations, such legislation may violate

of limiting the release of prisoners as a remedy for unconstitutional prison conditions.

A more satisfactory and certain resolution of the problem would be to delete the requirement in proposed 18 U.S.C. 3626(a)(2) that crowding must be the primary cause of the deprivation of a federal right. This would avoid potential constitutional infirmity while preserving the requirement that prison caps and the like can only be used where no other remedy would work.

Proposed 18 U.S.C. 3626(b) -- which automatically terminates prospective relief after two years, and provides for the immediate termination of prospective relief approved without a judicial finding of violation of a federal right -- raises additional constitutional concerns. It is possible that prison conditions held unconstitutional by a court may persist for more than two years after the court has found the violation, and while the court order directing prospective relief is still outstanding. Hence, this provision might be challenged on constitutional grounds as foreclosing adequate judicial relief for a continuing constitutional violation.

However, we believe that this provision is constitutionally sustainable against such a challenge. Importantly, this provision would not cut off all alternative forms of judicial relief, even if it applies both to state court and federal court suits. The possibility of construing the statute as not precluding relief through habeas corpus proceedings has been noted above (as has the possibility that habeas may provide only limited relief). Finally, the section does not appear to foreclose an aggrieved prisoner from instituting a new and separate civil action based on constitutional violations that persisted after the automatic termination of the prior relief.

A more pointed constitutional concern arises from the potential application of the restrictions of proposed 18 U.S.C. 3626(b) to terminate uncompleted prospective relief ordered in judgments that became final prior to the legislation's enactment. The application of these restrictions to such relief raises constitutional concerns under the Supreme Court's recent decision in Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447 (1995). The Court held in that case that legislation which retroactively interferes with final judgments can constitute an unconstitutional encroachment on judicial authority. It is uncertain whether Plaut's holding applies with full force to the prospective, long-term relief that is involved in prison conditions cases. However, if the decision does fully apply in this context, the application of proposed 18 U.S.C. 3626(b) to orders in pre-enactment final judgments would raise serious constitutional problems.

While we believe that most features of the STOP proposal are constitutionally sustainable, at least in prospective effect, we find two aspects of the legislation to be particularly problematic for policy reasons.