S. HRG. 104–573

PRISON REFORM: ENHANCING THE EFECTIVENESS OF INCARCERATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

S. 3
TO CONTROL CRIME, AND FOR OTHER PURPOSES

S. 38
TO AMEND THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, AND FOR OTHER PURPOSES

S. 400
TO PROVIDE FOR APPROPRIATE REMEDIES FOR PRISON CONDITIONS, AND FOR OTHER PURPOSES

S. 866
TO REFORM PRISON LITIGATION, AND FOR OTHER PURPOSES

S. 930
TO REQUIRE STATES RECEIVING PRISON CONSTRUCTION GRANTS TO IMPLEMENT REQUIREMENTS FOR INMATES TO PERFORM WORK AND ENGAGE IN EDUCATIONAL ACTIVITIES, AND FOR OTHER PURPOSES

H.R. 667
TO CONTROL CRIME BY INCARCERATING VIOLENT CRIMINALS

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PRISON REFORM: ENHANCING THE EFFECTIVENESS OF INCARCERATION

THURSDAY, JULY 27, 1995

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
WASHINGTON, DC.

The committee met, pursuant to notice, at 10:14 a.m., in room SD–106, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee), presiding.

Also present: Senators Specter, DeWine, Abraham, and Biden.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. We will call this hearing to order. We apologize that we are a little late, but we had a Judiciary Committee meeting that has taken us away for more time than we had expected.

This morning, the Judiciary Committee convenes to consider the effectiveness of incarceration in our Nation. This is one of the most important issues facing the criminal justice system today, and I am pleased that we will be assisted in our task by this very distinguished group of witnesses. I extend a warm welcome to each of you as witnesses. In particular, we are pleased to be joined by our colleagues, Senators Hutchison and Gramm, as well as Associate Attorney General John Schmidt and former Attorney General William Barr.

Properly understood, prisons serve three fundamental functions—the incapacitation of criminals, the punishment and deterrence of crime, and, when possible, the rehabilitation of criminals. Incapacitation is the linchpin on which the others depend. Punishment and rehabilitation cannot be accomplished if the criminal is not first incapacitated. If we know nothing else, we know that the criminal who is behind bars is not victimizing other innocent people in society at large.

Punishment is also a vital part of our prison system. Ideally, it instills in the criminal an understanding that breaking society's rules has consequences and encourages, we hope, the criminal to reform. The credible threat of serious punishment also should deter persons from committing crimes. Equally important, punishment provides closure and peace of mind to victims of crime who too often are forgotten by the criminal justice system.

Finally, incarceration should advance rehabilitation. The inherent worth of human beings requires that we recognize their ability to change and provide them the opportunity to do so. Yet, we must also recognize the limits of rehabilitation. Some criminals commit

acts so depraved that society cannot risk letting them go free again.

Our prison system today is plagued by several interrelated problems—the inappropriate utilization by Federal courts of population caps and intrusive micromanagement on State and local prisons, the costly effects of frivolous inmate lawsuits filed in Federal court, and the lack of sufficient capacity.

The Federal Government has the obligation to help address all of those issues. As of January 1994, 244 institutions in 34 jurisdictions reported being under conditions of confinement court orders, and 24 reported having court-ordered population caps.

No one, of course, is suggesting that prison conditions that actually violate the Constitution should be allowed to persist. Nevertheless, I believe that the Federal courts have gone way too far in exercising their equitable remedial powers to micromanage our Nation's prisons at the expense of the proper role of the political branches and the States.

As Justice Thomas suggested in his concurring opinion last term in *Missouri* v. *Jenkins,* Congress has not exercised its power to define the remedial powers of the lower Federal courts. Perhaps unwittingly, it has allowed Federal judges to run school districts, prisons, and other public institutions, a function more properly exercised by legislatures and the executive branches.

There are many other things I would like to address at this time, but I am just going to put the rest of my statement into the record and turn to my colleague, Senator Abraham, who will chair most of these hearings.

I notice that we have a vote on, and we are going to have probably 7 votes in a row, and so what we are going to try and do is keep the hearing going, even if we have to use staff. Both Senator Abraham and I will try and alternate so we can come back and take as much of this testimony personally as we possibly can, at least for the first while, and one or the other of us might get stuck over there.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

This morning the Judiciary Committee convenes to consider the effectiveness of incarceration in our Nation. This is one of the most important issues facing the criminal justice system today, and I am pleased that we will be assisted in our task by this very distinguished group of witnesses. I extend a warm welcome to each of them. In particular, we are pleased to be joined by our Colleagues, Senator Hutchison and Senator Gramm, as well as by Associate Attorney General John Schmidt and Former Attorney General William Barr.

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As Justice Thomas suggested in his concurring opinion last Term in *Missouri* v. *Jenkins*, Congress has not exercised its power to define the remedial powers of the lower federal courts. Perhaps unwittingly, it has allowed federal judges to run school districts, prisons, and other public institutions, a function more properly exercised by legislatures and the executive branches. It is time to restore to the political branches, and to the states, control over their prisons by imposing standards on the exercise of judicial remedial powers. Prison population caps, which result in revolving door justice and the commission of untold numbers of *preventable* crimes, should be the absolute last resort.

Frivolous lawsuits must also be addressed. Frivolous prisoner suits are reaching crisis proportions. In some states, these cases make up nearly 50 percent of the federal civil docket. In my State of Utah, 297 inmate suits were filed in federal courts during 1994. These accounted for 22 percent of all federal civil suits filed in Utah that year.

I would like to cite just two examples of frivolous prisoner lawsuits from my state of Utah. In one case, an inmate deliberately flooded his cell, and then sued the officers who cleaned up the mess because they got his Pinochle cards wet. [*Lane* v. *Avery*] In another case, a prisoner sued officers after a cell search, claiming that they failed to put his cell back in a "fashionable" condition, and mixed his clean and dirty clothing. [*Roberts* v. *Hopkins*]

It is time to restore sanity to this system by imposing legitimate limits on the ability of inmates to tie the courts and prisons in knots through frivolous lawsuits. Procedures must be modified to quickly identify the viable prisoner claims and weed out the meritless chaff. The money saved by reducing litigation costs could more appropriately be used by the states to help ensure that adequate prison space is available, and the courts will have more time to devote to truly worthy prisoner claims.

Finally, it is entirely appropriate that the federal government provide assistance to the states for an emergency build-up in prison space and to encourage the states, through the provision of extra funds, to adopt truth-in-sentencing laws that honestly tell citizens—and warn criminals—what the penalty is for breaking the law.

Our witnesses will be commenting on each of these matters, and pending legislative proposals address many of the issues raised. To that end, I am pleased to welcome our witnesses and I look forward to their testimony.

Senator HATCH. So, Senator Abraham, why don't we turn to you.

STATEMENT OF HON. SPENCER ABRAHAM, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator ABRAHAM [presiding]. Thank you, Mr. Chairman. Let me just say that I am pleased to have the opportunity to have the chance to preside over at least part of this hearing today and appreciate the opportunity to do so.

I am convinced that what we are doing here today is important because people of all political persuasions clearly think that our prison system is in need of a good, hard look. Americans, I think, are truly committed to protecting individual rights, but we are also convinced that any punishment should fit the crime. While we do a good job of protecting the rights of the accused, I think we are doing less well in our treatment of convicted criminals.

Rightly, in my view, we presume that individuals accused of crimes are innocent unless found guilty by proof beyond a reasonable doubt, and we provide people accused of a crime with many other protections—the right to call witnesses, the right not to be compelled to testify, the right to counsel, the right to trial by jury. These protections cost both time and money, but most Americans strongly believe that the costs are well worth bearing because they make our system more just.

However, once a person who has been given these protections is found guilty and our justice system has run its course, most Americans also believe that the time has come for law abiding citizens and the victims of crime to stop paying an increasing percentage of the price of crime. At that point, most believe that the burden should shift as much as possible to the criminals themselves.

This is not because most of our citizens are heartless or vengeful. In fact, to the contrary, I am confident that most Americans do not want to see prisoners subjected to genuinely cruel conditions. At the same time, however, I would like to ask all of you to consider a few crimes committed in this area that have been in the paper over the last few days.

One about the murder of a 46-year-old doctor and his 22-, 19-, and 15-year-old daughters, most likely after the 15-year-old was molested. The second involves a 12-year-old girl who was unspeakably tortured and ultimately killed. I won't go into the details of that crime, but it was an unbelievably anguishing experience to read about. A third example involves carjackers who kidnaped, robbed, and ultimately murdered a 23-year-old woman.

There are legitimate differences of opinion over whether those who committed these heinous crimes should be subjected to capital punishment. From the newspaper, I gather that for various reasons most of the individuals involved in these particular crimes cannot, in fact, be executed. But I think virtually everybody believes that a person convicted of any of these crimes should be put in prison for a long, long time and not released early on parole or otherwise.

I also think virtually everybody believes that while these people are in jail, they should not be tortured, but that they should not have all the rights and privileges the rest of us enjoy, and that their lives should, on the whole, be describable by the old concept known as hard time. Unfortunately, that is not what necessarily happens.

All too often, people who have committed heinous crimes do not face serious and predictable punishment. Instead, they enjoy amenities that the hard-working taxpayers who pay for them and who live honest lives and don't break laws could not in many cases necessarily afford for themselves. These can include unlimited access to color TV's, law libraries, weight rooms and other athletic facilities.

In addition, the merest inconveniences and hardships resulting from imprisonment become fodder for lawsuits. And to top it all off, many are released after serving relatively little time, either because they are paroled or because the court enters an order that the prisons are overcrowded.

Let me give you some examples, lest anyone thinks I am exaggerating. In my State of Michigan alone, prisoner grievances and lawsuits over prison conditions have included disputes over how warm the food is, how bright the lights are, whether there are electrical outlets in each cell, whether windows have inspected and certified up to code, whether prisoners' hair is cut only by licensed barbers, and whether air and water temperatures are comfortable.

Through these lawsuits in many States, prisoners, their lawyers, and unelected judges have replaced the people and their legislatures in controlling the character of prison life. As a further insult, the taxpayers themselves often pay for—in fact, in almost all cases, pay for these lawsuits, and this is completely at odds with principles of democracy and federalism.

What is more, the result of such litigation is that violent criminals are freed to prey on more victims, and that, I think, brings all of our social institutions into disrepute. I think most people in Michigan, and indeed most people in this country believe this is all wrong, and I have no doubt that they are right about this because most of us believe that if somebody is convicted of a serious crime, that person deserves to lose some of the rights the rest of us enjoy.

We believe this for a good reason. We believe criminals have earned punishment and deserve to be treated less well than those who obey our laws. We believe that if criminals learn that they will have to pay a serious price for committing crimes, they will be less likely to do it again, and we believe that people contemplating murdering an entire family or torturing and killing a 12-year-old girl or kidnaping, robbing, and killing a young woman may be less likely to commit that awful act if they know that they will face many years of confinement, hard work, and loss of control over their lives. In short, potential criminals will learn that crime not only does not pay, but may impose significant costs; most importantly, the loss of liberty, dignity, and comfort.

Unfortunately, our system does not always send this message. Quite the opposite. Through expansive glosses on the eighth amendment and other rights, our legal system has managed in various instances to create the impression that prisoners' rights to challenge the conditions of their confinement are at least on a par with society's authority to decide to put them in jail. This message of moral equivalence fundamentally subverts the core principle of our criminal justice system that individuals who have committed serious crimes are the legitimate objects of society's reproof and punishment.

How did this happen? To some extent, no doubt, it was a reaction to genuine and serious abuses that were taking place in prisons 25, or perhaps even 20 years ago, and indeed those abuses caution against complacency, since prisoners are undoubtedly uniquely vulnerable to being abused. But that insight is far from the whole story and should not make us lose sight of that story's central fact that people are in prison because they have done something seriously wrong. An endless flood of prisoner lawsuits alleging prisoner rights to more handball courts for recreation or more psychiatrists to cure them of their criminal proclivities fatally undercuts the fundamental purpose of incarceration.

The purpose of this hearing is to reexamine how we can serve those fundamental purposes. I believe it is time the pendulum swung back in the direction of law-abiding taxpayers and the victims of crime. We need to ensure that prisoners are fully protected against cruel and unusual punishment, as our Constitution requires, but we do not need to ensure that prisons are run according to criminals' preferences.

A number of my colleagues have introduced various proposals to address different aspects of these problems. We will be hearing from two of them now, or in the first panel when they get back from voting, but I would also like to take a moment to state the committee's appreciation for the work of two members of the committee, the Senator from Arizona, who has made some very innovative proposals about frivolous litigation, and the Senator from Colorado, who has been working along with Senator Shelby of Alabama on proposals regarding work in prison.

In sum, I am convinced that a more balanced approach to these issues would reduce the number of criminals released early to commit more crimes; reduce the number of criminals committing crimes after they are released, if they are released; and help prisons function as a more effective deterrent to crime. I hope in this hearing we will be able to explore the different ways by which we can achieve a better balance between individual rights and society's right to protect itself and all of us from dangerous criminals.

At this time, I do not see the Senators who would make up the first panel, but perhaps what we might do is begin with Associate Attorney General Schmidt, if that is agreeable, and have him begin his testimony. I will go to vote, and perhaps Senator Specter will officiate until Senator Hatch gets back.

Senator SPECTER. Well, we have a block of 6 votes back to back. This is an unusual morning. We are going to be gone, I think, for some time, delaying the hearing, but I would like to make a very brief comment.

I think these are very, very important hearings on the ongoing problems of—staff tells me that we are going to have shuttling Senators here to try to keep the hearing in process. That is going to be some job, with 10-minute votes and at least 5 or 6 minutes to and another 5 or 6 minutes from, but just a comment or two.

I think these hearings are very important on the ongoing problems of prisons in America. This is a subject that I have been deeply involved in since my days as an assistant district attorney in Philadelphia many years ago when I was chief of the Appeals and Pardons Section and would visit the prisons on people who had applied for pardons and paroles, and in that job had an opportunity to visit all of Pennsylvania's prisons. The shortage of prison space is a tremendous problem.

The first three bills I introduced in my first year in the Senate involved first, armed career criminals; second, Federal prisons for career criminals who moved in interstate commerce; and third, realistic rehabilitation requirements for inmates. We have had a shortage of prison space in this country for at least the past 30 years, to my personal knowledge, and we have had insufficient accommodations for prisoner education and training. It is no surprise when a functional illiterate leaves prison without a trade or a skill

that that individual goes back to a life of crime, so that job training and literacy training are very important.

I see Senator Hutchison has arrived to make her statement. Before I call on her, I would like to note the presence today of a very distinguished Pennsylvanian and a very distinguished Philadelphian, the district attorney of Philadelphia, Lynne Abraham, who faces very difficult problems as the chief law enforcement officer of a major American city, a job I had for 8 years. But I had an easier time of it than District Attorney Abraham does because I had Assistant District Attorney Abraham to help me with the job when I was district attorney.

You may not have noticed much about District Attorney Abraham because she hasn't appeared on the cover of the New York Times Magazine for almost a full week now. But she has unique problems and one of them is prison overcrowding. She is one of a very distinguished panel of witnesses, including former Attorney General Bill Barr.

At this point, I would like to submit Senator Shelby's statement.

[Prepared statement of Senator Shelby follows:]

PREPARED STATEMENT OF HON. RICHARD C. SHELBY, A U.S. SENATOR FROM THE STATE OF ALABAMA

Mr. Chairman, one of the many controversial provisions of the 1994 crime bill was the requirement that states have in place an array of dubious programs, including social "rehabilitation," "job skills," and even "post-release" programs, in order to qualify for the prison construction grant money contained in the bill. This requirement is simply a manifestation of the criminal rights philosophy, which has reeked havoc on our criminal justice system. This view holds that criminals are victims of society, are not to blame for their actions, and should be "rehabilitated" at the taxpayers expense. In their zeal to "rehabilitate" violent criminals, proponents of this ideology have worked overtime to ensure that murderers, rapists, and child molesters are treated better than the victims of these acts and that these criminals have access to perks and amenities most hard-working taxpayers cannot afford.

Award-winning journalist Robert Bidinotto has revealed a myriad of these abuses. For example, at Mercer Regional Correctional Facility in Pennsylvania, hardened criminals have routine access to a full-sized basketball court, handball area, punching bags, volleyball nets, 15 sets of barbells, weightlifting machines, electronic bicycles, and stairmasters facing a TV.

David Jirovec, a resident of Washington State hired two hit men to kill his wife for insurance money. His "punishment" includes regular conjugal visits from his new wife.

Bidinotto also exposed abuses at Sullivan high-security prison in Fallsburg NY, where prisoners hold regular "jam sessions" in a music room crowded with electric guitars, amplifiers, drums, and keyboards.

In Jefferson City, MO, inmates run an around-the-clock closed-circuit TV studio and broadcast movies filled with gratuitous sex and graphic violence.

Perhaps the winner in the race for "rehabilitation" is the Massachusetts Correctional Institution in Norfolk, MA. There, prisoners sentenced to life in prison—known as the "Lifers Group"—held its annual "Lifers banquet" in the $2 million visitor's center. These 33 convicts—mostly murderers—and 49 of their invited guests dined on catered prime rib.

This is just the tip of the iceberg. These are not isolated incidents, but have become commonplace in our criminal justice system. Violent criminals have by definition committed brutal acts of violence on innocent women, children, the elderly and other citizens. That the government continues to take money out of the pockets of law-abiding taxpayers—many of whom are victims of those behind bars—to create resorts for prisoners to mull around in is incomprehensible. The rationale for this system is likely summed up by Larry Meachum, Commissioner of Correction in the state of Connecticut: "We must attempt to modify criminal behavior and hopefully not return a more damaged human being to society than we received."

I reject this liberal social rehabilitation philosophy. I, along with ten of my colleagues, have introduced legislation, S. 930, which has a different message: prisons

should be places of work and organized education, not resort hotels, counseling centers or social laboratories. It ensures that time spent in prison is not good time, but rather devoted to hard work and education. This is a far more constructive approach to rehabilitation.

Specifically, S. 930 repeals the social program requirements of the 1994 crime bill and instead makes the receipt of state prison construction grant money conditional on states requiring all inmates to perform at least 48 hours of work per week, and engage in at least 16 hours of organized educational activities per week. States may not provide to any prisoner failing to meet the work and education requirement any extra privileges, including the egregious items listed above. (Exemptions from the work requirement are granted for security conditions, medical disabilities, or disciplinary action.)

The critics of this legislation are likely to portend that it is too costly or too unworkable. However, as prison reform expert and noted author John DiIulio has pointed out, one-half of every taxdollar spent on prisons goes not to the basics of security, but to amenities and services for prisoners. However, these extra perks would be severely restricted under my legislation. No one failing to meet the work and organized study requirements would have access to them, and since the inmates would be occupied for 11 hours per day fulfilling the work and study requirement, the opportunity for these costly privileges would be reduced. Moreover, to reduce operation costs even further, prison labor could be used to replaced labor that is currently contracted out. Thus, these programs could be implemented.

The other charge is that the federal government should not micro-manage state prison efforts. However, this bill does not micro-manage at all. Rather, states have been micro-managed by the *federal* courts which have mandated that states provide prisoners with every possible amenity imaginable. For example, Federal Judge William Wayne Justice of the Eastern District Court required scores of changes in the Texas prison system, designed to improve the living conditions of Texas prisoners. These changes increased Texas's prison operating expenses ten-fold, from $91 million in 1980 to $1.84 billion in 1994—even though the prison population only doubled. This legislation will empower state and local prison officials to operate their systems in a cost-efficient manner, and will give them the much needed protection from the overreaching federal courts.

Moreover, this is only a requirement on states who choose to receive federal prison construction money. It does not affect states which do not receive this money.

In closing, I want to reiterate that the American people are living in increased fear of being victimized by violent criminals. People no longer feel safe on the streets, in their neighborhoods, and even in their own home. Yet, law enforcement officials are only able to apprehend a fraction of those individuals committing crimes. And, only a fraction of those apprehended are ever sentenced. And when they are sentenced, they only serve a fraction of their time. Therefore, we should take every step possible to make sure that the time they do serve is not spent watching television, working out with weights, playing basketball, or any other luxurious activity. Rather, the Congress should do everything possible to ensure that prison time is devoted to hard labor and focused on requiring the offender to pay back to victims and society the debt he or she owes. This legislation is a first step in that direction, and I urge its passage by the committee.

Well, Senator Hutchison is here now, a very distinguished Senator from Texas who has been very active in this field. While I am not officially presiding, Senator Hutchison, I call on you at this time and I will stay for a couple of minutes. The first 15 minutes are just about up, so I will have to excuse myself in just a couple of minutes.

STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman. I certainly hope that you will be able to continue the hearing. I saw Senator Abraham at the elevator and I think he will be right back. I have already voted, so I certainly understand when you need to leave.

Mr. Chairman, I want to tell you the story about my friend, Cecile Autry. Cecile and I were sorority sisters at the University of Texas. She was voted one of the 10 most beautiful girls on cam-

pus. She was the Texas Bluebonnet Queen. She got married and moved to Houston and became active in the community.

Cecile didn't come home 1 day and she was found in a field about 200 miles from Houston. She had been strangled. As the story evolved, when her car was found and the man accused of her murder was arrested in Colorado, she had walked out to her car in a parking lot and a man had been waiting for her to come. He strangled her, threw her in the back of the car in the trunk, threw her out in a field on the way through Texas, and kept on driving to Colorado.

The murderer was on early release because of a case, the *Ruiz* case in Texas, that requires us to release prisoners if we go above an 11-percent vacancy rate. When asked why he strangled my friend, Cecile, he said, I just had to have her car.

Senator SPECTER. Senator, I am going to have to excuse myself now. We have got 4 minutes.

[Recess.]

Mr. COONEY. My name is Mannus Cooney. I am the staff director of the committee. We have a problem in that there are several back-to-back floor votes. I have been asked by the chairman of the committee, Senator Hatch, and by Senator Abraham to at least begin the testimony. Senator Abraham, I am told, is on his way back and Senator Hatch will be here shortly. There will be a few occasions where I may need to sit in in lieu of a Senator. We have checked with Mr. Schmidt and that is fine with him.

So, Mr. Schmidt, if you will proceed with your statement? This is John Schmidt, Associate Attorney General of the United States. Thank you.

STATEMENT OF JOHN SCHMIDT, ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. SCHMIDT. Thank you. I guess I should address you as "Mr. Chairman" and address all the distinguished members of the staff of the Senate Judiciary Committee, many of whom I do know well. I know how important you all here, so I am not reluctant at all to go forward.

I will be brief because I know there are some very distinguished people, including former Attorney General Barr, who are here to testify on this important subject. I have a written statement which we have submitted and I will just emphasize a couple of points.

I think the one message I would most like to convey is that we think the most important thing that we at the Justice Department can do to increase the capacity for effective incarceration in this country at this point is to go forward as rapidly as possible with grants to qualifying States under the prison grant provisions of the 1994 crime law.

As you know, almost $10 billion was committed under the 1994 crime law to various forms of assistance to the States in the incarceration area. $7.9 billion of that was set aside for grants to States which met the various conditions in the truth in sentencing area. Unlike some other areas of the crime law where funding was provided for us to make grants immediately, in this area the funding is intended to be available as of October 1, but it was expected, I believe, and certainly we have gone forward on the basis that we

should use this year to be ready so that on October 1 we could really begin the grant-making process.

So, in December, we put out draft regulations that requested comments on some of the key technical issues in the area of truth in sentencing and defining various categories that are important in that area. We have received comments from virtually every State on that subject. We have, in fact, met with representatives of virtually every State and talked about the prison grant program. We had a conference which was attended by virtually every State. We set up an office to administer the prison grant program under a very well-respected corrections professional.

We are ready to go, and I think the States are ready for us to go. There obviously is an enormous need in this area. You will hear from other witnesses, but I know from my own experience traveling around the country that there are literally places in this country where parts of the criminal justice system have broken down because of the unavailability of adequate prison space, and that is an intolerable situation. The 1994 crime law was intended to rectify it.

There are, as you all know, some proposals around to modify in various respects the truth in sentencing conditions that are set forth in the 1994 crime law. I think that would be a major mistake. I think it would be a mistake, first of all, because I don't think there are any alternatives that I have seen that will, in fact, be more effective in inducing real reform at the State level and in inducing the States to move in a realistic way toward truth in sentencing.

I also think it would be a major mistake because I think there is an overwhelming interest from the standpoint of sound public policy and stability in this area in allowing the States to go forward on the basis of the law that was passed in 1994. There are already a number of States which have passed laws reforming their sentencing procedures in reliance on that law. The law passed with respect to the prison area with overwhelming bipartisan support, and so I really think it is a mistake to talk about changing it. What we ought to do is go forward and put those resources to use in the way that Congress intended.

With respect to the other legislative proposals which are before you which deal with the effort to get at some of the problems of abusive prisoner litigation and the impact of litigation that Senator Abraham was referring to earlier, we generally support those proposals. The written statement sets out in some detail our positions, but we support the provisions that would strengthen the requirement for exhaustion of administrative procedures before prisoners can go to court. In fact, we would like to see those expanded to cover Federal prisoners as well as State prisoners.

We support the provisions that would generally require that prisoners pick up the costs of litigation, which I think is important given the absence of other disinducements to litigate in a prison situation. We support very strongly the objective of the STOP provisions to make absolutely certain that any cap on prison populations is used by the courts only as an absolute last resort when it is the only remedy which is available for a constitutional violation.

We do have a couple of constitutional and other concerns about particular provisions that are in the STOP proposal, and those are set out in detail in the statement. But just in general terms, our concern is that we not have provisions which would bar the use or a cap if that is, in fact, the only way to remedy a constitutional violation. I think the problem in the legislation does not arise where the violation is, in fact, attributable to overcrowding. In those circumstances, the provision says, yes, you can go ahead and do it.

I will interrupt and let Senator Abraham resume chairing his hearing.

Senator ABRAHAM. Mr. Schmidt, I apologize. Because of the way these votes are going and our need to try to make sure the Senators don't miss rollcall votes, Senator Hutchison, who, of course, is the chief sponsor of this bill, is here and has asked for 5 minutes to just outline the bill. We apologize to all witnesses, but particularly to you for the need for us to continue interrupting.

Senator Hutchison, thank you for being here, and I apologize for the fact that earlier when you were here, we were not in a position to hear your testimony.

Senator HUTCHISON. Thank you, Mr. Chairman. Earlier, after you left, I told the story of my friend from college who was brutally murdered by an early-release prisoner. In fact, it highlighted the need for doing something about this tragic situation, and my State is just one example and it is why I introduced this bill along with Congressman Bill Archer on the House side.

In my State and others, the Federal courts have imposed unwarranted and onerous limitations on State prison systems that have resulted in thousands of violent criminals being released back into society, in some cases before they have served even half of their original sentences.

Earlier this year, I introduced the Stop Turning Out Prisoners Act to curb Federal court takeovers of State prisons. My purpose in appearing today is to impress on the committee the seriousness of the problem of Federal court takeovers and to describe the tremendous costs, financial and societal, that the courts' actions are imposing on our States.

A brief history of the problem in my State may be helpful to the committee because it illustrates the absurd circumstances under which the courts are intervening and imposing judicial control over State prisons. Under the *Ruiz* case which was settled in 1992, a Federal district court has asserted control over every important aspect of Texas' correctional system. To quote from the court's final judgment, the court's control is in perpetuity in key areas such as population limits, restrictions on new facilities, use of force, access to the courts, and staffing.

Included in *Ruiz* is a requirement from the court that on any given day, at least 6,100 prison beds, 14 percent of the total space in my State's prisons, must be kept vacant. As a result of Texas prisons being forced to maintain a large permanent vacancy rate, literally thousands of violent criminals are released early after serving fractions of their sentences.

At the time of the *Ruiz* decision, I was treasurer for the State of Texas, so I speak from firsthand knowledge about the financial impact of these Federal court demands. In order to comply with the

Ruiz decision, the State of Texas has embarked on a massive prison-building program with annual expenditures estimated to grow from $3.75 billion to $4.4 billion over the next 2 years.

But the court has gone even further, Mr. Chairman, in imposing conditions on how and where new prison beds may be built. The court stepped in and prohibited building an addition on some prison ground that was used as a baseball field. The court ruled that Texas cannot use common space or recreation space for housing without first replacing the common space and outdoor recreation areas, including all ball fields. It is estimated that the court-mandated prison population caps will cost my State's taxpayers $610 million a year for the next 5 years.

This State prison population cap is also a critical problem for local taxpayers. Texas county jails are overcrowded with prisoners that cannot be transferred to State prisons and millions of dollars in extra costs are being incurred. I would add that so far there is no estimate of the extra costs of protecting every inch of baseball fields.

In the court's view, the prison population cap is necessary to ensure that convicts will be comfortable. However, with thousands of convicted murderers, rapists, muggers, and other criminals out roaming the streets instead of serving time behind bars, no law-abiding citizen can feel safe, let alone comfortable.

Our experience in Texas raises two key questions. First, which are more important, the rights of violent criminals to live comfortably or the rights of past and potential victims to live free of fear that those criminals will be released early to roam our streets? The second question follows directly from that. If Texans decide that victims' rights are more important, is Texas free to set prison standards that favor those rights?

My STOP bill would prevent more *Ruiz* decisions. It would limit relief in a civil action regarding prison conditions to extend no further than necessary to grant relief. My bill also provides that the courts not impose limits or reduction in prison population unless the plaintiff proves that overcrowding is the primary problem and there is no other solution available. Furthermore, the courts would not be able to use a single lawsuit as a springboard to take over the administration of an entire prison system.

In order to prevent the kind of permanent Federal court control over a State's correctional system that we have in Texas today, my legislation would automatically terminate prospective relief granted by a court after 2 years, and it would terminate immediately in the absence of a finding by the court of a Federal rights violation.

What has happened in Texas is particularly galling because the *Ruiz* decision was not appealed. Although I and others have repeatedly called for an appeal to be undertaken, the responsible State official has declined. Among the provisions of my bill is one that would allow other State officials and elected representatives that have a reason and a cause to step in and undertake an appeal in these cases when Federal courts have gone too far.

Mr. Chairman, we in Texas and those in other States desperately need these kinds of changes. While Federal prisons continue to operate at an average of more than 160 percent of capacity, my State's correctional system is required to maintain less than 90-

percent occupancy. We need the use of those extra beds. Our counties, whose jails are bursting with prisoners, need those beds to be available.

Mr. Chairman, I am encouraged that you are looking at this and I appreciate very much the time you are spending on it. I am sorry about the votes, and I know that has caused a problem. So I just hope you can get the testimony so that we can move this bill forward, and I hope it will be part of the crime package that you will put forward later this year.

Thank you.

Senator ABRAHAM. Thank you very much, Senator Hutchison, and thank you for working on this issue.

Thank you, Mr. Schmidt, for indulging all of our vote patterns over here today. We may have at least one other Senator who has to come between votes, but please continue your testimony.

Mr. SCHMIDT. Well, it is timely in that I was just about to comment on the STOP legislation. Let me just repeat the one basic point I had previously made, which is the importance that we see in Congress not doing anything that will prevent us from going forward and making grants to the States that qualify under the 1994 crime law for financial assistance to build new prisons because I think nothing else, certainly, that we at the Justice Department can do is as important as that in dealing with the problem that we face in this area.

With respect to the legislative proposals to deal with prisoner litigation and the impact of certain kinds of litigation, as I was indicating, we support the provisions that would require exhaustion of administrative remedies prior to going to court. We would like to see those expanded to cover Federal prisoners as well as State prisoners.

We support the provisions that would generally make it clear that prisoners must pick up the costs of filing lawsuits, which I think is important given that there are often no other disinducements to litigate in a prisoner situation. With respect to the STOP legislation, we strongly support the principle that a cap on prison populations should be imposed only if that is the absolute last resort and the only remedy available for a constitutional violation.

We have a couple of constitutional concerns with particular provisions that are in the legislation. The one that I was starting to refer to arises because of a concern that we not, by legislation, say that the cap will not be available if that is, in fact, the only remedy for a constitutional violation.

The problem arises not with respect to a violation where overcrowding is the principal violation because the legislation says then the cap can be used. But it is possible to have a situation where overcrowding is a secondary rather than a primary cause of a constitutional violation, and a court might nevertheless conclude that the cap is the only effective remedy for that violation. It seems to us in that circumstance there is both a constitutional and a policy problem in restricting the court from using the cap as the remedy.

We also have a constitutional concern with attempting to apply these restrictions to existing decrees that have resulted from prior adjudications of constitutional violations. I think there is a real

constitutional question whether Congress can do that with respect to decrees that result from adjudications of constitutional violations prior to the legislation.

Finally, we have just a practical concern about a couple of the provisions that relate to consent decrees. In particular, there is a provision that, at least as we read it, would say that in any consent decree there would have to be an explicit finding of a violation of constitutional rights.

The concern we have is that that might present a significant impediment to settling cases in circumstances where the State is prepared to accept all of the conditions of the decree, but is unwilling to make what would amount to an admission of liability which could have other consequences.

It seems to us that the problem that we are trying to get at there, which, as I understand it, is the concern that State officials would sort of collusively settle cases for their own reasons and not take into account the interests of the law enforcement community, is really dealt with by the other provisions of the bill that give to any local prosecutor or other criminal justice official who has a jurisdiction that will be affected the right to intervene in that proceeding and participate in any consideration of relief.

If you actually had a situation where all of those people, including all those intervenors, were prepared to sign off on a consent decree, but for whatever reason the State was unwilling to have that admission of a violation of the Constitution, it seems to us that in the interests of avoiding litigation, which is something we generally try to do in the Justice Department, that that really doesn't make sense.

The other somewhat similar concern we have is with the provision for automatic termination of all decrees after 2 years. The current law, as you know, now has a provision that gives the defendant a right to go in and seek a review of any decree after 2 years. It seems to us if you have a situation where at the end of 2 years there is still an unremedied constitutional violation, the effect of the automatic termination is going to be to force a new round of litigation, and that, from the standpoint of judicial and litigation economy, doesn't make sense.

It seems to us that an alternative approach there might be to give that same group of people who are given the right to intervene under the bill in the initial proceeding the right themselves to invoke the 2-year review of any decree. So there would be an assurance that the review would take place if there was any significant public interest at stake or that would warrant it, but you would not have an automatic termination that would force new litigation if, in fact, it is clear that there is a continuing constitutional violation.

With those qualifications—and I have to say I think those are issues that can be dealt with in the drafting—we think that that is an area where Congress should legislate. We would like to see it and we would like to work with the members of the committee to achieve something that would be both constitutional and sound from a policy standpoint.

With that, I will stop, and I will be happy to respond to questions.

Senator ABRAHAM. The preponderance of the questions may have to be in writing since the other panel members are still at the hearing.

Mr. SCHMIDT. That is fine.

Senator ABRAHAM. I am hopeful that Senator Hatch will, after casting what is now our fourth vote, will be able to be back, and I think he may have some questions as well.

I would just like to maybe focus a little bit, because there are other panels here, on a matter a little closer to home for me, which is our situation in Michigan. As I am sure you know, we have been under a longstanding consent decree that affects our prison system. In 1992, we believed, I think, that things had been worked out. There was a stipulation agreed to between the Department of Justice and our State corrections officials that we had solved the problems which had caused the initial issue to be raised, and so we felt we were on the way to essentially ending this judicial supervision.

But despite the fact that both parties had agreed to the stipulation, the court overseeing the consent decree refused to cede its power over these prisons, and when it rejected the parties' stipulation and we sought to appeal the court's ruling, as you know, DOJ refused to argue for support of the stipulation that it had itself entered into. I guess I really would like to understand the Department's position on that a little more clearly because it is a very disruptive situation, certainly, in our State.

Mr. SCHMIDT. Well, I know about the case. It happened before I was there, but I understand about it.

Senator ABRAHAM. And I would certainly stipulate that——

Mr. SCHMIDT. Let me tell you my understanding of it. It is certainly correct that the Justice Department had agreed to stipulate to a dismissal of the bulk of the consent decree. I think the provisions relating to mental health were going to remain in place.

Senator ABRAHAM. That is right.

Mr. SCHMIDT. But the rest was to be stipulated to be dismissed. The court refused to accept that stipulation. As I understand it, the issue on appeal was whether the court lacked jurisdiction to refuse to accept the stipulation, and on that legal question the view of the Justice Department was that the district court was correct that it did have the jurisdiction to refuse to accept the stipulation, although we had urged the district court in good faith and were prepared to accept the stipulation.

So on that legal question of whether the district court had the jurisdiction to refuse to accept the stipulation, the Justice Department took that position in the court of appeals and the court of appeals agreed with that. So the district court retained jurisdiction.

Senator ABRAHAM. Right.

Mr. SCHMIDT. My understanding is the district court, when it rejected the stipulation, set up an alternative procedure under which it said the decree could, in fact, be dismissed in sort of a piecemeal fashion if there were a demonstration of compliance in various areas. It is my understanding that that process is, in fact, going forward, and to the extent that there are continuing issues under the decree, substantive issues, they result almost entirely from concerns in the mental health area.

But there is, in fact, I think, a mediator process that was established by the court of appeals which is going forward in an effort to embody under the new procedure that the district court set up the sort of substantive result that would have been reached immediately had the stipulation been accepted.

Senator ABRAHAM. But there is nothing in your Department that has changed insofar as its acceptance of the conditions that prompted the stipulation; that is, there has not been a reversal of position at least with regard to the areas not including the mental health area?

Mr. SCHMIDT. Well, my understanding of what the district court said was that we needed to look at them area by area and make a demonstration to the satisfaction of the district court that there was no continuing constitutional violation. What I said is, I think, a correct statement of where we are that we think that is going forward and that it is only in the mental health area that we see major continuing problems.

Senator ABRAHAM. But you would say that in the other areas, your position remains consistent with the earlier view that Michigan prisons were no longer in violation of the Federal law?

Mr. SCHMIDT. Well, I think our position is that we need to look at each of those areas and make the appropriate demonstration to the satisfaction of the district court. The district court refused to accept the flat dismissal, so I think our view of it is that it is not appropriate for us then to say, well, not withstanding your refusal to accept our stipulation, we are effectively dismissing the case.

But, substantively, it is my understanding that we are working through the other areas in an effort to go to the district court and say that we believe that, apart from the mental health area, there is no need for continuing jurisdiction by the district court.

Senator ABRAHAM. All right. What I am trying to, I guess, establish is this. Clearly, the district court has reached a different conclusion which you have accepted, but has your position or the Department's position changed insofar as your earlier conclusion? I mean, there is some difference there between your actions and your assessment of the circumstances and I just wonder——

Mr. SCHMIDT. Well, I am not trying to be evasive. I guess what I am saying is that I think given that the district court rejected the stipulation and said that we should look area by area and make a demonstration and an evaluation of whether there was compliance, we are doing that. My understanding, though, is that that is going positively and that the sixth circuit or the eighth circuit.

The sixth, imposed a mediation process, so there is actually a mediator with whom the parties are working to try to work through the question of: Has there been compliance in each of these areas?

Senator ABRAHAM. I see that we have been joined by another member of the Senate who is in between rollcall votes here. Again, if you would indulge us, Mr. Schmidt, I would now ask Senator Phil Gramm to join us at the table. He, too, I know, has some strong opinions on some of the current legislative issues before us.

In order that you might get back for the next vote, Senator Gramm, we appreciate your joining us today and welcome you.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Mr. Chairman, let me thank you for continuing the hearing during these votes because this is important business, and given the number of votes we have on the floor, many people would be precluded from having the opportunity to speak.

Let me begin by saying that I am a cosponsor with my dear colleague from Texas, Kay Bailey Hutchison, of her bill S. 400. That bill is very important. I want to urge the committee to adopt it as part of an omnibus crime bill. We took an initial step last year to try to limit Federal courts from setting arbitrary caps on prison populations. We took a first step toward setting a higher standard. This is the next logical step and we need to take it.

Mr. Chairman, you might get a lot of suggestions about how to figure out who ought to be in prison, not just on the basis of who committed a crime but by using some other formula or suggestion because we don't have the capacity. I want to take a totally different tack. People who are convicted and sent to prison ought to serve their full terms.

Let me tell you some things that need to be changed. First of all, we have at least three Federal statutes that ought to be repealed. The Hawes-Cooper Act of 1929, the Ashurst-Sumners Act of 1935, and certain provisions of the Walsh-Healy Act of 1936 should be repealed. Now, these are three laws that have one objective, and that objective is to criminalize prison labor in America.

One bill restricts the commerce of goods produced in prisons. The second bill prohibits the interstate transport of most goods produced by prisoners for sale in the private sector of the economy. The third bill basically has the objective of banning prison labor, with certain exceptions.

Now, it seems to me that with the number of people we have in prison in America, nothing is more logical than putting these people to work. I believe the statutes I mentioned should be repealed. I think we can work out a compromise to satisfy the concerns that have been expressed. Every year, my dear friend, Jesse Helms, offers an amendment banning trade with countries that have prison labor, and I wonder every year why we can't be one of them. So I think it is very important that we go back and repeal these laws and that we put prisoners to work. I think Federal prison inmates ought to work 10 hours a day, 6 days a week, and I think they ought to go to school at night.

I can tell you as Chairman of Commerce, State, Justice Appropriations, which funds the prison system in this country, that last year we spent $22,000 per Federal prisoner, and that doesn't count the cost of building prisons. We should include in our next crime bill a goal of cutting that amount in half over the next 8 years, and we ought to set a goal of paying for half that amount by having prisoners work.

We should change the standards for prison construction. We should stop building prisons like Holiday Inns. We should take out color televisions and weight rooms and air conditioning. We should build our prisons as miniindustrial parks where people go to prison, they work, they go to school at night. They pay for their cost of incarceration by working, something that used to be common

prior to 1929 when we started making it a crime to make prisoners work.

Finally, we need to change the whole approach we have in terms of the criminal justice system. I believe if we change the standards for prison construction, if we make prisoners work, we can afford to incarcerate violent criminals in America. I think that is the approach we should follow and I strongly urge this committee to do that.

Thank you very much.

Senator ABRAHAM. Senator Gramm, thank you very much for being with us today.

Mr. Schmidt, I asked you to stay here because I thought maybe some of the others would come back. I just heard a beep, so I think I am going to have to go back and vote, as well, fairly soon. So I would like to thank you for being here.

Mr. SCHMIDT. Thank you.

Senator ABRAHAM. We in our office are going to submit some additional questions, and I suspect some other members will want to as well, and we appreciate your taking time. Thank you very much.

[The questions of Senator Abraham are located in the appendix.]

Mr. SCHMIDT. Thank you.

[The prepared statement of Mr. Schmidt follows:]

PREPARED STATEMENT OF JOHN R. SCHMIDT

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.[1] We also recommend that parallel provisions be adopted to require federal prisoners to exhaust administrative remedies prior to commencing litigation.

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—

[1] Letter of Assistant Attorney General Sheila F. Anthony to Honorable Henry J. Hyde concerning H.R. 3, at 17–19 (January 26, 1995).

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 T1§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 percent 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 percent 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.[2]

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

[2] 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."

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 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 due process. *See, e.g., Webster* v. *Doe,* 486 U.S. 592, 603 (1988); *Bowen* v. *Michigan Academy of Family Physicians,* 476 U.S. 667, 681 n.12 (1986); *Bartlett* v. *Bowen,* 816 F.2d 695, 703–07 (D.C. Cir. 1987). We therefore examine the proposal's various remedial restrictions from that perspective.

Proposed 18 U.S.C. 3626(a)(1) in the proposal goes further than the current statute in ensuring that any relief ordered is narrowly tailored. However, since it permits a court to order the "relief * * * necessary to remove the conditions that are causing the deprivation of * * * Federal rights," this aspect of the proposal appears to be constitutionally unobjectionable, even if it constrains both state and federal courts.

Proposed 18 U.S.C. 3626(a)(2) bars relief that reduces or limits prison population unless crowding is the primary cause of the deprivation of a federal right and no other relief will remedy the deprivation. We strongly support the principle that measures limiting prison population should be the last resort in prison conditions remedies. Remedies must be carefully tailored so as to avoid or keep to an absolute minimum any resulting costs to public safety. Measures that result in the early release of incarcerated criminals, or impair the system's general capacity to provide adequate detention and correctional space, must be avoided when any other feasible means exist for remedying constitutional violations.

Certain features of the formulation of proposed 18 U.S.C. 3626(a)(2), however, raise constitutional concerns. In certain circumstances, prison overcrowding may result in a violation of the Eighth Amendment, *see Rhodes* v. *Chapman,* 452 U.S. 337 (1981). Hence, assuming that this provision constrains both state and federal courts, it would be exposed to constitutional challenge as precluding adequate remedy for a constitutional violation in certain circumstances. For example, severe safety hazards or lack of basic sanitation might be the primary cause of unconstitutional conditions in a facility, yet extreme overcrowding might be a substantial and independent, but secondary, cause of such conditions. Thus, this provision could foreclose any relief that reduces or limits prison population through a civil action in such a case, even if no other form of relief would rectify the unconstitutional condition of overcrowding.

This problem might be avoided through an interpretation of the notion of a covered "civil action" under the revised section as not including habeas corpus proceedings in state or federal court which are brought to obtain relief from unconstitutional conditions of confinement. *See, e.g., Preiser* v. *Rodriguez,* 411 U.S. 475, 499 (1973). However, this depends on an uncertain construction of the proposed statute, and the proposal's objectives could be undermined if the extent of remedial authority depended on the form of the action (habeas proceeding vs. regular civil action). Since the relief available in habeas proceedings in this context could be limited to release from custody, reliance on such proceedings as an 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.

First, the proposal apparently limits prospective relief to cases involving a judicial finding of a violation of a federal right. This could create a very substantial impediment to the settlement of prison conditions suits—even if all interested parties are fully satisfied with the proposed resolution—because the defendants might effectively have to concede that they have caused or tolerated unconstitutional conditions in their facilities in order to secure judicial approval of the settlement. This would result in litigation that no one wants, if the defendants were unwilling to make such a damaging admission, and could require judicial resolution of matters that would otherwise be more promptly resolved by the parties in a mutually agreeable manner.

Second, we are concerned about the provision that would automatically terminate any prospective relief after two years. In some cases the unconstitutional conditions on which relief is premised will not be corrected within this timeframe, resulting in a need for further prison conditions litigation. The Justice Department and other plaintiffs would have to refile cases in order to achieve the objectives of the original order, and defendants would have the burden of responding to these new suits. Both for reasons of judicial economy, and for the effective protection of constitutional rights, we should aim at the resolution of disputes without unnecessary litigation and periodic disruptions of ongoing remedial efforts. This point applies with particular force where the new litigation will revisit matters that have already been adjudicated and resolved in an earlier judgment.

Existing law, in 18 U.S.C. 3626(c), already requires that any order or consent decree seeking to remedy an Eighth Amendment violation be reopened at the behest of a defendant for recommended modification at a minimum of two year intervals. This provision could be strengthened to give eligible intervenors under the STOP proposal, including prosecutors, the same right to periodic reconsideration of prison conditions orders and consent decrees. This would be a more reasonable approach to guarding against the unnecessary continuation of orders than imposition of an unqualified, automatic time limit on all orders of this type.

Senator ABRAHAM. At this time, I would call the next panel forward—Mr. Barr, Mr. Cappuccio, Mr. DiIulio, District Attorney Abraham, Mr. Gadola, Mr. Watson, and Mr. Martin.

Thank you all for coming here today, with the same caveat that the whole morning, I think, we will unfortunately have to operate under, that we may have votes that cause me to have to leave. Hopefully, Senator Hatch and I will be able, between us, or the staff, to continue this hearing without interruption at this point, but I do ask ahead of time for your indulgence.

Our panel consists of former Attorney General William Barr; Mr. Paul Cappuccio, an attorney at the law firm of Kirkland and Ellis; Professor John DiIulio, of Princeton University; Lynne Abraham, district attorney for Philadelphia, PA; Mr. Michael Gadola, who is the director of the Office of Regulatory Reform of the State of Michigan; Mr. Bob Watson, who is director of the Department of Corrections for the State of Delaware; and Dr. Steve Martin, who

is the former general counsel of the Texas Department of Corrections.

What I would propose is that in the order of introduction, each of you make your opening statements, and then we will proceed to questions at the end of the panel and hopefully have other members here by then when the votes probably will be over.

So we will start with Attorney General Barr. Thank you for being here today.

PANEL CONSISTING OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; PAUL T. CAPPUCCIO, KIRKLAND AND ELLIS, WASHINGTON, DC; JOHN J. DiIULIO, JR., PROFESSOR OF POLITICS AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY; LYNNE ABRAHAM, DISTRICT ATTORNEY, PHILADELPHIA, PA, ON BEHALF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION; MICHAEL GADOLA, DIRECTOR, OFFICE OF REGULATORY REFORM, STATE OF MICHIGAN; ROBERT J. WATSON, COMMISSIONER OF CORRECTION, STATE OF DELAWARE; AND STEVE J. MARTIN, FORMER GENERAL COUNSEL, TEXAS DEPARTMENT OF CORRECTIONS

STATEMENT OF WILLIAM P. BARR

Mr. BARR. Thank you. It is a pleasure to be here, Mr. Chairman, on this important topic. I have a prepared statement which I ask to be entered in the record, and I will try to be brief with just some overview remarks.

Senator ABRAHAM. Without objection, it will be entered.

Mr. BARR. Part of my central program as Attorney General was to stress the essential need for prison capacity in any criminal justice system. I believe that the key addressable element of violent crime in our society is the violent crime committed by chronic habitual offenders. I believe this is the largest part of predatory violence and it is the most preventable part of the problem, and that we have to have adequate prison capacity to incapacitate these violent offenders.

As I tried to get this message out and worked with State and local officials on this issue, I constantly heard that one of the central problems that was faced at the State and local level was the Department of Justice itself and the fact that the Department had been a key player in hamstringing State and local officials in operating and managing their prison resources.

So I started to look into the problem, and Mr. Cappuccio, who is here with me today, was spearheading that effort at the Department of Justice when I was there. We found that in the 1970's and 1980's, really, during the heyday of judicial activism and sort of soft-headed constitutional law in many areas of the law, there was a flood of litigation under the eighth amendment challenging prison conditions.

In many of those cases, the litigation was appropriate. Conditions were unconstitutional and the beginning of that litigation was fully justified. But in many cases, we also found that the Federal courts, assisted by the Department of Justice, had applied incorrect standards in determining an alleged deviation from the Constitu-

tion, overall circumstances or totality of circumstances tests, and had really not been rigorous in determining whether there was indeed a Federal constitutional violation.

In other cases, we found that courts sort of confused what the eighth amendment required with what was sort of sound penological practice at the time, or what the best practice was thought to be in correctional circles, and attempted to run prisons according to those standards.

We found that in remedying eighth amendment violations, or alleged violations, many of the courts went far beyond what the Constitution required. They started specifying diets and exercise programs. I think the *Ruiz* case down in Texas is probably the best example of judicial overreaching. I personally visited the Texas prison system where the judge was specifying the materials that had to be used for tables and chairs, the length of shelving that was required in the prisoners' cells, and so forth.

Most pernicious of all, many courts were actually capping prison populations and forcing the turning-out violent predators back out onto the streets without any real analysis of whether this was essential to alleviate an unconstitutional condition.

This judicial micromanagement of the prison system had substantially raised the costs of prison construction and precluded the use of existing space. For example, many courts had prohibited double-bunking, as if double-bunking was per se unconstitutional. We now know it isn't. They specified the size of cells. In many situations, the required size of cells was much bigger than what we currently had in the Federal prison system, which during my tenure was operated at about 165 percent capacity.

I also believe that there was an overly aggressive use during the 1970's and 1980's of consent decrees in prison litigation, and I thought the Department had misused consent decrees in two ways; one, in putting into those consent decrees conditions and standards that were plainly in excess of constitutional requirements. I think that some of your examples in your opening statement, Senator Abraham, are good examples of the kinds of things that the Justice Department was putting in consent decrees and clearly are not mandated by the Constitution. They may be good or bad practice as a policy matter, but they are not mandated one way or the other by the eighth amendment.

The other way I thought the Department was misusing consent decrees was really using these suits as sort of an occasion, a triggering event that was used to take control and impose on prisons sort of perpetual obligations and perpetual supervision, rather than using a case for what it should be, which is resolving a particular dispute, eliminating the unconstitutional violation and then terminating the case. Rather, they were using consent decrees as a regulatory tool for keeping perpetual supervision over the systems.

I took a number of actions in early 1992 when I became Attorney General, and some of the details are set forth in my testimony and Mr. Cappuccio's testimony. Basically, I directed that the Department should not initiate or continue prison litigation unless it was necessary to remedy a specific deprivation of a prisoner's basic human needs, the standard set forth in the *Seiter* case.

Second, I directed that the Department should not seek remedies that go beyond remedying the discreet constitutional violation. Third, I directed that the Department should not encourage or support ongoing supervision of a prison system unless plainly necessary.

Let me say—and I don't hold me exactly to this, but I think when I took office, prison systems or part of prison systems in 43 States were being run under judicial decrees. My view was that State officials can be trusted to run the prison system and that we should not encourage ongoing supervision or micromanagement by the judiciary.

Fourth, I directed that once a violation was cured, then the decree should be terminated and the litigation should be ended. Let me just say in the *Michigan* case, I think the Department was wrong in not appealing. If the parties to a suit agree that there is no longer a controversy, there is no controversy. There is no article III basis for a continued Federal court role. If someone wanted to then make a claim and invoke the power of the court and point to a violation, they are free to do so, but that case should have been settled on the basis that was agreed to by the Department when I was there as Attorney General.

Fifth, I took the position that the Department should now actively support States in modifying their consent decrees under the *Rufo* case and that we should come to the aid of the States who wanted to reopen their decrees. Two States and one city took me up on that. Texas and Michigan were the States and Philadelphia was the city, and I know you will be hearing more about the situation in Philadelphia from Lynne Abraham, the District Attorney.

The courts fought us tooth and nail on each of these cases, and obviously when we left the Department this effort petered out, to put it charitably. Our experience, though, suggests to me that there is need for clear legislative standards and this cannot be left to the comings and goings of administrations and the peccadillos of particular Federal judges, but we do need a clear, uniform standard on this.

I generally support the proposals in the STOP legislation. I think that the Department has pointed to two concerns. I think they are easily addressable. One concern is the requirement that the overcrowding be a primary cause in order to justify a cap. I think that the word "primary" there is ambiguous, and it is almost metaphysical whether overcrowding or unsanitary conditions, for example, or lack of plumbing are the primary cause. What is the primary cause?

I think that could be more artfully drafted, and basically I think everyone knows what we are saying, which is that unless there is—you have to show there is no other way of remedying the violation—for example, putting in new plumbing—before you can resort to something like caps.

The second problem with the STOP legislation that the Department refers to is the automatic retroactive termination of existing decrees; that is, decrees that are in effect today and the fact that that might run afoul of the *Plaut* case. I think that that, again, we can address relatively easily in the legislation. I agree that the way

it is drafted now does raise constitutional problems, but I do think it is possible to require the courts to revisit at a certain date.

If the decree has been, for example, in existence for 2 years—the existing decrees I am talking about, not prospectively—revisit those decrees and terminate those decrees unless it can point then to an ongoing constitutional violation. I think that that would be constitutional because I think you must be able to point to a violation. It is OK to say to a court you have to point to a violation today to keep a decree in effect because if they can't point to a violation, if there is no ongoing violation, then I think essentially the article III basis for use of the Federal power has evaporated.

So, in conclusion, I think this is a critical part of solving the violent crime problem in the United States, bringing some rationality to the judicial micromanagement of the prison system. I think there is a need for statutory standards and I think a lot of the proposals that are before this committee deserve urgent attention.

Thank you.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR

Thank you, Mr. Chairman. I am pleased to be here today to testify in support of this committee's important efforts to help the Justice Department and the States to protect our society by incarcerating habitual violent criminals.

I thought what I might do today is describe for you what, during my tenure as Attorney General, I saw as the challenge facing the Federal Government and the States in providing adequate prison capacity in this country, and then to discuss briefly some of the principles that I believe should guide legislative reforms in this area.

Study after study shows that there is a small segment of our population who are repeat violent offenders and who commit much, if not most, of the predatory violent crime in our society—you know the profile—these offenders typically start committing crimes when they are juveniles, and they keep on committing more, and more serious crimes through their adult years.

When arrested and released before trial, these habitual offenders go right on committing crimes.

When given probation, instead of a prison term, they go right on committing crimes.

When let out of prison on parole and early release, they go right on committing crimes.

In fact, the only time we are sure that these chronic offenders are not committing crimes is when they are locked up in prison.

We can debate a lot of things about prisons: Can they rehabilitate criminals? Do they deter offenders? But, there is one thing that is beyond serious debate: *Imprisonment incapacitates chronic violent criminals.* For every year an habitual offender sits in his prison cell, there are scores, perhaps hundreds, of fewer violent crimes committed on our streets.

Now, it is obvious that, in order to pursue a successful strategy of incapacitating habitual violent offenders, the Federal Government and the States must provide adequate prison space to incarcerate these career criminals. That was a central part of my message, particularly to state officials, during my tenure as Attorney General.

As I travelled the country with this message, I heard consistent refrain from State corrections officials: The ability of the States, to operate their prisons effectively and efficiently has been hamstrung by the involvement of the Justice Department and the Federal courts in the day-to-day operation of State facilities. After hearing these complaints enough times, I asked my staff to look into them, and to develop recommendations for alleviating inappropriate burdens on the States.

I believe that both the problems that we identified and the solutions that we attempted to implement internally at the Justice Department in 1992 provide an appropriate starting point for this committee's consideration of legislative reform in this area, particularly reform of the Department of Justice's and Federal courts' role in litigation challenging the conditions of confinement in State prisons.

What we found was this:

First, the 1970s and 1980s saw a flood of litigation in the Federal courts by State prisoners challenging poison conditions as violating the eighth amendment's prohibition of "cruel and unusual punishment." In some instances, Federal court intervention was appropriate because the conditions in State prisons genuinely did fall below the constitutional minimum—amounting to "cruel and unusual punishment." In many cases, however, the lower Federal courts applied incorrect constitutional standards to justify their intervention in some cases, courts applied a vague "totality of the circumstances" or "overall conditions" standard to find that the State system was in violation of the eighth amendment. In other cases, courts improperly equated the eighth amendment's minimalist protection against "cruel and unusual punishment" with a requirement that States follow what was thought to be current sound penological practices.

Second, we found that, in remedying alleged eighth amendment violations, many lower Federal courts often went far beyond what the constitution requires—issuing orders with respect to the particulars of prisoners' diets, exercise, visitation rights and health care. Most burdensome of all, many courts imposed limitations, or caps, on the populations of state prisons and local jails.

As a result of these extra-constitutional requirements, we saw that the cost of a prison bed space in many State institutions was far above what was necessary to comply with the Constitution, and in some instances, was even higher than cost in the Federal prison system. But even more troublesome was the effect of the arbitrary population caps imposed by some courts. In 1991, while I was Attorney General, the Federal prison system operated at approximately 140 percent of design capacity, and did so in compliance with the Constitution. Many States, however, are required by judicial order or decree to operate *at,* or even *below,* design capacity. At the time, we calculated that if the States could operate at levels at or near the level of the Federal prison system, the States would have room for nearly 300,000 additional inmates, which translates into a savings of approximately $13 billion in prison construction costs. While not every State may be able to operate at the same level as the Federal system, it seems clear that the potential for savings from removing arbitrary court-imposed population caps is *enormous.*

The *third,* and perhaps most disturbing, problem that we found was the Justice Department's overly aggressive use of consent decrees in the prison litigation context. I'll let Mr. Cappuccio speak to this problem in more depth, as I understand it to be the focus of his testimony. But let me just briefly outline the problem:

In my view, in the past, the Justice Department has used consent decrees in two ways that, in the context of prison litigation, are inappropriate:

First, in the past, the Department has insisted on including in consent decrees requirements that quite plainly go well beyond the protections of the Constitution. In fairness to the Department, in many cases those decrees were negotiated at a time when some lower courts thought that the eighth amendment required more ambitious improvements by the States than the Supreme Court has subsequently held that amendment requires. But the fact remains that Federal court decrees in this area are rife with requirements that go well beyond the minimum protections provided by the eighth amendment.

Second, in the past the Department has used the occasion of a lawsuit alleging discrete eighth amendment violations impose nearly perpetual obligations on, and supervision of, State prison systems. By and large, the Department and the Federal courts have lost sight of the fact that Federal interference with the authority of the States to run their own corrections system may legitimately last only so long as is necessary to remedy the specific eighth amendment violation alleged in the Government's or prisoner's complaint. Such a lawsuit should not, however, be used as an excuse to impose continuing supervision of the State system beyond the time it takes the State to remedy the discrete constitutional violations alleged in the complaint.

Perhaps most troublesome and burdensome of all is the *combined* effect of these two missteps. By first insisting on decree provisions that require more than the eighth amendment guarantees, and then, attempting to enforce those extra-constitutional provisions after the underlying constitutional violation has been remedied, the Department and the courts have, in some cases, succeeded in imposing on the States in near perpetuity burdensome and expensive requirements that the Federal Government had no authority to impose on the States to begin with.

To remedy these problems, in early 1992, I set forth the following general principles and specific guidelines to govern the Justice Department's involvement in prison litigation. I believe these principles, which I imposed as a matter of the Department's prosecutorial discretion, are also appropriate guideposts for any legislative reform in this area.

First, as the Supreme Court has recently made clear in cases such as *Wilson* v. *Seiter,* the Federal courts have no authority to hold that prison conditions are unconstitutional unless it is proven that prison officials have acted with "deliberate indifference" to "the minimal civilized measure of life's necessities." It is not an eighth amendment violation merely because the overall conditions in a prison are bad or substandard where no specific deprivation of a human need is demonstrated.

Accordingly, I directed that the Department should not initiate poison litigation, or intervene in on-going prison litigation, unless necessary to remedy specific deprivation of a prisoner's basic human needs—deprivations that rise to the level of cruel and unusual punishment,

Second, in remedying constitutional violations, the courts are not free to order prison officials to improve conditions beyond the basic necessities required by the Constitution. As the Supreme Court has recognized, the Constitution "does not mandate comfortable prisons," and the courts may not require prison officials to follow what some may think are sound correctional practices.

Accordingly, I directed that the Justice Department should seek to remedy constitutional violations, but should not seek to impose on the States—through litigation or consent decrees—additional burdens not required by the eighth amendment or other applicable Federal law.

Third, the business of running prisons belong to the appropriate State officials, not to Federal judges, Justice Department officials, or special masters. The fact that a court finds a constitutional violation does not justify court or Justice Department supervision of prisons either direct or through the appointment of a special master. The duty to vindicate inmates' constitutional rights does not confer on the courts or the Justice Department the power to manage prisons. Where a court finds a constitutional violation, it should give the State an appropriate opportunity to remedy the violation without ordering more specific relief and without attempting to take control of the State prison system.

Therefore, I directed that the Department of Justice should not encourage or support court supervision of State prisons, either directly or by the appointment of a special master, except as a last resort where it was plainly necessary to remedy a continuing constitutional violation that a state failed to remedy.

Fourth, once a State has cured a specific constitutional violation identified by a court, ongoing remedial decrees should be terminated. Court decrees should not operate in perpetuity once the State has come into compliance with the requirements of the Constitution, neither continuing court supervision nor permanent conditions and limitations are appropriate. Moreover, many States are operating under decrees that were negotiated at a time when some courts thought the eighth amendment requires more than it does. Under the Supreme Court's decision in *Rufo* v. *Inmates of Suffolk County Jail,* courts must stand ready to reopen, modify and/or vacate decrees where a State seeks modification based on the change of the underlying constitutional law.

To effectuate these fundamental limits on consent decrees, I directed that the Department should support termination of a consent decree as soon as a State has remedied past constitutional violations and there is no indication that the State will revert to prior unconstitutional practices. In addition, I directed that, where a consent decree or other judicial order remains in effect, the Department should consider whether to support State's request for modification of such decree either because of a change in the governing constitutional law or to the extent necessary to remove restraints on the State not required by the Supreme Court's recent interpretations of eighth amendment.

After announcing these new guidelines, I offered States and localities living under Federal-court consent decrees opportunity to have the Department review their case to determine whether they were entitled to relief. Two States (Texas and Michigan) and one major city (Philadelphia) took me up on the offer. Over the next several months, after staff reviewed these cases, we began to make significant progress in freeing these States and localities from unwarranted Federal-Government intrusion in the management of their prisons and jails.

The task, however, was more challenging than I thought, and more difficult than it should have been. Even with the support of the Department—which was a plaintiff in the Michigan action and a long-standing intervenor in the action—the Federal judges in those cases resisted our attempts to return complete control to the States' even though it was clear that both States were in compliance with the Federal Constitution. Before the task was completed, administration turned over and we left the Department.

It seems to me that the difficulty we faced in implementing these common sense guidelines makes legislation in this area all the more important. Codifying these principles in legislation would achieve two important goals: First, it would ensure

a more consistent application of the fundamental principles governing prison litigation that would not depend on the inclinations of the particular administration in power. Second, many of these limitations can, and should, be imposed not merely on the Executive Branch, but also on the courts. Since nothing in these principles would in any way undermine the ability of the Federal courts to remedy genuine constitutional violations, it would be entirely within the power of Congress to impose these common sense limits on the courts.

Senator ABRAHAM. Thank you very much.

Mr. Cappuccio?

STATEMENT OF PAUL T. CAPPUCCIO

Mr. CAPPUCCIO. Thank you, Mr. Chairman. I also have extended written testimony that I have submitted to the committee and, if you would, I would like it to be made part of the record and I will just briefly summarize that testimony now.

Senator ABRAHAM. It will be.

Mr. CAPPUCCIO. I had the privilege of working for Attorney General Barr at the Justice Department and one of my primary responsibilities was to assist in a review of ongoing Federal court litigation concerning the conditions in State prisons and local jails. As part of that task, Mr. Chairman, I visited a number of prisons, a number of jails, very many from your State. I think I took the entire tour of the Michigan facilities. I have also been through Texas facilities and facilities in Philadelphia, and some of these trips were actually inspection tours that the Civil Rights Division was conducting.

Based on that experience and some of my other work with the Department, I left with some serious concerns about how the Department was conducting prison litigation and, in particular, concerns about the use of consent decrees in prison litigation. I would like to address those problems briefly and then talk about some commonsense solutions.

Mr. Chairman, I start from the proposition that, at least in theory, consent decrees are good things. They avoid the enormous expense of litigation which could last for years and they allow the parties to agree on relief and to avoid potentially much more intrusive court orders. So I begin with the bias that we should continue to encourage the use of consent decrees, provided, however, we can control some of the adverse consequences that have sort of come up in practice. That is what I would like to talk about today, is some of the practical problems with them and ways to fix them.

I identify a number of problems with the Government's use of consent decrees in my written testimony, but I want to focus on just three this morning. First, and perhaps one of the more serious ones, is under the current law there is little or no limitation on the scope of relief or the scope of requirements that can be imposed on a State in a consent decree. That is a consequence of a case decided by the Supreme Court called *Local 93* v. *Cleveland* which says that the parties to a consent decree can agree to relief that is broader than necessary to remedy a Federal violation. In fact, the Supreme Court has held that the parties can agree to relief that the court itself could not impose after full litigation.

In large part, as a result of this rule, I saw a repeated pattern in many of these negotiated decrees of going well beyond what I think a fair court would rule the eighth amendment requires, and

you see this in at least three different respects. Some of these decrees went into specifying all manners of prison life—the diets of prisoners, their exercise rights, health care, visitation rights, all sorts of other things.

I think some of the examples, Senator Abraham, that you gave in your statement today are good examples of decrees getting into specifics that go well beyond what the eighth amendment minimally requires. Even more troublesome, as Attorney General Barr pointed out, is many decrees impose quite arbitrary population caps and space requirements, and those levels generally are much lower than the levels that the Federal Bureau of Prisons has been operating with successfully for many years.

Still other decrees, I think, go beyond the Constitution by, in effect, replacing the narrow constitutional standard, whether the State is depriving a prisoner of the minimal necessities of life, and replace that narrow constitutional standard with more openended and vague standards, like the State of Michigan shall provide sound care; the State of Michigan shall provide adequate recreational facilities and safe conditions. These broader standards and more openended standards end up replacing the constitutional standards, and the State ends up agreeing to do much more than it would have had to do if the court was ordering it to fix a violation.

A second problem relates to the duration of these decrees, and it sort of dovetails with the first. Some of these decrees have been going on for many, many, many years. Again, the problem is the parties will agree and the court will approve quite broad and openended relief, such as sound conditions and adequate recreation, and then for the next decade or so the Justice Department will monitor whether, in its view, the State is living up to those rather openended obligations.

The result is situations like Michigan where, by my calculation, the Justice Department has been in there something like 11 years, maybe more, even though—and this is based on my own personal experience—even though if you walked through those prisons, you would be hard-pressed to see anything that you would call a systemic constitutional violation. There may be incidents of guards doing things wrong, but I don't think a fair person could walk through the Michigan prisons and say they are not providing prisoners with the bare necessities for life.

Nevertheless, because these consent decrees impose these openended obligations, the Justice Department continues to enforce the decree and hasn't let go. In fact, I think we need to give a lot of credit to the career people at the Justice Department for their tenacity and hard work and all that, but if I would criticize them in one area, it is for hanging in there too long. I mean, I think we have to keep in mind the notion of a lawsuit. The notion of a lawsuit in Federal court ought to be the Federal Government gets in, fixes a problem, and then leaves. We have lost sight of that.

A final problem, I think, is sort of democratic process problems. I think it is bad, particularly given the duration of these things, for one administration to be able to bind successor administrations in a consent decree. I think that is the problem that Philadelphia has, and Ms. Abraham will be talking about that. That, I think, is unhealthy.

There are also sort of collusive budgetary problems. When I went around the country, I noticed that, oddly, while senior State officials often opposed continuing consent decrees, the local correctional people didn't mind them so much, and the reason for that was it was guaranteeing their budget. That seems to me to be an evasion of the democratic process.

Well, then, quite briefly, how do we fix all this? How do we save consent decrees, while at the same time fixing these problems, and at the same time not infringing on the constitutional role of the courts?

I guess I would begin by saying it would be enormous progress in this area if the committee could get the Justice Department merely to agree that it will adhere to the five commonsense guidelines that Attorney General Barr announced in January of 1992. They are in my testimony and they are in his. I have the originals right here. If anyone reads those and thinks they are controversial, I don't think they are being serious about reform in this area. If the Department would agree to those guidelines and enforce them internally seriously, we would come a long way. I think legislative reform is also appropriate here, and I will just end by saying I also support most of what is in the STOP legislation, with the few tinkerings that the Attorney General talked about.

Thank you.

[The prepared statement of Mr. Cappuccio follows:]

PREPARED STATEMENT OF PAUL T. CAPPUCCIO

Thank you, Mr. Chairman and Members of the Committee, for inviting me to testify today.

I served as an Associate Deputy Attorney General at the Justice Department under Attorney General Barr. Shortly after he become Attorney General, General Barr offered State and localities that were involved in Federal court litigation concerning the conditions in their prisons and jails the opportunity to have the Department review their cases to determine whether Federal intervention should be terminated or modified. A number of States and cities took General Barr up on that offer—including the States of Texas and Michigan, and the city of Philadelphia—and I was assigned the job of assisting in that review.

In carrying out this task, I had the chance to see first hand how prison conditions litigation is carried out at the Federal level. I came away from that experience with decidedly mixed feelings. On the one hand, I could not help but admire the dedication and tenacity of the career staff at the Civil Rights Division in doing what they believed was right. On the other hand, I came away convinced that in several instances over the last 20 years, the Department of Justice had overreached in pursuing, or continuing to pursue, prison conditions litigation, and improperly intruded into the legitimate domain of the States and localities to manage their own correctional facilities.

In my testimony today, I would like to focus, very briefly, on just one area of prison conditions litigation that, based on my experience, I believe needs reform. Specifically, I would like to focus the committee's attention on some of the problems with the use of consent decrees in prison litigation.

Of all the things that need fixing, why complain about consent decrees? After all, the *theory* of the use of consent decrees in institutional litigation is that they are decidedly good things. Consent decrees allow the parties to agree to remedy an alleged violation of law without the crushing expense of litigation, and, when properly used, they allow the defendant institution to agree to a remedy that it has some role in shaping and implementing, rather than be subjected to more intrusive court orders.

But there is often a difference between theory and practice. Based on my experience, in *practice* the use of consent decrees in the prison litigation context has often

turned out to be more burdensome for States and localities than full-blown litigation would have been. Indeed, just the other day, I was speaking with one State official who told me that, based on that State's experience with a Justice Department consent decree, the State would have been better off if it had fought the lawsuit in court to the end.

I. PROBLEMS WITH THE USE OF CONSENT DECREES

As I see it, the problems that have arisen from the use of consent decrees in prison litigation lie in several different areas. These problems can, in my view, be corrected by a combination of responsible Executive Branch conduct and sensible legislation that is respectful of the constitutional functions of the Federal courts.

(1) One problem with the widespread use of consent decrees in this area is that, in practice, they give the Government some incentive to pursue cases that it likely could not (and should not) win in a full-blown court proceeding under the governing constitutional standard.

As the committee is aware, over the last several years, the Supreme Court has clarified that the eighth amendment is not violated unless prison officials have acted with "deliberate indifference" to "the minimal civilized measure of life's necessities." *see Wilson* v. *Seiter,* 501 U.S. 294 (1991). Based on my experience, some of the cases that the Government pursued and resolved by consent decree may well have been cases in which the Government could not have established this difficult standard in court.

The device of the consent decree, however, allows the Government to force the States and localities to agree to take action in marginal or weak cases. The threat of expensive and time-consuming litigation, the unequal resources of Justice Department versus the States and localities, and the possibility of drawing an activist judge are too much for most States and cities to stand up to, so they end up agreeing to consent decrees in some cases that most likely do not rise to the level of genuine eighth amendment violations.

While such overenforcement may be good in some other areas, in the context of prison litigation, it has costly implications for States' rights and the rights of law abiding citizens.

(2) A *second* problem with the use of consent decrees in prison litigation concerns the scope of the relief that may be included in a consent decree. Under Supreme Court jurisprudence, the parties to a consent decree can agree to "broader relief than the court could have awarded after a trim." *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland,* 478 U.S. 501, 525 (1986). In many consent decrees in this area, the relief contained in the decree goes well beyond either the minimum requirements of the eighth amendment, or even what a Federal court could have ordered after a trial on the merits.

A number of the decrees that I reviewed while at the Justice Department specified, either by their terms or through mandatory implementation plans, the details of all manners of prisoners' diets, health care, exercise and recreation, and the like. In several instances, the particulars of what these decrees required seemed quite plainly to exceed what could reasonably be thought to be required by the eighth amendment. Perhaps even more troublesome, however, several of these decrees imposed arbitrary numerical caps on the number of prisoners that the State or locality could incarcerate in its facilities that were well below the level at which the Federal bureau of prisons has been successfully operating.

Thus, in many instances, the burden on a State or locality imposed by a consent decree has turned out to be greater than what a court could have ordered after full blown litigation because the terms of the decree go beyond strictly remedying the constitutional violation alleged.

(3) A *third,* and in my view more serious, problem with the use of consent decrees in prison litigation concerns their duration. In many instances, the Justice Department and the courts have, in my view, not known when to let go. Instead, they have maintained intrusive supervision and micromanagement of state correctional facilities well beyond the time when the State has cured the underlying constitutional violation.

The vast majority of consent decrees in this area contain no explicit durational limit. Accordingly, termination of the decree is governed by Federal rule of civil procedure 60(b), which provides for termination of a court decree when the purposes of the litigation have been fully achieved.

Termination under rule 60(b) should be straight-forward when the underlying constitutional violation is remedied by an easily-identifiable, objective event. However, in the prison litigation context, the determination of when conditions cease to be "cruel and unusual" is somewhat mo. subjective, and this difficulty is

compounded by the fact that the Government often includes in consent decrees somewhat vague and open-ended requirements, such as the provision of "adequate" medical care or "safe" conditions. As a result, in cost instances, the Federal courts have not usually terminated prison consent decrees when they should—when the specific and particular constitutional violation alleged in the original complaint has been remedied.

As a consequence, it is entirely unsurprising to see States and localities bound up by consent decrees (and the intrusive court or government supervision they entail) for longer than a decade, and well past the point that a reasonable person would conclude that there was any genuine ongoing eighth amendment violation. Thus, for example, Michigan has lived under a consent decree with the Justice Department for over 11 years, and Texas has lived under some form of negotiated decree even longer. And based on the review that I was involved in, I do not believe that either State was currently in violation of the eighth amendment on system-wide basis, or even close to that line.

(4) A *fourth,* and perhaps the most serious, problem with the use of consent decrees in this area relates to the inappropriate ceding of State and local government power. Precisely because of the uncertain and nearly perpetual duration of many of these consent decrees, the effect of pressuring (or even allowing) State or local officials to enter into a consent decree governing the management and operation of their correctional facilities is to cede for the indefinite future a significant aspect of local governmental power to the Federal Government, the courts, and/or even to private plaintiffs.

This strikes me as decidedly unhealthy in a couple different respects: First, the practical consequence of the use of consent decrees in this area is that one administration of a State of local government can bind successor administrations to remedies (and expenses) that go beyond the minimum that the Constitution requires. That necessarily infringes upon the essence of local democracy the right of the voters to change their minds and elect officials who will do things differently. Second, consent decrees can encourage semi-collusive arrangements between the plaintiffs and those correctional officials who (understandably) want a larger share of the State's budget. By agreeing, in near perpetuity, to specific and detailed requirements in a consent decree, corrections officials can ensure that the State will fund their agency fully for the foreseeable future. Such arrangements evade the democratic budgetary process.

II. COMMON SENSE REFORMS

In my view, these problems with consent decrees are serious and must be addressed. But to say that there are problems with consent decrees in this area is not to say that their use should be (or even could be) prohibited altogether. Rather, in my view, there are some obvious and common sense reforms that can and should be implemented in this area that would allow all involved to enjoy the benefits of consent decrees without much of their current pitfalls.

(1) Many of the problems with consent decrees can be avoided by responsible Executive Branch conduct. Shortly after becoming Attorney General, General Barr announced new guidelines to govern the Justice Department's participation in prison conditions litigation. Those five simple guidelines were:

> (a) The Department should not initiate or intervene in prison litigation—including by entering into a consent decree—unless necessary to a specific deprivation of a prisoner's basic human needs, *i.e.,* unless necessary to remedy a genuine eighth amendment violation.
>
> (b) In resolving prison litigation—by consent decree or otherwise—the Department should seek to remedy the constitutional violation, but should not seek to impose on the States or localities additional burdens not required by the Constitution or other applicable Federal law.
>
> (c) Where an existing consent decree or other judicial order remains in effect, the Department should consider supporting a State's or locality's request to modify the decree to the extent necessary to remove restraints on the State or locality not required by the Constitution.
>
> (d) The Department should not encourage continuing court supervision of State prisons or local jails, either directly or by a special master, unless such supervision is plainly required as a last resort to remedy a continuing constitutional violation.
>
> (e) And finally, as soon as a State or locality had remedied past constitutional violations (and there is no specific indication that the State or locality will revert to such unlawful practices) , the Department should support

termination in a timely manner of all litigation and consent decrees that limit the ability of the State or locality to run its own prisons and jails.

If these 5 common sense, and I believe uncontroversial, guidelines were strictly adhered to by the Department, many of the evils associated with prison litigation and consent decrees in which the United States is a party would be substantially alleviated. Of course, such reforms would not necessarily cure the problems with consent decrees resolving prison litigation initiated and controlled by private plaintiffs.

(2) Legislative reform is also called for in this area. indeed, in my view, three different types of legislative reform are worth considering in more depth:

(a) First, I see no reason why the Congress should not impose some presumption of a durational limit on prison condition consent decrees that are enforceable in the Federal courts. It seems to me entirely justified to put a limit on the duration of relief (provided, however, that the consent decree can be extended if the constitutional violation has not been substantially remedied); or, at a minimum, to require the courts to consider periodically over the life of a decree whether partial or full termination is warranted under rule 60(b).

(b) Second, I believe that it would be entirely appropriate for the Congress to specify that, in approving consent decrees, a Federal court must determine that the relief contained in the decree is narrowly tailored to remedy the constitutional (or other Federal) violation alleged, and does not contain broader requirements that unnecessarily intrude upon the legitimate governmental functions of States and localities. In my view, such a provision would present no serious separation of powers concerns, provided it was carefully crafted, because it would not in any way prevent a Federal court from doing what was necessary to remedy a genuine constitutional violation. Indeed, such a provision would not be different in kind from the requirement in the Tunney Act that requires a Federal court to determine that a consent decree is in the public interest before approving it.

(c) Finally, the Congress may want to consider reaffirming and making more explicit what I believe the law already requires—that as soon a State or locality can demonstrate to a Federal court that it has remedied the constitutional violation alleged in the underlying complaint, and there is no imminent risk of that violation recurring, a consent decree should be terminated. That is so even if the consent decree contains additional provisions that may go beyond what the Constitution requires. A Federal court cannot enforce a decree when the underlying Federal violation has been fully remedied, and the parties have no right to attempt to confer upon the court the jurisdiction to enforce their own agreement with the contempt power of the court.

* * * * *

All of these reforms can be accomplished without intruding on the responsibility of the federal courts to remedy constitutional violations. In this regard, I note that the draft bill that the committee staff sent to me addresses a number of these reforms. Although the language of the bill may need some tinkering both to be effective and to ensure an appropriate respect for the courts, it seems to me that the committee is headed in the right direction.

Senator ABRAHAM. Thank you very much.

Mr. DiIulio?

STATEMENT OF JOHN J. DiIULIO, JR.

Mr. DiIULIO. Thank you, Mr. Chairman. With your permission, I would like to just summarize portions of my 11-page written testimony.

Senator ABRAHAM. Please, and we will submit your full testimony for the record.

Mr. DiIULIO. Thank you.

Make no mistake, revolving-door justice is a reality. The facts and the figures on the public record support the American public's crime fears. The testimony you will hear today from Ms. Finnegan, the testimony you heard earlier from Senator Hutchison, and the

testimony that could be given by literally millions of crime victims and their families, including my own, is not merely anecdotal, as is sometimes claimed. Nor are these tales of criminals who are released from custody and who maim and kill merely sensational. Rather, as I will attempt to show very briefly, they are reflective of the systemic realities of revolving-door justice in America today.

Let's take a look at just some of the hard facts, just the tip of this iceberg. In 1992, there were over 10 million violent crimes committed in America, but only about 641,000 of these violent crimes led to arrests, barely 165,000 to convictions, and only about 100,000 to prison sentences which, on average, would end before the criminal served even half his sentence behind bars.

Indeed, fully 60 percent of convicted criminals with one violent felony conviction, 45 percent with two, and 41 percent with three are not even sentenced to prison. Even those convicted of homicide and released from prison in 1992 had served, on average, only about 6 years on sentences of about 12.5 years. Of the 4.9 million persons under correctional supervision in America in 1993, about 72 percent were not incarcerated.

What I would like to stress here and beg for understanding is that while some prisons may indeed be overcrowded, and while overcrowding may create in some conditions a need for judicial action, the Nation's streets are now overloaded with serious convicted criminals who are out on probation and parole. This is not a myth. This is a reality.

In 1991, for example, recent research shows that of those persons convicted of a violent crime and presently under correctional supervision, 372,000 were in prison while nearly 600,000 violent convicted criminals were out at that point on probation or parole. What happens on probation or parole? We all know the statistics about 33-percent recidivism rates, about only a fifth of probation violators who are ever sentenced to jail for their failure to comply. We know about over 90 percent of all convicted criminals who do go to prison get paroled after serving only 35 to 40 percent of their sentenced time behind bars.

Nearly a third of parolees who are in prison for a violent crime and nearly a fifth who are in prison for a property crime are rearrested within 3 years for a violent crime. Too often, that violent crime is murder. Of death row prisoners in 1993, 68 percent had a history of felony convictions, including 9 percent with at least one previous homicide conviction. Moreover, 42 percent were in custody, mostly on parole, at the time they murdered.

Indeed, ongoing research reveals that up to a third of those convicted of murder over the last many years were in custody on probation, parole, pretrial release, at the very time they did the murder or murders for which they were convicted. For example, between 1990 and 1993, Virginia convicted some 1,411 persons of murder, 33.5 percent of whom had an active legal status at the time they did the crime. Likewise, between 1987 and 1991, prisoners released early from Florida's prisons committed well over 15,000 crimes, including 346 murders. Indeed, about a third of all violent crime is committed by persons who are technically in custody when they find their latest victims.

Once and for all, let us lay to rest the fatally false notion that most prisoners are mere drug offenders or technical parole violators. Based on a scientific survey representing 711,000 State prisoners in 1991, the U.S. Bureau of Justice Statistics found that fully 94 percent of State prisoners were violent or repeat criminals. This same analysis, by the way, has been run with data representing three previous data sets stretching back to the 1970's. In every case, the figure was 90 percent or more.

Studies I have done with Harvard economist Ann Piehl likewise document that in the year prior to their incarceration, State prisoners commit an average of a dozen serious crimes, excluding all drug crimes. Likewise, a recent National Bureau of Economic Research study reported that incarcerating each State prisoner reduces the number of crimes by approximately 13 a year, and a recent analysis published in the Journal of Quantitative Criminology, which is good for insomnia, I suppose, suggests that prisoners commit between 17 and 21 indexed crimes a year when they are on the loose.

Parolees do not return to prison for nothing. This is a popular myth, a myth that has been promulgated especially with regard to the increase in the California prison population, the Nation's largest, over the last 5 or 6 years.

In three separate blue-ribbon commission reports in California, it was asserted that the main factor fueling the growth of that State's prison population was the return to prison of mere technical parole violators. That, we now know from recent research, is totally and demonstrably false.

In California, in 1991, some 84,194 persons were admitted to prison, but only 3,116 of them, 3.7 percent of total admissions, were technical parole violators. The other 42,834 parole violators, representing 51 percent of total admissions and 96 percent of all parole violator admissions, had been convicted of thousands upon thousands of new crimes, including 255 newly convicted of murder. In sum, Mr. Chairman, it is absolutely and abundantly clear from all the empirical data on this subject, from all the real studies and research, that America does have a world-class problem of revolving-door justice.

I have no comparative advantage here in discussing the constitutional or legal issues involved with the STOP provisions. I am not a lawyer; I do not want to be, I do not pretend to be. But I would urge this Congress to avoid getting lost in what most Americans, I think, would consider to be rather empty legalisms on this subject, especially with regard to such issues as prison crowding.

As I summarize on pages 9 and 10 and 11, I believe, of my written testimony, as all the best studies indicate, and I cite several there, such inmate housing practices as double-celling and open-bay dormitories are neither constitutionally impermissible nor automatically dangerous to institutional order and well-being.

In conclusion, the rise of judicial intervention has had precisely the adverse public safety and other consequences detailed by the National District Attorneys Association, lamented by legions of local police, and testified to by countless crime victims.

The responsibility to act on this stretches, obviously, to both ends of Pennsylvania Avenue. At a recent White House dinner I attended, President Clinton participated in a 3-hour discussion of crime and violence in America. It is clear that both President Clinton and leaders in this Congress care deeply about America's crime problem and are concerned about the demographic time bombs that are waiting to go off in just a few years.

What remains unsettled, however, is whether our institutions, beginning with this Congress, can work to protect decent, law-abiding citizens from violent and repeat criminals released early because of prison caps. With these hearings, Mr. Chairman, I am heartened that that might happen, and I thank you for inviting me to testify.

[The prepared statement of Mr. DiIulio follows:]

PREPARED STATEMENT OF JOHN J. DIIULIO, JR.

These Senate hearings on crime could prove to be among the most important that Congress has ever held. If Congress acts wisely, it can help to end the insanity of revolving-door justice in America. Moreover, it can help to restore public trust and confidence in the criminal-justice system, and, in turn, in the moral authority of government itself. At stake in your deliberations is not only the fate of proposals to reinforce or revise provisions of the 1994 federal crime bill. At stake is the very capacity of our representative institutions to honor the will of a persistent popular majority of the American people, a majority that encompasses Americans of every race and region, and of every demographic description and socio-economic status.

I believe that your deliberations should be guided by three sets of principles.

First, America does have a deep, documentable, and morally disastrous problem of crime without punishment.

Second, the problem of revolving-door justice is due largely to the influence over the criminal-justice system exercised by activist judges, as well as by the disproportionate influence over criminal-justice policy exerted by those who insist (and, in some cases, have insisted for decades) that many or most incarcerated criminals should be released from custody or placed on probation or parole.

Third, this Congress does have the constitutional writ, the moral responsibility, and the policymaking capacity with which to begin to set America's criminal-justice system straight, enhancing public safety while bolstering public confidence in our political process.

THE REALITY OF REVOLVING-DOOR JUSTICE

Revolving-door justice is a reality. The facts and figures support the American public's crime fears. Ms. Finnegan's testimony here today, the testimony offered in the House last February by the father of slain Philadelphia police officer Daniel Boyle, indeed, the testimony that could be given by literally millions of crime victims and their families, including my own, is not merely anecdotal. Nor are the tales of released criminals who maim and kill merely sensational. Rather, they are reflective of the systemic realities of revolving-door justice in America today.

Earlier this year, the U.S. Bureau of Justice Statistics (BJS) released what is the first fully reliable data set on criminal victimization in America in a given calendar year. The product of BJS's outstanding 10-year effort to perfect its National Crime Victimization Survey (NCVS), the data revealed that in 1993 Americans suffered some 43.6 million criminal victimizations, 11 million of them violent crimes. Thus, fully a quarter of all crimes committed in America in 1993 were violent crimes.

Given that American citizens are now suffering well over 10 million violent crimes each year, how many predators really do go to prison for violent crimes, how long do they actually remain behind bars, and what is their complete criminal profile?

In 1992 about 3.3 million violent crimes were reported to the police. About 641,000 led to arrests, barely 165,000 to convictions (over 90 percent of them the result of plea bargains), and only 100,000 or so to prison sentences, which on average ended before the convict had served even half his time behind bars. Indeed BJS data show that fully 60 percent of convicted criminals with one violent felony conviction offense, 45 percent with two felony conviction offenses, and 41 percent with three felony conviction offenses are not sentenced to prison. Even those convicted of homicide and released from prison in 1992 had served, on average, only 5.9 years on sentences of 12.4 years.

And of the 4.9 million persons under correctional supervision in America in 1993, about 72 percent were not incarcerated. Between 1980 and 1992 the nation's incarceration rate per 100,000 residents increased from 139 to 344. But over the same period the number of persons sent to prison per 1,000 crimes increased from 128 to only 148.

Likewise, from 1980 to 1993 the nation's prison population increased by 184 percent but its parole population increased by 205 percent. A recent study by Professor Joan Petersilia of U.C. at Irvine, formerly research director of RAND's criminal justice program, found that in 1991 of those persons convicted of a violent crime and presently under correctional supervision, 372,000 were in prison while nearly 600,000 were on probation or parole.

Revolving-door justice in corrections begins with revolving-door justice at the time of arrest. In 1992, 63 percent of the 51,000 felony defendants in the nation's 75 largest counties were released before trial. Among the released defendants, 27 percent had one or more prior felony convictions. About a third of those released were rearrested on a new charge, failed to appear in court as scheduled, or committed some other violation that resulted in the revocation of their pretrial release.

Within three years of sentencing, nearly half of all probationers are convicted of a new crime or abscond. Among probationers with new felony arrests, 54 percent are arrested once, 24 percent are arrested twice, and 22 percent are arrested three times or more.

The popular belief that the nation's 4 million community-based convicted criminals can get away with murder is true both figuratively and literally.

As a recent article in *Science* by Dr. Patrick Langan revealed, about 90 percent of probationers are required to do one or more things as a condition of their community-based status—pay restitution to victims, stay under house arrest, perform community service, participate in substance abuse counseling, and so on. But about half of them never comply with the terms of their sentences, and only a fifth of the violators ever go to jail for failure to comply.

Similarly, over 90 percent of all convicted criminals who do go to prison are paroled after serving only 35 to 40 percent of their sentenced time behind bars. Nearly a third of parolees who were in prison for a violent crime, and nearly a fifth who were in prison for a property crime, are rearrested within three years for a violent crime.

Between 1977 and 1993 about a third of a million Americans were murdered. Over the same period, however, 225 persons were executed for murder while 1,789 persons convicted of murder had their death sentence lifted as a result of commutations, higher court decisions, or other reasons.

At the end of 1993, some 2,716 persons were on death row. Available criminal history records reveal that 68 percent had a history of felony convictions, including 9 percent with at least one previous homicide conviction. Moreover, among death row inmates whose legal status at the time of the capital offense was reported, 42 percent were "in custody" at the time they murdered. About half of them were on parole. The other half were on pretrial release, probation, or had escaped from prison.

In many jurisdictions, about a third of those convicted of murder over the last many years were "in custody" at the time they did the murder or murders for which they were convicted. For example, between 1990 and 1993, Virginia convicted 1,411 persons of murder, 33.5 percent of whom had an active legal status at the time they did the crime. More broadly, since 1986 in Virginia, over half of all murders, 76 percent of all aggravated assaults, and 81 percent of all robberies have been the work of repeat offenders. The data on other states are much the same. For example, between 1987 and 1991 some 127,000 prisoners were released early from Florida's prisons. Within a few years of their parole, they committed over 15,000 violent and property crimes, including 346 murders.

Indeed, about 12 percent of all persons arrested for all violent crimes are out on pretrial release for a previous charge, 7 percent are on parole, and 16 percent are on probation. Thus, about a third of all violent crime is committed by persons who are technically "in custody" when they find their latest victims.

In sum, we have reached the point in this country where the criminal penalties for crime in general, and for violent crime in particular, are neither swift, nor certain, nor severe, and where more is invested in finding out how many convicted sex offenders get what type of ineffective treatment behind bars than in how many rape victims, assault victims, and murder victims could be spared by ending or at least pumping the brakes on revolving-door policies and practices.

And yet, despite all the data I've just summarized, despite the mountains more that document the same revolving-door reality, and despite the public's justifiable outrage, one continues to hear and see reported as fact the fatally false notion that most prisoners are "mere" drug offenders, "technical" parole violators, and other unfortunate souls who did little criminal harm to society when they were free, and would do no harm to society if they were released from prison tomorrow morning.

Such anti-incarceration notions are errant nonsense at best, and do not merit the academic, media, judicial, and legislative attention that they continue against all reason and morality to receive.

Based on a scientific survey representing 711,000 state prisoners in 1991, BJS found that fully 94 percent *of state prisoners were violent or repeat criminals:* 49 percent were serving time for a violent crime, 62 percent had been convicted of one or more violent crimes in the past, and all but 6 percent had a previous sentence to probation or incarceration. Nearly a quarter of violent prisoners had victimized more than one person, and 20 percent had victimized a minor.

Studies I have done with Harvard economist Anne Piehl and published in *The Brookings Review* document that, in the year prior to their incarceration, state prisoners commit an average of a dozen serious crimes, *excluding all drug crimes.* Likewise, a recent study by Dr. Steven Levitt of the National Bureau of Economic Research reported that incarcerating each prisoner reduces the number of crimes by approximately 13 a year. And a recent analysis published in the *Journal of Quantitative Criminology*—not exactly beach reading, but quite relevant here—suggests that prisoners commit between 17 and 21 index crimes a year when on the loose.

By the same token, a recent study of "mere" federal drug-law violators revealed that the average quantity of drugs involved in their cases was 183 pounds for cocaine traffickers and 3.5 tons for marijuana. In 1991, only 2 percent of those admitted to federal prisons were convicted of simple drug possession. In the states, most drug-law violators, like most prisoners generally, are recidivists who have done a mix of property and other crimes.

Likewise, a recent study by Professor Petersilia examined the oft-repeated claim that the growth in California's prison population has been driven by the return to prison of "technical" parole violators who had done no more than failed to phone their parole officer or failed a urine test. She found that in 1991, 55 percent of the 84,194 persons admitted to California prisons were indeed parole violators. But only 3,116 of them—3.7 percent of total prison admissions—were technical parole violators. The other 42,834 of them—51 percent of total admissions, 96 percent of all parole violator admissions—were returned to prison because they had committed and been convicted of thousands upon thousands of new crimes, including 255 newly-convicted of murder.

In sum, the Pope is Catholic, frogs do not have wings, and America has a world-class problem of revolving-door justice.

COURTS AND CRIMINALS

But why? Why does this problem persist against all public concern, all evidence, and all laws intended to bring it under control? For example, in the 1970's and 80's many states passed wave upon wave of mandatory sentencing and truth-in-sentencing-style reforms. Yet by 1988, most prisoners still served a third or less of their time in confinement, and violent offenders were released after serving 43 percent of their time behind bars. By 1992, that number had moved in the right direction—up!—but only to 48 percent of time sentenced, time served. Why?

A huge part of the answer concerns the role that activist judges, mainly but not exclusively at the federal level, have come to play in America's criminal-justice system. Earlier this year, a Florida felon who had 13 previous convictions for robberies, burglaries, theft and drug crimes was indicted for killing an aspiring major-league pitcher and father on a West Palm beach street. Because of a judicial order to relieve "overcrowding" in Florida's prisons, the felon was on his fourth so-called conditional release when he was booked for the cold-blooded murder.

Since the first filing of prison overcrowding litigation on the grounds of cruel and unusual punishment in 1965, similar lawsuits have been brought in at least 47 states. Twenty-five years later, 1,207 state correctional facilities were under court order or consent decree, 264 of them ordered to limit their populations, and hundreds of others under specific orders governing staffing, food services, recreation, counseling programs, and other matters. In its own January 1993 prison project "status report," the ACLU trumpeted the overwhelming success of prisoner-plantiffs in 64 out of 70 major overcrowding cases. By late 1994 some 39 states and 300 of the nation's largest jails operated under some form of federal court direction. Indeed, the entire prison system was under court orders in nine states, and overcrowding litigation was pending in many more.

In 1990 I edited a book entitled *Courts, Corrections, and the Constitution* (Oxford University Press), which examined the impact of court intervention on prisons and jails. I believed then, and I believe now, that some instances of court intervention

are both constitutionally required and morally imperative. Most federal judges act responsibly to balance public safety, prisoners' rights, and other important public values.

But in far, far too many cases over the last three decades, federal judges have issued reckless orders that unduly jeopardized public safety and imposed great human and financial costs on citizens.

In December of 1994, the National District Attorneys Association (NDAA) passed a resolution that took dead aim at the undue influence exercised by judges who impose prison caps that invite released criminals to do murder and mayhem on the streets. The NDAA resolved that "federal court orders in prison litigation often have severe adverse effects on public safety, law enforcement and local criminal justice systems." Last February, the House strengthened relevant provisions of the 1994 federal crime bill by adopting Title III of the Violent Criminal Incarceration Act.

The Stop Turning Out Prisoners or STOP provision cuts to the heart of what's wrong here by making prison caps a remedy of last resort. In essence, STOP would stop federal judges from issuing sweeping orders, as they do now, and releasing dangerous criminals without ruling on constitutional claims or holding a trial on the allegations.

Those who opposed the kindred provision of the 1994 crime bill, and who are rallying now to stop STOP, would like us to accept the entirely disingenuous argument that the judges in question aren't imposing anything on anyone. They attempt to hide behind the fact that many such court interventions occur via so-called consent decrees, which are signed by mayors or other duly-elected public officials.

But the process by which activist federal judges have gained control of substantial portions of the nation's justice system is hardly the disinterested, thoroughly apolitical, arms-length, judicially-tempered process conjured up by the anti-STOP coalition. *Government by federal consent decree is not government with the consent of the governed.* Anyone who doubts this should take a look at recent books and articles on the subject, most pointedly the essay in the Summer 1995 issue of *Policy Review* by Philadelphia Assistant District Attorney Sarah Vandenbraak.

Better still, they should read *Federalist* Paper No. 78, wherein Alexander Hamilton tried to assuage the fears of those early Americans who worried about an imperial federal judiciary. The judiciary, promised Hamilton, would have "no influence over either the sword or the purse," and could "take no active resolution whatsoever." If Hamilton could return to Philadelphia today and talk to Mayor Rendell, District Attorney Abraham, or other city officials who for years have been battling the jail cap imposed by Federal District Court Judge Norma Shapiro, he would have to concede that the Anti-Federalists were only too right to worry. Likewise, Senator Hutchison and others who have witnessed Federal District Court Judge William Justice's control of the Texas prison system know that judges in these cases have gone way beyond remedying specific, documentable violations and exercised enormous influence over both prison populations and public expenditures. In Texas, since 1980 the prison population has about doubled, but inflation-adjusted per prisoner spending has increased ten-fold. As a result of court orders and consent decrees," in many states today half or more of every prison dollar goes to prisoner services, amenities, and things other than security basics.

The anti-STOP coalition would like nothing better than to have this Congress focus on side issues and get lost in empty legalisms. And from prison crowding to parole, the anti-STOP coalition would like this Congress to believe that the plural of anecdote is data. But it is not. The empirical evidence on the relationship between prison population densities and levels of violence and other problems behind bars is ambiguous or non-existent. To cite just four examples:

1. A 1986 BJS study of over 180,000 housing units at 694 state prisons found that the most crowded prisons had a rate of homicide lower than that of less crowded prisons, and concluded that there was no clear evidence that crowding levels were directly related to the incidence of homicide, assault, or major disorders. (C. Innes, Population Density in State Prisons (BJS, December 1986)
2. A 1989 survey of the empirical literature on prison crowding concluded that, "despite familiar claims that crowded prisons have produced dramatic increases in prison violence, illness, and hostility, modern research has failed to establish any conclusive link between current prison spatial and social densities and these problems." (J. Bleich, The Politics of Prison Crowding, CA Law Review, 79, 1989)
3. A 1990 review of the empirical literature on crowding and other "pains of imprisonment"—produced, incidentally, by scholars whose other work some STOP opponents have cited in support of prisoner rehabilitation programs—flatly challenged "the validity of the view that imprisonment is universally painful," and added that from "a physical health standpoint, inmates appear more healthy than their community counterparts." (J. Bonta and P. Genreau, Reexamining the Cruel and Unusual Punishment of Prison Life, Law and Human Behavior, 14, 1990)
4. An exhaustive 1994 review of the empirical literature on crowding, one that revised the author's own much-cited 1985 research on the subject, concluded plainly as follows: "Despite the prevailing sentiments about the harmful effects of crowding, there is little consistent evidence supporting the contention that short- or long-term impairment of inmates is attributable to prison density." (G. Gaes, Prison Crowding Reexamined, The Prison Journal, 74, September 1994).

Such inmate housing practices as double-celling and open-bay dormitories are neither constitutionally impermissible nor automatically dangerous to institutional order and well-being. Institutional leadership and management are among the crucial intervening variables that determine how, if at all, crowding affects conditions. But too many judges have totally ignored the empirical evidence and used false, unproven, and unprovable arguments about crowding to justify sweeping interventions.

CONGRESS IS CONSTITUTIONALLY RESPONSIBLE

In conclusion, the rise of judicial intervention has had precisely the adverse public safety and other consequences detailed by the NDAA, lamented by legions of local police, and testified to by countless crime victims.

I am not a lawyer, and I do not want or pretend to be. Nor do I specialize in constitutional theory or such topics as consent decree draftsmanship or prisoners' rights. But I fail to see how STOP would prevent any real violation of federal law or any unconstitutional deprivation suffered by a particular prisoner in a particular place at a particular time from being addressed as necessary by federal judges.

I will readily concede, however, that like most Americans I place victims' rights ahead of prisoners' rights, and public safety concerns ahead of legal abstractions. I remain, by turns, amazed and appalled at how so seemingly simple and straightforward an exercise of democratic will—anti-crime laws passed by duly-elected officials—can be weakened or gutted time and again by irresponsible judges and a well-organized and influential band of policy elites who dismiss public concerns about revolving-door justice as reactionary.

But as I have attempted to show, the public's concerns are rational, not reactionary. This debate is not about "get-tough" politics. It's not about "judge-bashing." It's about the moral and constitutional responsibility of Congress to respond to the will of a persistent popular majority, and to check and balance federal courts that trifle with public safety and drain the public purse.

As the late great Princeton constitutional law scholar Edward Corwin argued, the Congress and the Congress alone vests judicial power in "such inferior Courts" as it "may from time to time ordain and establish." The explicit language of Article III, Section 2 of the Constitution furnishes Congress with more than enough authority to enact STOP and STOP-like provisions into federal law.

But while Congress should not duck its responsibility to act, neither can it act alone.

At a White House dinner I recently attended, President Clinton participated in a three-hour discussion of crime and violence in America. It's clear that both President Clinton and many leaders of both parties in Congress care deeply about America's crime problem, and are concerned about the demographic crime bombs that are set to explode in only a few years.

What remains unclear, however, is whether our representative political institutions, beginning with this Congress, can work to protect decent, law-abiding citizens from violent and repeat felons.

In 1993 and 1994, only one public institution received lower ratings from the public than did the Congress itself, namely, the criminal-justice system. By passing STOP without any major changes, and by passing other measures that help to lock the revolving-door, this Congress can begin to save innocent lives and rehabilitate public trust in government.

I thank you for inviting me to testify.

Senator ABRAHAM. Thank you very much.

District Attorney Abraham, I have just been informed that another vote has started, and in that there are no other members here, what I would like to ask somebody with the same name as me is to give me a few minutes to run over, cast what will be 2 votes, and then we will start again, because I think every panelist

deserves the opportunity to address at least one member of this committee and convey their testimony.

Ms. ABRAHAM. My pleasure.

Senator ABRAHAM. So I will be back soon and the hearing will stand in recess for a few minutes. Thank you.

[Recess.]

Senator ABRAHAM. The committee will come to order, please. For the benefit of the panelists and the audience, we have 2 votes left and we will continue now with District Attorney Abraham's testimony. I will probably have to leave at the end of it and cast those final 2 votes, but I think we will be able to get those 2 done a little quicker.

So at this point, if you would continue.

STATEMENT OF LYNNE ABRAHAM

Ms. ABRAHAM. Thank you, Mr. Chairman and Senator Biden. My name is Lynne Abraham. I am District Attorney of Philadelphia, and in addition to appearing in my own right, I am appearing also on behalf of the National District Attorneys Association.

I would appreciate it if the Chair would move into the record a letter sent to the Honorable Orrin Hatch from Michael Barnes, now the new President of the NDAA, and make that a part of the record.

[The letter referred to follows:]

NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
OFFICE OF THE PRESIDENT,
Alexandria, VA, July 25, 1995.

The Hon. ORRIN G. HATCH,
Chairman, Senate Committee on the Judiciary,
Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN HATCH: As the new President of the National District Attorneys Association I want to express our appreciation for your continual efforts in exploring new and enhanced methods of assisting local law enforcement in fighting crime and protecting the citizens of our communities. The work you are embarking upon, in amending the Violent Crime Control and Law Enforcement Act of 1994, can only refocus public interest in the abilities, and needs, of local communities in fighting crime. In reviewing what we believe needs to be done to remove obstacles to our efforts, one area for Congressional effort is readily apparent.

The almost continual intervention and interference by federal courts in prison litigation has had an adverse effect on our ability to protect our communities. Court orders stemming from the unwarranted intrusion by federal judges has resulted in the release of dangerous criminals back to our city streets; has resulted in the squandering of scarce resources to meet the whims of self-designated monitors; and has usurped the authority and responsibilities of locally elected officials.

Our Association strenuously urges the Congress to adopt legislation that would establish uniform provisions limiting federal court orders and consent decrees that affect local prisons and jail facilities; that would limit any permissible injunctive or equitable relief to those that are least intrusive and burdensome to local government and with the weight to doubt being given to the needs of public safety; that would give local prosecutors and other law enforcement officials standing to challenge the intervention of federal courts; that would provide for the modification or vacation of court orders where unconstitutional conditions have been corrected or where prior findings are no longer valid; and provide measures to protect prisoners rights to obtain prompt determinations of legitimate challenges to the constitutionality of prison conditions.

As a career prosecutor, and speaking on behalf of my peers from across the country, there is nothing more frustrating to a local law enforcement official then to end a lengthy criminal investigation and criminal trial only to see a convicted felon essentially walk free because of judicial overreaching. Our criminal justice system is a mockery when prisoners rights and comforts imperil the law-abiding citizen

The members of the National District Attorneys Association and I look forward to continuing to work with you in our mutual efforts to make this country a safe and decent place to live and raise our families.

Sincerely,

MICHAEL P. BARNES,
PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
Prosecuting Attorney, South Bend, IN.

Ms. ABRAHAM. Since I am going to digress from the previous notes that I submitted on behalf of my testimony, I would ask that the Chair also admit my testimony in whole so that I may speak to some of the issues that perhaps some of the other speakers have not touched.

I also wanted to thank publicly former Attorney General Bill Barr who, during his tenure, very graciously and wholeheartedly entered into Philadelphia's problems with the prison cap and was of significant assistance to us.

I think that all of the people who have appeared before me have talked about several of the things that are of interest to them, and I thought I would put a little more human face on it. This past Saturday, I took 25 of my 1st-year assistant district attorneys across the city to see how what they are doing impacts upon Philadelphia, and also to get them familiar with what they are going to deal with as assistant district attorneys.

One of the places that we visited was a shooting gallery and crack house in a drug-infested, crime-ridden neighborhood where the house that we entered was without any kind of heat, light, or electricity. It was the flop house for 30 or 40 drug addicts. It is filled with bugs and garbage and lice, some of which were carried off on my assistants. We met 4 drug addicts there, one of whom was very close to needing to be carried to the hospital because he was losing his leg because of sepsis caused by drug injections.

I couldn't help but think that if any or all of the people that we saw in that house were arrested, two things would happen. Number one, they would join the prison suit complaining about the inhumane conditions of the prison, even though they lived in such conditions. The second thing is that they would be released right back to that house to live that night because they would be part of the prison cap problem.

Since I have become district attorney in Philadelphia, I have been waging a very hard campaign to rid Philadelphia, and indeed with the STOP Act I hope every jurisdiction, of the kinds or prison caps that we have been suffering. In 1970 in this country, there were no prisons or jails under sweeping court orders, but by 1990, 508 municipalities and over 1,200 State prisons were subject to court orders or consent decrees, many of which contain prison population caps.

In our case, in particular, the Federal judge sitting on our prison cap issue and our consent decrees has never made a finding of a constitutional violation. There has never been a trial on the issue. There has been nothing determined that would violate any constitutional right, but what has happened is that at least 600 prisoners a week are released from our prisons. They don't have to post bail. They frequently don't appear.

As a matter of fact, as a running feature in the Philadelphia Daily News there is a series called "Back on the Street," and what

it does every week is it features a person, and sometimes more than one person, who has been released under the cap. It lists the 500 or 600 people who have been released, and it gives you the name of the person and it tells you how many cases this person has failed to appear from before.

We have people with 6, 7, and 8 cases open; 11, 12, 15, and sometimes 20 people who fit into this category of having 10, 11, and 12 failures to appear. One, in particular—a defendant has 8 open felony cases, including robbery, burglary, and criminal trespass. He had 7 prior failures to appear last year. He is a fugitive from other States. He has 5 Social Security numbers, 5 addresses, and 6 different names. This man will never show up in our court. The only way he will show up is if he is arrested and incarcerated. This group of people is similar to the many, many hundreds who have gone through our prison system and been released.

In addition to the wholesale release of prisoners, the issue of how you can be released is really quite simple. Instead of considering the defendant's failure to appear, what his charge is, his history of criminal conduct, the only thing that we worry about is a charge-based system. In other words, the only question that the bail commissioner asks is what is this defendant charged with today, not any of those other factors that are traditionally considered by judges.

If the defendant is charged with what the Federal judge has deemed to be a nonviolent crime, that person cannot be held for bail or go to jail, no matter how many times he has failed to appear. Some of these so-called nonviolent offenses are stalking, carjacking, robbery, burglary, drug-dealing, vehicular homicide, manslaughter, terrorism threats, and gun-dealing. A person cannot be detained pretrial, no matter how many time he has previously failed to appear, and in this absurd situation drug dealers who carry loaded Uzis on a street corner cannot and will not be sent to prison under our present prison cap because carrying a loaded Uzi by a drug dealer is not considered a violent offense. Therefore, we have that issue.

In the 18-month period that we tracked, and of the thousands of defendants who were released onto the street because of the prison cap, some of these people have been arrested for a variety of crimes, including 79 murders. One of the people who has been with us in this fight throughout this issue on the STOP bill is Patrick Boyle, who is here today right in the front row, in the tan suit. Mr. Boyle is the father of young Danny Boyle, a 21-year-old police officer who stopped a defendant who had been in a stolen car who was released under the prison cap. The defendant shot his son and killed him right on the street and right through the stolen car window because he did not want to be arrested and he did not want to go back to prison.

This is not the only case of that kind. In Atlanta just a few months ago, a person released under a prison cap in Atlanta shot and killed an Atlanta Braves replacement ball player during spring training because he was released from the Atlanta prison because of the prison cap even though he was himself a career criminal. In addition to the 79 murders of people who are released under the cap, we had another almost 1,000 robbers, almost 2,500 new drug-

dealing charges, almost 750 burglaries, 3,000 thefts, 90 rapes, and several thousand assaults.

The STOP Act, it seems to me, Mr. Chairman and members of the committee, is an important Act for our citizenry. The STOP Act does several things. It properly prevents consent decrees, which are nothing more than hammers imposed upon us by unfortunately too frequently activist Federal judges who intrude themselves unnecessarily, and sometimes, unfortunately, in perpetuity, into State matters.

Full compliance with these mandates is impossible. The decrees underestimate the sheer magnitude of the problem. They don't anticipate changing conditions. Political support is certainly lacking and, of course, it binds one administration after another, each one pointing the finger at the previous administration that it wasn't his or her fault, that the cap or consent decree was there before. Of course, the cost not only in monetary terms, but in human terms is absolutely astronomical.

It seems to me that STOP is an appropriate way to address the issues. There may be some tinkering with some of the language, as suggested by Attorney General Barr, that we might wish to look at, but STOP is not a violation of the separation of powers since we can change in Congress the substantive underpinnings of how the courts will adjudicate matters because the laws will change. It certainly won't deny access to the courts, but it certainly does limit remedies and the length of time for those remedies.

Since my light is red, I would be happy to answer any additional questions at such time as the Chair wishes to ask me, and I appreciate the opportunity to be here.

[The prepared statement of Ms. Abraham follows:]

PREPARED STATEMENT OF LYNNE ABRAHAM

Good Day, I am Lynne Abraham, the District Attorney of Philadelphia. I am also a member of the Board of Directors of the National District Attorneys Association. I am delighted that the Senate Judiciary Committee has invited me to speak today about prosecutors' concerns.

While Congress has before it a number of federal issues that are critically important to prosecutors, I would like to focus on the question of what the federal government can do to help states run their own criminal justice systems in order to ensure justice for both, for the victims of crime and those who commit crimes.

Over the last 25 years, we in law enforcement have seen a dramatic change in prisoner release practices. In 1970, there were no prisons or jails under sweeping court orders. By 1990, 508 municipalities and over 1,200 state prison were subject to court orders or consent decrees, many of which contained prison population caps. Unfortunately, the federal courts, often with the intention of improving prison conditions, have intruded unnecessarily into the state criminal justice systems and completely undercut their ability to dispense justice and protect the public.

A Justice Department study of 79,000 felony probationers found that 49 percent of them were rearrested for another felony within their state while on probation. Half of these arrests were for a violent crime or a drug crime. Another study shows that 35 percent of *all* persons arrested for violent crimes were, at the time of their arrest, on parole, probation or pre-trial release. All too often these chronic violent offenders are on the street because of pressure from the federal courts.

From the day I took office as District Attorney over four years ago, I have been trying to rid the City of Philadelphia of a prison cap that has gutted the Philadelphia criminal justice system and has convinced our residents that crime pays big-time. After inmates in our local prisons filed a lawsuit complaining about the prison conditions, a federal judge, who made no finding of any constitutional violation, began overseeing what has now become an eight-year-old program of wholesale re-

leases of up to 600 criminal defendants per week to keep the prison population down to what she considers an "appropriate level".

In this same federal lawsuit there has never even been a trial. In fact, a different federal judge recently found that the conditions in even Philadelphia's very oldest and most decrepit facility—Holmesburg Prison—were still constitutional. Unfortunately, the prior mayoral administration did not even put up a defense to this lawsuit—it simply folded its cards and agreed, under pressure from the federal judge, to enter two consent decrees providing for the ongoing release of huge numbers of inmates.

These two consent decrees mandate federally ordered releases of criminal defendants awaiting trial. Instead of individualized bail review, where Philadelphia judges would consider all of the factors relating to a defendant's dangerousness and risk of flight, we have a "charged-based" system for determining who may enter the prisons. In other words, the only question asked is "what is the defendant charged with today"? If the defendant is charged with what the federal judge calls "non-violent crimes", he cannot go to jail no matter how dangerous he is and no matter how obvious it is that he will flee and not show up for his trial. Some of these so-called non-violent offenses are stalking, carjacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terroristic threats and gun charges. A person cannot be detained pretrial *no matter how many times* he has failed to appear in court. In this absurd system a drug dealer carrying a loaded Uzi is deemed "non-violent". The defendant's prior convictions, his history of failing to appear for court, his mental health history, his lack of ties to the community, even if he is in the country illegally, and his drug or alcohol dependency are deemed completely irrelevant under these federal decrees.

Unfortunately, criminal defendants know the system and know that Philadelphia judges no longer have any power to compel a defendant to appear for his trial. The federal interference with our state bail system has been catastrophic:

- Before the federal prison cap began, Philadelphia had approximately 18,000 outstanding bench warrants (that is, arrest warrants issued when a defendant fails to show up for trial and becomes a fugitive). Now, we have almost 50,000 bench warrants and virtually no one out on the streets looking for these fugitives. Why bother—if arrested, they will all be released again to the streets because of the cap.
- In an eighteen month period, thousands of defendants who were on the street because of the prison cap have been arrested for new crimes, including 79 murders, 959 robberies, 2,215 drug dealing charges, 701 burglaries, 2,748 thefts, 90 rapes, and 1113 assaults.
- In 1993 and 1994, over *27,000 new bench warrants* for misdemeanor and felony charges were issued for defendants released under the prison cap. This represented 63 percent of all new bench warrants issued in 1993 and 74 percent of all new bench warrants issued for the first six months of 1994.
- The rate of failure to appear in court is higher for prison cap defendants than for defendants released under our traditional state court bail programs. A 1992 study established the following failure to appear rates: drug dealing 76 percent; burglary 74 percent; theft 69 percent. By contrast, the failure to appear rate for aggravated assault—a crime for which defendants cannot be released under the prison cap—was just 3 percent. The fugitive rate nationally for defendants charged with drug dealing is 26 percent in a year. In Philadelphia, however, our FTA rate of 76 percent is three times the national rate.

But these statistics do not reflect the incalculable losses to our community caused by criminals confident in their belief that the criminal justice system is powerless to stop them. The murder of even one citizen is too high a price for these ill-conceived consent decrees but we have seen over 100 persons in Philadelphia killed by criminals set free by the prison cap. Nationally, with well over 3 million probationers and parolees, many states will not seek to return violators to prison because of the impact parole or probation revocations have on the prison population. Even when parole or probation violators are sent back to prison, they are often released again to comply with a federally-ordered prison cap—a real Catch 22.

Unfortunately, the prison caps also cause needless financial losses to our citizens and businesses. Businesses suffer thefts, losses not covered by insurance deductibles, increased security and surveillance costs, and increased insurance premiums. How can we hope to attract retail businesses to urban areas when store owners know that professional thieves and burglars have a "get-out-of-jail-free card"? Prison caps are not simply a law enforcement issue—they are, in turn, inextricably tied to the financial viability of a city. Fear of crime and the belief that law

enforcement is ineffective are the synergies behind citizens arming themselves in record numbers. The notion is widespread, firmly fixed and accurate that federally-ordered prison caps create nothing more than recycling programs for criminals.

Philadelphia is, by most accounts, an extremely attractive terminus in the drug trade. The Philadelphia International Airport is now a favored location to send out-of-state couriers. Under the prison cap, we cannot hold a drug smuggler in prison unless he is caught with more than 50 pounds of marijuana or more than 50 grams of cocaine. So the drug cartels and their minions need not even have to suffer the inconvenience of putting up any money to bail out the courier—none is required.

One case involving a drug dealer out of jail because of the prison cap. Undercover detectives from Montgomery County, which is adjacent to Philadelphia, arranged a drug deal in a parking lot along the road that forms the border between Philadelphia and neighboring Montgomery County. Before the deal took place, the defendant tried repeatedly to move the deal to the Philadelphia side of the street because, the defendant explained to the undercover detectives, he could go to jail in Montgomery County but not in Philadelphia. The defendant nevertheless completed the deal on the Montgomery County side of the street and, yes, he did go to jail out there. He would not if he had completed his drug deal on the Philadelphia side of the street.

While the prison cap has encouraged defendants to commit more crimes and to thumb their noses at our court system, one must keep in mind that individualized bail review—as opposed to the cap's "charge-based" system—is essential for reducing the overall costs to the criminal justice system.

The consent decrees in this case raise extremely disturbing questions about whether any federal court ought to intrude so unnecessarily into one of the most basic functions of state government—its criminal justice system. The federal judge, of whom I am speaking, has controlled 224 million dollars in bond funds for the construction of a new state prison and the new state courthouse, even though there is not a single prison bed in the courthouse. The federal judge even insisted that the Bond Indenture contain language requiring her approval of routine construction matters. Every single construction change order has required federal court approval. Recently, for example, the Philadelphia court system wanted to expand one room in the courthouse for court interpreters. This change, if done during the construction phase, would have cost $5,000. But the federal judge did not like the proposal, so she rejected it. This change will now be completed post-construction—at a cost to Philadelphia taxpayers of $30,000.

The federal court has micro-managed the Philadelphia criminal justice agencies to a fare-thee-well—there have been debates over the placement of flag poles on our prisons, whether the state judges' new chairs should be scotch-guarded, the candle watt power of the light fixtures, and the choice of art work at the prisons. Even if some of these issues are important, the fundamental question is who should be in charge of the debate—the federal judge or state officials?

This raises a most disturbing aspect of federal consent decrees in prison conditions lawsuits. With a consent decree, one state political administration can arrogate unto itself powers it does not have under state law. It can make political decisions, embody them in the federal court order, and then insulate that policy from change by the next duly elected mayor. Indeed, as it stands now, prison caps can be—and have been—forced upon states for as long as twenty years, with no power vested in the state to be relieved of the burdensome weight of the decrees.

We, the current mayor, other law enforcement officials and I are attempting to rid ourselves of the prison cap, even though I have no standing to challenge any of the issues I have spoken about today. But we cannot take the naive view that this step alone will solve the problem. Elimination of the prison cap is only the most immediate action that can be taken to increase the effectiveness of law enforcement. Law enforcement in a large urban area is tough enough; federally-enforced prison caps undermine our efforts. Restricting federal court interference with individualized bail review, the state judges' power to punish those defendants who willfully refuse to appear for their court hearings or who violate probation or parole, is an essential step in returning to our state criminal justice system the ability to dispense justice.

In Philadelphia, we are committed to devoting adequate resources to ensure appropriate prison conditions for inmates and safety for our correctional officers. Humane conditions are essential not only because they prevent a federal takeover of our prisons but, more importantly, because we are morally required to regard the rights of all members of our society, even those who break the law. But we must also recognize that resources devoted for prisoners come at the expense of other programs essential for our law-abiding citizens. None of us has the luxury of housing prisoners in conditions that far exceed the standards of humane treatment when we

do so at the cost of depriving needy, law-abiding citizens of essential and fundamental government services.

In Philadelphia, a new 2,000 bed prison is about to open. Because Holmesburg Prison, our oldest facility, will be closing, we will have a net gain of only 400 prison beds. These beds, which will be filled in a matter of days, are too costly to be squandered by rigid adherence to outdated and ill-advised consent decrees that preclude the full use of available prison space.

For these reasons, the National District Attorneys Association, a bi-partisan organization of prosecutors from across the country, has unanimously endorsed a resolution recognizing the severe, adverse effects of federal prison conditions litigation and strongly urging Congress to strengthen the provisions of last year's Crime Bill limiting remedies in prison litigation. On February 10th of this year, the House passed H.R. 667, which included provisions that would accomplish the major goals endorsed by the National District Attorneys Association. Senator Hutchison's Senate Bill 400 contains these same provisions. I strongly urge the Judiciary committee to include in the 1995 Crime Bill these provisions establishing reasonable and necessary limits on prison court orders.

I genuinely appreciate the invitation to speak here today. I entreat you to help all of us in law enforcement with this overwhelming problem. With Congress' help we may finally have an effective criminal justice system in Philadelphia that our citizens have the right to expect but long ago gave up hope of ever seeing.

Thank you.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

RESOLUTION

WHEREAS, federal court orders in prison litigation often have severe adverse affects on local criminal justice systems because of the premature release of dangerous pretrial detainees or sentenced prisoners;

WHEREAS, such federal court orders are often entered pursuant to a consent decree in the absence of a finding that detainees or prisoners have been subjected to unconstitutional conditions:

WHEREAS, such federal court orders often result in substantial federal court supervision of local and state prisons and jails exceeding that necessary to ensure constitutional prison conditions;

WHEREAS, such federal supervision often results in an inordinate percentage of state and local funds being diverted to improve prison conditions at the expense of law enforcement programs designed to protect the public:

WHEREAS, federal injunctive relief often remains in effect even after prison conditions clearly meet constitutional standards:

WHEREAS, such supervision often results from federal consent decrees whereby one political administration attempts to bind future political administrations to policies concerning prison and criminal justice administration:

WHEREAS, such consent decrees are contrary to one of the most fundamental principles of our nation that the electorate is free to compel political changes when it disagrees with the policies of elected officials:

WHEREAS, on September 13, 1994 President Clinton signed into law the Violent Crime Control and Law enforcement Act of 1994 (hereinafter the 1994 Crime Bill):

WHEREAS, Section 20409 of the 1994 Crime Bill amended Title 18 of the United States Code by adding a new section. §3626 entitled "Appropriate remedies with respect to prison crowding" (hereinafter "Prison Remedies Provision "):

WHEREAS the Prison Remedies Provision of the 1994 Crime Bill provides (1) that a federal court shall not hold that prison crowding causes an Eighth Amendment violation unless a particular identified inmate proves that he has been subjected to cruel and unusual punishment: (2) that a federal court shall not order a prison population ceiling unless it is necessary to remedy a constitutional violation: and (3) that state and local governments are entitled to periodic reopenings of outstanding prison orders and consent decrees:

WHEREAS, attorneys opposing local criminal justice officials have attempted to prevent enforcement of this provision on a wide variety of grounds, seizing upon alleged ambiguities in the language of the Prison Remedies Provision to assert that this legislation violates the separation of powers doctrine, does not apply to local detention facilities, does not apply to consent decrees entered prior to its enactment, does not require the reopening of consent decrees, and, at most, codifies existing law;

WHEREAS, the Congressional sponsors of the Prison Remedies Provision clearly intended that this legislation would place substantial restrictions on a federal court's ability to enter excessive injunctive relief in prison cases, intended that it apply to local detention facilities, intended that it apply to all outstanding consent decrees in prison cases, and intended for local jurisdictions to have the immediate right to vacate prison cap orders in cases where there had been no finding of a constitutional violation:

WHEREAS, at least one federal judge has expressed the opinion that the Prison Crowding Remedies provision should not be interpreted as the Congressional Sponsors intended it to be; and

WHEREAS, there has been a historical reluctance of the federal courts to disturb federal injunctive relief in institutional prison litigation or modify federal injunctive relief on an expeditious basis.

BE IT NOW RESOLVED, that the National District Attorneys Association urges Congress to ensure comprehensive relief for local and state governments who have been adversely affected by federal court orders entered in institutional prison litigation. The National District Attorneys Association urges that this comprehensive legislation accomplish the following goals:

(1) establish a uniform provision limiting federal court orders and consent decrees affecting all state and local prisons or jails including those facilities that house pretrial detainees, sentenced prisoners, or a combination of prisoners:
(2) establish these limitations in those federal proceedings, such as civil actions filed pursuant to 42 U.S.C. §1983, where Congress clearly retains the right to limit federal remedies without raising an arguable separation of powers claim:
(3) limit the federal courts injunctive and equitable remedies to those that are the least intrusive means to remedy a constitutional violation, with substantial weight being given to any adverse affect on the public safety or the operation of a state or local criminal justice system:
(4) provide for the prompt modification or vacation of orders where the inmates are not currently subject to unconstitutional conditions, or where the prior findings or orders for injunctive relief are no longer current:
(5) permit law enforcement officials whose duties may be adversely affected by prison population reduction measures to have standing to challenge such measures:
(6) establish time limits for court rulings on such motions: and
(7) protect prisoners rights to obtain prompt judicial determinations of legitimate challenges to the constitutionality of prison conditions and continued enforcement of any measure necessary to protect those rights.

BE IT FURTHER RESOLVED, that the attached proposed amendments to 18 U.S.C. §3626 would accomplish the foregoing goals endorsed this day by the National District Attorneys Association.

BE IT FURTHER RESOLVED, that the National District Attorneys Association strongly urges Congress to enact legislation in accordance with this Resolution.

Adopted by the Board of Directors, December 3, 1994 in Longboat Key, Florida.

Senator BIDEN. Mr. Chairman, the light has been red for 5 minutes, but I have never known you to stop for a red light, Lynne. It is good to have you here.

Ms. ABRAHAM. I learned at the feet of a master, Senator Biden, so thank you.

Senator BIDEN. I know you did. It is good to see you, Lynne. Thanks for being here.

Ms. ABRAHAM. My pleasure.

Senator ABRAHAM. Just to inform the panel, happily, one of the votes has now been voice-voted, so we only have one left. There are about 5 minutes left and I think perhaps, before we go ahead on the balance of the panel, it might be better for everybody if we recess temporarily, go vote, and then we can at that point have clear sailing.

Senator BIDEN. And then hopefully at that point have no more interruptions.

Senator ABRAHAM. Thank you all very much. We stand in recess again.

[Recess.]

Senator ABRAHAM. The committee will come to order again, and I thank witnesses and I thank the audience and the huge press corps that continues to join us over here on this vital topic for their indulgence. [Laughter.]

I think Senator Biden will be joining us. I passed him on the way coming up here, but we had had from the outset known that Attorney General Barr would have to leave at about 1 p.m., and I had at least one question that I wanted to ask you before you left and the panelists who have not yet testified have agreed to hold until we get through with any questions for him. Then I gather everybody else can stick around for a bit and we will go through the normal question format.

Mr. Barr, I would like to ask your opinion, having now witnessed both from inside the Justice Department as well as from a distance here the CRIPA statute and how it has come into play, how it interrelates with the normal rights that prisoners might have to bring lawsuits under any conditions. I would just like to get your view as to its efficacy and worth at this point, if you think we need it.

Mr. BARR. I think, on balance, Senator, we do need a statute like CRIPA. I think it is important, however, that it be accompanied with the kinds of guidelines that are being discussed here so that we don't have Federal agencies like the Department using it really as a vehicle for taking over the functions of State officials, and also some rigor in determining when a Federal constitutional violation really does exist. I think if we get some ground rules in that area, I still think it is an important protection for prisoners.

Senator ABRAHAM. Thank you.

Senator Biden, as I indicated, Mr. Barr has to leave at 1 p.m. and if you had questions for him, I thought maybe we would do that now.

Senator BIDEN. Well, I do, and I will be brief.

It is good to see you, General.

Mr. BARR. It is good to see you, sir.

Senator BIDEN. As I know you know, but others should know, too, I truly enjoyed working with you when you were Attorney General. You were one of the best I have ever worked with, and there have been a lot of Attorneys General since I have been here, and I mean that sincerely.

Mr. BARR. Thank you, sir.

Senator BIDEN. I have a number of questions. I will send a couple to you in writing. I won't overburden you. I know you are busy as can be, but let me ask you two constitutionally related questions, and if you don't have an answer off the top of your head, I would be delighted to have it in writing.

I am intrigued by this legislation. I think Lynne Abraham is the single best district attorney in the country. I mean, I really mean that. She prosecutes more cases in one year than the entire Federal system does in a year, and that is not to suggest that other big cities don't have similar caseloads. The fact that both of you are here supporting this gives me reason to take a much closer look at it, but I have a couple of questions. I have an open mind about it and I would be curious to know what your view is.

As I understand it, the STOP legislation terminates currently existing consent decrees; not just future consent decrees, but currently existing consent decrees. These are contracts between two parties, contracts between the Federal Government and the State or the locality. Is there any constitutional impediment, as has been suggested by U.S. District Court Judge Milton Schader to Senator Hatch? He says potential constitutional problems involving the impairment of contracts exist.

Do you see any potential constitutional problems protecting against government actions which impair the right to contract here? In fact, in some contexts, government action interfering with contracts could be construed as a taking under the takings clause. Do we have any of that problem, or is that an unreasonable concern or a concern that is so distant that it is not worth us spending much time thinking about?

Mr. BARR. Well, recognizing this is off the top of the head, as I said in my opening extemporaneous remarks, I do have some concerns over the provision of the STOP proposal that would terminate existing decrees almost automatically and retroactively, but that is really under the *Plaut* decision relating to the legislative power's ability to upset final judgments of courts.

Senator BIDEN. That was my second question. I have a similar concern on separation of powers.

Mr. BARR. I guess I haven't thought about the contract provision, although my view of a consent decree is that it is not a contract. It is a consent decree which implicates the article III power of the court. It has some attributes of a contract, but ultimately you are asking a Federal court to enforce it. That means there should be an underlying Federal case or controversy. So I think the right analysis is to look at the *Plaut* case and what burden that puts on retroactively upsetting a consent decree rather than the contracts clause.

My proposed solution to the *Plaut* problem would be to say that when these things are revisited on a 2-year basis, or what have you, a judge still must make a determination that there is an underlying violation still there because my view is once the Federal violation goes away, I don't care what the parties have agreed to. There is no longer a proper article III remedial function being performed by the court and I think the case should then be terminated.

Senator BIDEN. I have several more questions, but I know the General has to leave by 1 p.m. and I will refrain. Thanks an awful lot.

Mr. BARR. Thank you, Senator.

Senator ABRAHAM. Thank you very much for being here today. I appreciate it very much.

At this time, we will continue with the panel and their testimony, and it is Mr. Gadola's turn. Thank you for being here.

STATEMENT OF MICHAEL GADOLA

Mr. GADOLA. Thank you, Mr. Chairman. Mr. Chairman, I would ask that my written testimony be made a part of the record as well.

Senator ABRAHAM. Without objection.

Mr. GADOLA. Mr. Chairman, I appreciate this opportunity to convey the State of Michigan's perspective on the topic of prison reform. In my previous incarnation, I was deputy counsel for the governor in the State of Michigan and had some fair involvement with prison litigation in that capacity.

The Michigan perspective is necessarily colored by Michigan's experience, which is unfortunately not unique, with the Civil Rights of Institutionalized Persons Act, or CRIPA, as it is enforced by the Civil Rights Division of the U.S. Department of Justice. That experience began in 1982 when the Justice Department launched an investigation of the conditions in various Michigan prisons. This investigation culminated, or should I say led to, the Justice Department's simultaneously filing in 1984 a CRIPA action against the State and various State officials, an entry of a consent decree and an accompanying State plan for compliance that were designed to address the Civil Rights Division's myriad concerns about Michigan's penal institutions.

The consent decree and State plan permit the Civil Rights Division attorneys and the Federal district court in Michigan to delve into such constitutional enormities as whether food being served to prisoners in segregation is scraping the top of the meal slot when being delivered to whether food debris has adequately been cleaned from an electric can opener in a prison mess hall.

I brought with me a series of compliance reports that the State has prepared during the tortuous course of this litigation that outline the unbridled extent to which the Federal judicial and executive branches have delved into the minutest details of the administration of Michigan's prisons.

The bill of particulars that is the State plan for compliance and attendant court orders allow for a situation in which the State of Michigan advances the ball down the field to satisfy the demand of the moment, only to have the court and/or the Justice Department move the goal posts further away by an equal distance. The State thus negotiates with itself in its futile efforts to bring an end to this enormously costly litigation.

But my primary purpose in speaking to you today is not to delve into the minutia that is the *U.S.A.* v. *Michigan* consent decree. It is rather to ask that you think about what message the Michigan experience with CRIPA, the Civil Rights Division, and the Federal court sends to all States. To understand this, it is important that you understand where Michigan found itself in January of 1991 when my boss, John Engler, became governor of the State of Michigan.

The Federal district court had found Michigan in contempt of court for its failure to comply with the various requirements of the decree and had imposed $10,000-per-day fines on the State. The new administration's response to the state of affairs was to purge the contempt and to seek compliance with the terms of the decree in an honest effort to terminate the need for further litigation.

This approach met with initial success when the Justice Department, after conducting its own investigation of the conditions in Michigan's consent-decree institutions, concluded that Michigan had attained the objectives of the decree in the areas of medical

care, fire safety, sanitation, and others, with the exception of mental health.

In April of 1992, the parties stipulated to the dismissal of all consent decree issues, with the exception of mental health care. It appeared that Michigan's vigorous and expensive efforts at compliance had resulted in the hoped for outcome. The Federal district court, however, refused to dismiss the most onerous decree requirements. Michigan thus found itself in the anomalous situation of not being able to dismiss a lawsuit that the parties themselves agreed should be dismissed.

Michigan appealed the court's refusal to take the parties at their word, hoping against hope that the Justice Department would rally to the defense of the stipulation that it had entered into less than a year previous. In fact, not only did the Justice Department fail to support the stipulation on appeal, it filed a brief with the Sixth Circuit Court of Appeals supporting the district court's ability to refuse acceptance of its own stipulation with Michigan. Following this Justice Department flip-flop, the sixth circuit upheld the district court's ruling.

Allow me to share two further indignities that Michigan has suffered that demonstrate the counterproductive message that the Michigan experience sends to the States. In its effort to purge contempt in early 1991, the State entered into a stipulation that included, at the court's insistence, a requirement that the State operate mental health bed space equivalent to 3.2 percent of its prison population, with 1 percent of that total consisting of acute care beds.

To attain compliance with this and other consent decree requirements, the State converted a former prison facility into a 400-bed, state-of-the-art mental health hospital, at a cost of approximately $30 million. The State also instituted a new treatment regime and, in a revolutionary move, turned administration of its prison mental health program over to the State's Department of Mental Health.

Given current population projections, the 1-percent acute care requirement would force Michigan to fully staff approximately 400 acute care beds by the end of this year. The only problem with this requirement is that patient caseloads do not justify opening this number of beds. The current acute care caseload is below 300 patients, in part due to the State's success in treating inmates. The State's motion to modify this requirement were denied, and earlier this week the sixth circuit denied the State's motions for stay, which now forces the State to open and fully staff acute care beds for patients that do not exist.

The patent absurdity of this situation faces Michigan with a choice between defying a Federal court order or spending millions of scarce taxpayer dollars treating imaginary prisoners. I put it to you that the taxpayers of Michigan or any other State would demand that any elected policymaker who made such a decision be promptly examined by one of the newly hired psychiatrists and ensconced in one of the newly created beds. Again, Michigan's efforts at compliance have been met with an unrelenting refusal to give the State any credit for managing its own affairs in this arena.

What has been Michigan's latest reward in its continuing struggle to hit the moving target that is the *U.S.A.* v. *Michigan* consent

decree? It was announced to State officials in 1994 that the Civil Rights Division would be launching yet another CRIPA investigation, this time of the State's women's prisons. Thus far, I am happy to report the State has successfully resisted the Justice Department's heavy-handed efforts to pry its way into our facilities on the basis of generalized prisoner complaints. In fact, two Federal district judges in Michigan have denied the Civil Rights Division's efforts to tour these facilities prior to filing suit.

To help demonstrate the absurdity of the allegations the Civil Rights Division is making in its investigation of the State's women's prisons, the Federal Bureau of Prisons periodically houses female inmates at one of the facilities subject to the investigation. As recently as last fall, the Bureau gave the facility a glowing report on all measures of performance.

The Civil Rights Division alleges that the prisoner grievance system denies female inmates their constitutional rights, but the Justice Department recently certified that system pursuant to the procedures set forth in CRIPA itself. It would appear that the left hand does not know what the right hand is doing at the Justice Department with respect to Michigan's prisons housing female inmates, which I believe calls into question the true motivation of the Division in this investigation.

Now, I would ask you, members of the committee, what does the Michigan experience say to States involved in CRIPA litigation? Michigan's sincere efforts at compliance and the attendant expenditure of millions of taxpayer dollars have left it in no better position than it found itself in in January of 1991 when the court was imposing $10,000-per-day fines upon the State. If the wages of compliance are the same as those one would presume for continued unrepentence—namely, Justice Department flip-flops, court orders bearing no basis in reality, and seemingly vindictive attempts to impose another consent decree on the State—then why should the State be motivated to comply?

The message to the States seems to be that there is no benefit to be derived from complying with the demands of the Justice Department and Federal courts and CRIPA litigation. I suggest to you that this particular consent decree has outlived its usefulness and that the CRIPA statute as a whole deserves serious reform.

Thank you very much.

[The prepared statement of Mr. Gadola follows:]

PREPARED STATEMENT OF MICHAEL GADOLA

Mr. Chairman and distinguished Judiciary Committee members, thank you for providing me the opportunity to communicate the great State of Michigan's perspective on the issue of overhauling the nation's prisons. For better or worse, prisons are particularly big business in Michigan. We incarcerate more people per capita than any other northern, industrial state. The current budget for our Department of Corrections is $1.3 billion dollars. In Washington terms, that is probably not much, but in Michigan it is extremely significant. In point of fact, Michigan now spends 15 percent of its general revenue funding to operate its prison system. In 1980, corrections spending represented only 3 percent of the general revenue fund. Why the tremendous increase in resources committed to corrections? The reason is simple: our prison population has skyrocketed over the past 15 years—from 15,148 prisoners in 1980 to 38,815 prisoners as of July 21st this year. During that 15 year time frame, Michigan has spent in excess of one billion dollars on net prison construction.

Because of the explosive growth in our prisoner population and in prison spending, Michigan has, in part out of fiscal necessity, become a national leader in prison reform. The State's Community Corrections and Boot Camp programs are just two of the innovate, reasonable and cost-effective alternatives to traditional incarceration which have been independently implemented by the state. Michigan is also proud of its efforts to run a high quality, humane and constitutional prison system. Nearly all of our correctional facilities are fully accredited by the American Corrections Association. We have what may be the most extensive training program in the nation for corrections officers. Our rate of prison violence is among the lowest of any state. Michigan spends an average of $4000 per year, per prisoner for health care, including nearly $1700 for mental health services.

Despite these and other pertinent facts (several of which I will note below), several federal laws, whether by their plain words or through judicial interpretation, have enabled both the Civil Rights Division of the Justice Department and federal judges to micro-manage the day-to-day operations of innumerable Michigan prisons. Such federal micro-management of a purely state function has resulted in more than a decade of protracted litigation which has cost Michigan taxpayers hundreds of millions of dollars since 1984. The Committee now has the unique and important opportunity to remedy the abuses caused by certain federal laws, while preserving the level of constitutional rights to which a prisoner is entitled.

The federal statute which has been most frequently utilized to micro-manage Michigan's prisons is the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA). As you are aware, CRIPA as written provides limited power to, and one would have thought, fairly clear directions as to the role of the Attorney General: the Attorney General may *only* initiate suit against a state if the Attorney General personally verifies that he/she "* * * has reasonable cause to believe that any state * * * is subjecting [prisoners] to egregious or flagrant conditions which deprive persons of any rights * * * secured-or protected by the Constitution * * * causing such persons to suffer grievous harm, and is pursuant to a pattern or practice of resistance to the full enjoyment of such rights * * *" This is a very high threshold. Congress also placed clear requirements upon the Attorney General with respect to pre-filing disclosures and the offering of federal assistance to states, as a means of limiting federal intrusion into state matters and to reduce, to the extent possible, adversarial litigation.

Moreover, Congress properly attempted to limit the remedies which the Attorney General could seek in any CRIPA action to: "* * * equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of those rights * * *" As Michigan's unfortunate history with the Justice Department's Civil Rights Division and federal court interpretation of—CRIPA reveals, the Congressional limitations initially placed within the statute are not being adhered to by either of these two branches of the federal government. Instead, CRIPA is being used by federal officials as a vehicle to insure that state prisons are operated in a manner which these officials believe they should be operated, disregarding the Congressional directive of limiting federal authority to enforcing the minimum corrective measures necessary for the enjoyment of constitutional rights. To taxpayers and to all law-abiding citizens, the abuse of CRIPA is a crime.

In 1982, the Justice Department's Civil Rights Division investigated several Michigan prisons and concluded that unconstitutional conditions existed. In July 1984, and on the same day that federal court litigation had been instituted by the Attorney General, a Consent Decree was entered into by the parties to remedy the concerns raised by Justice. As the District Court itself had noted, the Consent Decree was entered into *as a means to end the litigation* (see *United States* v. *Michigan*, 680 F.Supp. 928 (WD Mich. 1987)) and alleviate certain minimal constitutional concerns raised by Justice. This is consistent with CRIPA's original intention that the Attorney General safeguard prisoners' threshold constitutional rights through minimum corrective measures.

Since 1984, however, the Attorney General and the Federal District Court have strayed far from the limited constitutional purposes of CRIPA and the Consent Decree. The Consent Decree, rather than settling the CRIPA suit as intended, has provided Civil Rights with a vehicle to pursue a course of litigation (with the admiration and full support of the Federal District Court) to micro-manage the Consent Decree prisons. What has resulted in the *USA* v. *Michigan* case is the federal government (more specifically the Executive and Judicial branches) pursuing litigation to insure that food served to prisoners is a certain temperature, that a certain number of light fixtures and electrical outlets are in each cell, and that food loaf not be served to prisoners under certain circumstances. These patently absurd rulings with which Michigan has had to comply or appeal are all verifiable and reported in the volumes of the Federal Supplement. See *USA* v. *Michigan*, *supra*, 680

F.Supp. at p. 1004; *USA* v. *Michigan*, 680 F.Supp. 270, 277 (WD Mich. 1987). What is lost in all this litigation is one simple fact. Prison is not a vacation, and not a home away from home. Prison is punishment.

Of course, the Consent Decree was agreed to by the state, and has proven successful in certain areas specifically provided for in the Decree. The problem lies in the Court and Civil Rights Division's continued pursuit of prison intervention by delving into the minutia of prison operations all in the name of enforcing the general provisions of the Decree.

During the eleven years of its continuing jurisdiction over the CRIPA Consent Decree, the Court has ordered the hiring of numerous independent experts to administer compliance with the Consent Decree. Unlimited access to prisons, prison personnel and documents are granted to these experts, each of whom are paid excessive hourly or daily rates at the expense of Michigan taxpayers. These experts, who have a significant financial incentive if the Court continues monitoring these Michigan prisons, have assisted the Court in making rulings on such constitutionally significant decisions as the handling of laundry and the frequency with which laundry must be done. See *USA, supra.*

I state the obvious when I say that what was lost upon the Executive and Judicial branches is the Congressional pronouncement that CRIPA remedies are to be *narrowly* tailored to remedy, in the least restrictive manner, *constitutional* violations. Issues like whether a prisoner's diet includes food loaf, or whether food served to prisoners is at a certain temperature, do not raise to constitutional significance; rather, they provide clear examples of the federal judiciary improperly delving into the state's exclusive role of managing the day to day affairs in its own prisons. In fact, in *Sandin* v. *Connor*, 1995 U.S.L.W. 4601, the U.S. Supreme Court recently cited the *USA* case as an example of impermissible federal micro-management of prison operations which occurs under the guise of enforcing constitutional rights.

I am sorry to report that the trivialization and abuses of CRIPA continue to this day. Most recently, the Court in *USA* has granted the Civil Rights Division request for access to a prison *not* covered by the Consent Decree, and which did not even exist in 1984. Furthermore, over the past year, the Civil Rights Division has been conducting an investigation of two Michigan women's prisons, alleging the existence of unconstitutional conditions. This investigation is apparently continuing despite the fact that one of the prisons has been *approved* by the Justice Department's *own* Federal Bureau of Prisons to house federal women prisoners, and both are fully accredited by the American Correctional Association. The Civil Rights Division has also alleged that Michigan's grievance procedure violates Due Process; at the same time this allegation was made, this same Justice Department awarded full certification of the procedure under CRIPA.

On July 28, 1994, the Justice Department filed suit against Michigan, seeking unlimited access to these women's prisons for purposes of its investigation, a tactic employed in other states as well. In a letter dated May 9, 1995, Governor John Engler asked Attorney General Janet Reno to prevail upon her staff to "* * * follow the CRIPA statute and provide the requisite notice of the specific concerns involving the Michigan facilities prior to issuing a complaint." The Governor went on in the letter to remind the Attorney General that "* * * the CRIPA envisions cooperation through reciprocal exchange of information." Michigan has always been willing to cooperate with federal officials regarding legitimate concerns related to its prison operations, but we have steadfastly insisted that those officials comply with the spirit and intent of CRIPA before the state would consider going to the rather extraordinary step of facilitating a free-ranging inspection of any of its correctional facilities. And indeed, two Federal District Judges have concurred with Michigan's decision to deny Justice Department access to the women's prisons in question. Both District Judges held that CRIPA does not provide pre-litigation access to a state facility without state consent. However, even this principle, seemingly made clear by Congress in the statute and its legislative history, has been subject to differing interpretations across the country.

Costs for compliance with the requirements of the *USA* Consent Decree, as interpreted by the Court and Justice, are staggering. Since 1984 Michigan has spent over $225 million to comply with the initial terms of the Consent Decree as well as the supplemental requirements ordered by the Court. The Michigan Department of Corrections has hired innumerable staff whose sole responsibility is to ensure compliance with the Consent Decree.[1] These excessive costs and the micro-management

[1]The Department has been ordered to submit to the Court and its experts bi-annual and quarterly compliance reports on mental health issues, non-mental health issues, and out-of-cell activities. I have brought copies of several such reports for the Committee to examine, as the

Continued

of Michigan prisons are the direct but unforeseen result of the misinterpretation and misuse of CRIPA by the federal courts and Civil Rights Division. The best suited remedy to alleviate these serious abuses is to amend—CRIPA, to make explicit what was initially intended by Congress, and to limit the statutory power of the Attorney General in pursuing CRIPA actions.

For example, an amendment making it explicit that the Attorney General does not have a pre-litigation right of access to a state facility in the absence of state consent. Such an amendment will not only preserve the law as intended by Congress in 1980, but will also preserve state sovereignty, another important issue recognized by CRIPA but ignored by Justice and the courts. A CRIPA amendment providing that the Attorney General shall not institute a suit unless he/she has clear and convincing cause to believe a violation of the statute exists should be adopted to protect states against frivolous suits brought at federal taxpayer expense. Currently, the Attorney General only needs reasonable cause to believe a violation exists.

Other amendments which I believe would remedy the abuses spawned by CRIPA can be found within the Contract With America's "Taking Back Our Streets" proposal, which includes: continuing the requirement of dismissing a suit for 180 days when the prisoner has not exhausted available remedies, but eliminate the judicial discretion in ordering the dismissal; adding a provision allowing a judge to dismiss *sua sponte* a prisoner complaint which fails to state a claim; and, with respect to pre-litigation issues, amendments requiring (1) the Attorney General to provide a state with the specific facts which allegedly constitute unconstitutional misconduct—including the names of prisoners subject to the alleged misconduct—and (2) enabling a judge to review the substance of an Attorney General certification, which would reduce the number of federal suits by providing the full disclosure of facts necessary to make a preliminary determination as to the validity of any allegations and whether there is a need for voluntary compliance to remedy actual constitutional violations.

With respect to Consent Decree cases, an amendment placing specific time limits on the duration in which the Attorney General may litigate CRIPA consent decree cases—such as three years unless specific unconstitutional conditions are proven to exist—would ensure that the Attorney General and the courts no longer lure states into voluntary compliance plans only to turn around and create decades of costly and constitutionally unnecessary litigation. While federal judges may serve for life, consent decrees should not be a lifelong burden on states. Given the history of consent decree litigation in this country, most especially in Michigan, only with such an amendment will states have any incentive to enter into voluntary agreements which save costs for everyone and expeditiously alleviate the unconstitutional conditions which Congress has sought to remedy through CRIPA. Under current law, no state would enter into a consent decree when doing so inevitably continues and expands litigation and reduces resources otherwise available for the prison system.

Thank you for allowing me to express Michigan's strong concerns on these important topics. If we can be of further assistance in your efforts, we would be pleased to help.

Senator ABRAHAM. Thank you, Mr. Gadola, and thanks for your patience in waiting.

Mr. Watson, thank you also for your patience and waiting here.

Senator BIDEN. Mr. Chairman, if I may interrupt, Mr. Watson is from Delaware and I am glad he is here, but his patience is legendary. Thanks for waiting.

STATEMENT OF ROBERT J. WATSON

Mr. WATSON. Mr. Chairman, I would request that my written statement be entered in the record, also.

Senator ABRAHAM. It will, without objection.

Mr. WATSON. Let me depart a moment from my prepared testimony just to say that with regard to control of crime, Delaware, being a small State, has taken considerable action in this area. We

reports evidence the absurd detail in which Justice and the Court have become involved in prison operations. These reports just as clearly establish the amount of taxpayer supported work which is required of Michigan to prove compliance with these extraordinary orders.

abolished parole and we have enacted truth in sentencing. I think we are one of the few States that complies with the 85-percent requirement of the crime law. We have had a three-strikes-and-you-are-out bill for 17 years that has been in use.

We have 5 levels of sentencing, really, to protect the public by allowing judges to craft sentences that are more responsive to what they see in the defendant, and they generally combine them—some prison time, some halfway house time, then some intensive supervision and on back to the community. So I just say that as a preliminary comment because there are some other distinguished colleagues in the room you will hear from later who will speak about other matters before the committee. So I will defer to them to talk about those issues.

I am here to speak about the matters before you that relate to STOP. I think as one of the prior panelists said, he has found corrections commissioners generally see those with some favor because of the consequence on our budgets, and I think that is true. That has been my experience.

I also think that by abolishing the access to consent decrees as an initial move or a preliminary move, the States really lose the right to get in and to resolve things when we consider that to be appropriate. It does not take away the option of the State to take a matter to trial if that is how we see the matter should go. It also, I think, adds costs to local government.

STOP requires that almost all lawsuits involving conditions of confinement in prisons, jails, and detention facilities would have to go to trial, and that just means that local governments can't settle these suits without admitting liability and opening themselves to countless other actions.

I was in the Oregon Department of Corrections for approximately 30 years, and in that time was the head of the department for 10. Seven of those 10 years, we were in Federal court on a lawsuit that dealt with the totality of conditions in the prisons. That was overturned. Then we had to go back to trial on every single condition, and in the end we lost and had a long order entered by the court, which in subsequent years I have seen very closely resembled what could have happened had we entered into a consent decree and dealt with those matters.

The ironic thing is that in the case and in matters that have occurred since, the strongest evidence the attorneys for the inmates have is our own requests for improvements to the prison system that we document for them year after year, improvements that need to be made. As you know, legislatures have limited funds and tend to defer to other matters in many instances of a much higher priority, and I would agree with that. But nevertheless, when these lawsuits come forward, it is not unusual to have subpoenaed your budget requests for the last several years, or matters that go to accreditation and what those circumstances find.

So, in hindsight, it looked as if we would have been far better off than spending 7 years and wasting the court's time and ending up at the end of that time with something that could have been negotiated and probably was a mistake. So in subsequent lawsuits there, we did settle some others by consent decree, and in others

we went to trial. We felt that we were right and, for the most part, won those.

But I think where we go after a settlement with no chance of winning, we ire the courts. We bring about increased attorney's fees. Our attorneys don't work for anything either, plus all tne time it takes from our staff, and they are always key staff, to appear in court.

Under the provisions of STOP, as you have heard, they self-destruct every 2 years, and I can tell you after 42 years in corrections and 18 heading State departments, you don't get things corrected in 2 years. It takes several years, usually, to deal with the matters that get brought before the Federal courts.

We have a consent agreement in Delaware that is not before the Federal courts, but it has been around since 1988. We had hearings over the last 2 days, again, about a number of issues that for the most part I would generally agree need attention. We don't think we are in contempt of court. We don't think they are unconstitutional, and that is the argument with the judge.

But those things take time to resolve, and to have these things self-destruct every 2 years—and perhaps the suggestion earlier of a review would be a way to deal with that, but I think it will interfere with measured efforts to move forward. Quite often, we will go the legislature and we have to go with a 3-year plan, and sometimes it is a 5-year plan so they can allocate money over a longer interval of time. Judges have found those acceptable. The 2-year self-destruct, I think, is a problem and it increases our expenses.

It does require a commitment on behalf of the legislature to make these things work, and quite often we can't get their attention without some action by the court. So, again, I think the provisions of automatically terminating are a problem.

So how do we deal with this thing? I think our best approach, of course, is to have professional staff so they can do the job that has to be done in the prisons, and to do it in a way that we all want done. Professionals in corrections would then avoid having to deal with unconstitutional prisons. Again, it is a money problem, and quite often it is a training issue that has to be gone over and over and over again. The professional standards of the field require individuals to be trained every year. So it requires ongoing monitoring and if you miss, then it could be an issue that would have to go back to trial again, which I think is probably again a mistake.

An inordinate portion of our budget, I think, would be shifted to defending these suits and I think it would delay improvement if we did that. I think it stops courts from having access to more information in a timely way. I just have to say that when these issues have arisen, as a corrections person I have more to say about the court orders and the consent decrees than I do when it goes to trial. That is really an issue that gets up in the air.

When it is a consent decree, I go personally and our key staff sit down and say here is what is possible to do and here is the time schedule it would take to do it, contingent upon funding. If you go to trial, it is the lawyers taking over, and they argue legalities and they argue forever and it takes a long time to get these matters settled. I much prefer a consent order that I have had substantial say in what it looks like, when it happens, and how we are going

to do it. So I think that is a serious consideration that is lost by the STOP legislation.

These cases are complex. They are burdensome, they are politically sensitive. You read about them in the paper. They generate all kinds of mail going to the courts and to my office and to legislators and to everyone. I haven't found a judge yet that really likes them. I know the judge that we got so acquainted with in Portland, OR—after the hearing, we would often go to speak at the bar association or some organization and I would be introduced as the head of the department of corrections and he would introduce himself as really the head of the department of corrections.

That was really the way it was. His role became so involved. After hearing every detail of all those prison conditions and the testimony that was brought forth and the issues that were brought by experts from both sides, I think he was really an expert after the end of that trial after all those years.

I would close by saying that prisons are not a bastille anymore. At prisons all over the country, volunteers come by the hundreds. In our small State, about 500 volunteers a month come in. They help with things like education and religious services and vocational training, and on and on, and I think those individuals are entitled to assurance that the prisons are safe. I think they are safer with a ready access to consent decrees than if that issue was abolished, and again, good staff, a good grievance system, and finally access to the courts, if all else fails. I think passage of STOP would complicate this process and make it more difficult to settle legitimate claims.

I would just close by saying that prisons are not ideal places to live. They will always be subject to challenge. As a person who has spent 42 years in the field, I urge this committee to not make my job more difficult by taking away from the States this important tool. It is cost-effective and humane, and I think our goal to manage safe prisons and the right to settle these things at our option and go to trial when we have to and settle when we don't should be left alone.

Thank you.

[The prepared statement of Mr. Watson follows:]

PREPARED STATEMENT OF ROBERT J. WATSON

Good Morning. Thank you for giving me the opportunity to testify before this Committee regarding legislation that is currently under consideration by this Congress.

My name is Bob Watson. I am the Commissioner of Correction of the State of Delaware, a position I have held for over eight years. I have worked in the field of corrections for 42 years, beginning in Oregon in 1953 as a Correctional Officer in the State's maximum security prison. After working my way up through the ranks, I was appointed head of the Oregon Department of Corrections in 1976, a position that I held for 10 years before moving to Delaware.

I have also been an active member of a number of national corrections organizations, having served as President of the Association of State Correctional Administrators, Chair of the Commission on Correctional Accreditation, and Chair of the Congress of Correction. I am also a recipient of the American Correctional Association's E.R. Cass Correctional Achievement Award.

My purpose in being here today is to offer you my views regarding the "Stop Turning Out Prisoners Act," a bill known as "STOP." This proposed legislation is of serious concern to me for a number of reasons. First and foremost, it has the practical effect of depriving state administrators of the right to settle prison conditions litigation by whatever means they consider most appropriate under the circumstances. This significantly compromises states' rights and creates an enormous potential fiscal impact on the states.

By prohibiting courts from approving and enforcing orders that do not include a finding of liability, STOP requires that almost all lawsuits involving conditions of confinement in prisons, jails and juvenile detention facilities will have to go to trial. This means that local government defendants cannot settle suits—even when they deem it to be in their best interests—without admitting liability and opening themselves up to countless actions for damages that they would be unable to defend.

The Oregon Department of Corrections was sued in the late 1970's regarding a variety of conditions of confinement. We spent nearly seven years in Federal Court defending the conditions that were alleged to be unconstitutional, giving many hours of testimony on each of the issues raised. We lost that lawsuit in part because the conditions were clearly unacceptable and in part because our own documents—for example budget requests, accreditation applications and our own professional attempts to make improvements—revealed that we were aware of the existing problems. Our state legislature has many priorities and prisons and detention centers are not always at the top of the list. For this reason, it is not uncommon for important requests for funding to be repeated year after year, underscoring our knowledge of the need for improvement. In that case, we spent tax dollars in defense of a situation that was not defensible and, in the end, the court entered an order that required necessary improvements to be made over time—a situation that in hindsight could have been achieved far less expensively and far more effectively through the negotiation of a consent decree.

In subsequent lawsuits that were filed during my ten years as head of corrections in the State of Oregon, we settled some issues and cases, and went to trial on those issues that the parties were unable to resolve by agreement. We settled when in our assessment we had no chance of winning, and by negotiating a settlement we avoided a finding of liability and minimized the financial burden on the State that would have resulted from trial, as well as from the countless damages actions that would have been filed by individual prisoners on the basis of a court finding of liability. The decision to litigate or to settle out of court without admitting liability should be left to state and local officials to make, not imposed on states by the federal government.

Under the provisions of STOP, judicial findings of liability will self-destruct every two years, requiring repeated full-blown trials on the merits. Thus, STOP will interfere with officials' measured efforts to eliminate unconstitutional conditions and will result in huge expenditures of money and judicial resources. Many of the improvements that are required to bring conditions up to constitutional standards take years to implement. They also require a commitment on behalf of legislators to provide the necessary funding. A two-year limit on court ordered relief will create a tendency to delay necessary improvements, adopt only temporary fixes, and/or devote all of the Department's resources to litigating the same issues over and over every two years.

By way of illustration, federal lawsuits often challenge a prison's staffing component by claiming, for example, that there are insufficient correctional staff to safeguard prisoners from violence at the hands of other prisoners. However, if a court orders a remedy for this problem, and the state elects to hire additional staff, but does not require the staff to undergo an adequate training program, we can make a temporary fix, which will do nothing to solve the underlying problems. In the short term this may appear to save money. In the long term it will lead to more litigation and far greater expense. Tax dollars that would have to be spent on the repeated defense of prison conditions suits that would result from temporary fixes would be much more effectively spent on implementing long-term, well-planned improvements.

Professional corrections staff do not want to run unconstitutional prisons. They want to improve conditions where necessary but will be undermined in their attempts to do so if their state legislators and Department of Corrections are required to divert a significant portion of the Department's budget to defending cases that should be settled.

Various of the STOP bill's other provisions are equally misguided. As a result of the intervention provisions in this bill, corrections officials, state and local executives, and State Attorneys General will lose control of litigation. Local sheriffs, district attorneys, or individual legislators who intervene as defendants can turn good faith, coordinated efforts to meet constitutional requirements into political circuses.

STOP also deprives courts of the benefit of court monitors appointed to monitor compliance and serve as mediators during the remedial stage. Magistrates are not permitted to perform these functions and, as a result, courts and states' attorneys

will be required to conduct repeated compliance hearings. Most monitors that are appointed by the courts have significant corrections experience or expertise in the specific areas covered by the court order—for example medical care—and can work with corrections officials during the remedial stage, offering practical suggestions and working out problems based on their expertise in the area in questions. This vital role of court-appointed monitors would be lost if this provision of STOP were enacted. The attorney's fee provision of the bill would exacerbate this problem by limiting plaintiffs' attorneys' role in the remedial phase of litigation—a loss of expertise at a crucial stage in prison conditions litigation and a significant erosion of the nation's commitment to safeguarding the civil rights of all persons.

STOP would also seriously impede the federal judiciary'sability to enforce the constitutional and statutory rights of adults and juveniles by removing the power to issue emergency relief. Federal courts do not willingly become involved in the operations of prisons and jails—these cases are complex, burdensome, politically sensitive, generate a lot of prisoner mail, and continue for a much longer period of time than most litigation. In all my years in the correctional field, I have yet to come across a judge who likes these cases. Nonetheless, the courts perform an essential role in protecting the rights of prisoners. The importance of this role is even more pronounced in the context of emergency life and health-threatening conditions. A court must be able to respond to a proven emergency, such as a TB outbreak, without holding a full-blown trial. The power of the courts to act quickly without the delay of a trial, when there is an imminent danger, is one of the most important safeguards offered by our legal system. Restricting the ability of the courts to respond to such emergencies raises not only civil liberties concerns but also serious management problems for those of us working in the corrections field.

A prison is not an isolated bastille populated solely by prisoners and staff. Due to limited funding, and efforts to bring the community into corrections, members of the local community visit prisons on a daily basis to assist with church services, the provision of educational and vocational programs, and an array of other programs. In Delaware, more than 500 volunteers visit our prisons each month. In larger states with similar policies, the number of volunteers could be in the thousands. We owe the protection of the courts to all those inside our prisons and to the communities to which they return.

We are also responsible for the safety and security of these volunteers, as well as that of staff and prisoners. STOP will make our job more difficult in this area as well. Good prison management requires an effective and respected process for the resolution of prisoners' claims. An orderly process for the resolution of claims helps to relieve the frustration and anger of prisoners who feel they have genuine problems that require resolution. Well-trained staff are the first step in responding to legitimate prisoner claims; a formal grievance system is the second step. Overloaded state and federal courts are already insisting that states implement certified grievance systems that reduce the courts' workload by resolving prisoners' claims out-of-court. The final step, when all else fails, is for the prisoner to sue the governor and corrections staff in court. Passage of STOP would complicate this process by making it more difficult to settle legitimate claims out-of-court and by diverting scarce tax dollars from the important areas of staff training and prison maintenance to litigation, thereby adding to the inevitable tensions of prison life.

This proposed legislation is extremely costly and comes at a time when tax dollars are particularly scarce. The Judicial Impact Office of the Administrative Office of the U.S. Courts has estimated that the potential annual resource costs of STOP could be more than $239 million and 2,096 positions, of which at least 280 would be judicial officers. At least $95 million could be incurred if just 50 percent of existing prison conditions consent decrees and court orders were refiled in federal court subsequent to their termination under this bill. Many more millions of dollars in resource costs could be incurred by the judiciary if all the plaintiff members of a class were required to testify as to how the alleged prison conditions affected them specifically. On top of all of this are the countless dollars that states will be required to expend to conduct a trial in almost every case, and every two years thereafter. The vast majority of these expenditures would be for no good purpose and could be saved by leaving well enough alone.

Prisons are not ideal places to live, and they should not be. However, conditions will always be challenged, sometimes with good cause. As a person who has spent 42 years in the field of corrections, eighteen of which have been spent heading up departments in two states, I urge this Committee not to make my job more difficult by taking away from the states an important tool in the cost-effective, humane, and safe management of our prisons—the right to settle litigation when we determine it to be in our own best interests.

Senator ABRAHAM. Thank you very much, Mr. Watson.

Last but not least, Mr. Martin, and thank you for your indulgence and patience here today.

STATEMENT OF STEVE J. MARTIN

Mr. MARTIN. Good afternoon, Mr. Chairman and Senator Biden. A housekeeping matter. May I likewise move my written statement to be part of the record?

Senator ABRAHAM. It will be so included.

Mr. MARTIN. Then one additional request, if it doesn't violate protocol. I have some correspondence from colleagues in Texas, former board members and a former director of the Texas prison system, that I think would be relevant and helpful to the committee. If I could also move that?

Senator ABRAHAM. Without objection, they will be entered into the record.

[The correspondence referred to follows:]

RAYMOND K. PROCUNIER,
Gardnerville, NV, April 19, 1995.

Hon. ORRIN G. HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: I urge you to read this letter with care as it is based on my more than 40 years of experience in the field of corrections. I served as Director of Corrections in California from 1967 to 1975 under then-Governor Ronald Reagan. I also have served as Director of Corrections in Utah, Virginia, and Texas. In Texas and California. I managed the two largest state prison systems in the United States.

I am not soft on crime, and I am not soft on corrections conditions. I support the death penalty, for example, and have presided over executions in Virginia and Texas.

I am writing about two pieces of critically important legislation that are pending before the United States Senate and that are of enormous importance to American correctional professionals.

One of these is section 103 of S. 3, introduced by Senator Dole and others. Section 103 corresponds to Title II ("Stopping Abusive Prisoners Lawsuits") of H.R. 667, which the House of Representatives has passed. Section 103 would reduce frivolous or malicious individual lawsuits filed by prisoners. Based on my experience in corrections, passage of this legislation will reduce the financial resources dedicated to unnecessary litigation, reduce the time corrections officials waste in court, and improve the operation of inmate grievance systems. Therefore, I strongly urge you to vote *in favor of* section 103.

Just as strongly, however, I urge you to vote *against* S. 400, which is pending before the Senate Judiciary Committee and which has not yet been incorporated into S. 3. S. 400 ("Stop Turning Out Prisoners") is identical to Title III of H.R. 667, which the House of Representatives has passed. Unlike section 103 of S. 3, however, S. 400, if passed, will be harmful to corrections.

S. 400 would:

- deprive federal and state courts of jurisdiction to enforce existing or future consent decrees in class actions involving prison and jail conditions;
- cause the court's remedial decrees to automatically self-destruct every two years, requiring class actions to be re-litigated every two years;
- permit any federal state, or local official who "is or may be affected" by class action litigation involving prison conditions to intervene as a defendant;
- prohibit any state or federal court from issuing preliminary relief (*e.g.*, a temporary restraining order or a preliminary injunction) until a full trial on the merits of the action has been completed; and
- eliminate, for all practical purposes, the court's authority to appoint a special master or court monitor to engage in informal monitoring and mediation processes, even when State officials determine the appointment of such a court monitor is in the State's best interests.

I believe that good prison administrators avoid litigation by running lawful and professional correctional institutions and systems. If they do this, they avoid the need to enter into consent decrees. Indeed, as Director of Corrections in four systems, I have not been required to negotiate and enter into a consent decree to settle class action litigation.

On the other hand, I have served in systems (Texas being the best example) that had fallen below constitutional standards before I became Director. I also have served in systems that had settled class action litigation through consent decrees before my appointment.

I do not argue that all class action lawsuits against prison officials are meritorious. I also have seen some consent decrees in which State officials agreed to terms they should have refused. Unfortunately, however, many lawsuits are valid. I have testified in some lawsuits on behalf of prisoners, and for the state in others. Most important, when meritorious suits are filed, it is imperative that State officials, including the Director of Corrections, maintain control of the litigation. When they deem it appropriate to do so, these officials must be permitted to settle a case by entering into a consent decree.

Thank you for reading this letter and considering my views. The issues I have discussed are of vital importance to the American corrections profession.

I urge you to *support* section 103 of S. 3.

I urge you to *oppose* S. 400, whether it becomes part of S. 3 or is offered as an amendment during floor debate on S. 3.

Sincerely yours,

RAYMOND K. PROCUNIER.

HARRY M. WHITTINGTON,
ATTORNEY AT LAW,
Austin, TX, July 19, 1995.

Hon. ORRIN HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: From 1979 to 1985, during the ten-year *Ruiz* litigation, I served as a member of the Texas Board of Corrections, and I was the liaison between the Board, the State Attorney General and the Special Master appointed by the Federal Court. In this role I participated in extensive negotiations which led to the settlement of the class action suit brought by inmates to enforce their constitutional rights against the State of Texas.

Though my legal practice in Austin, Texas, since 1950 had not included any civil rights matters, I soon learned that the State of Texas was exposed to serious liability for the manner in which it had been operating its prisons. Much of the information I obtained came from my own investigation of the treatment inmates were receiving, and I was astounded to learn that so many state officials were either unaware of the prison conditions or unwilling to recognize the obligation of Texas under the U.S. Constitution.

In recent years I have observed that most political candidates in Texas are basing their campaigns on "law and order" and attempting to discredit all or us who had any part in the settlement of the *Ruiz* litigation. Most of the politicians have failed to understand the complex issues which were involved and also have very limited knowledge of the operational aspects of correctional institutions. Anyone who was familiar with Texas prisons and wanted to see them operated in a safe, humane and constitutional manner would agree that the needed reform would not have occurred without the intervention of the Federal Court.

As I read Title III of House Resolution 667, I am concerned that such legislation is no more than an attempt to allow states to flaunt the U.S. Constitution under the guise of preventing the early release of convicted felons. Moreover, this legislation would seriously impede the progress which correctional institutions have already made throughout the nation. I am disappointed that my two friends and fellow Republicans from Texas are supporting the bill which has been incorrectly titled as the "Stop Turning Out Prisoners" Act.

The last time we met in Austin you helped us elect Chief Justice Tom Phillips to the Supreme Court of Texas. He is running for re-election and so far does not have an opponent.

I hope to have the opportunity to see you again soon when I am at Snowbird.

Best regards.

Yours very truly,

HARRY M. WHITTINGTON.

ROBERT D. GUNN,
PETROLEUM GEOLOGIST,
Wichita Falls, TX, July 24, 1995.

Hon. ORRIN HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am a longstanding, active supporter of the Republican party in the State of Texas. In 1981, Governor William Clements appointed me to serve on the Texas Board of Corrections, the governing agency of the Texas Department of Corrections. I was a member of the Board for five years, and served as Chairman from 1983 thru 1985.

It is from these perspectives that I am writing to urge you and the other members of the Senate Judiciary Committee to oppose S. 400, popularly known as the Stop Turning Out Prisoners Act (STOP). In brief, this proposed legislation, if enacted, will create chaos in state correctional systems that are attempting to operate lawfully while discharging their duties to protect the public.

As you may know, Texas was the site of a prison-condition class action called *Ruiz* v. *Estelle*. Until I became a member of the Board of Corrections, I did not realize the depth of the problems in the correctional system in Texas. To name a few, inmates performed the function of guards, three or four prisoners lived together in 45 square feet cells, prisoners were brutalized by other inmates and by staff, and living conditions—by any standard of measurement—were generally intolerable. What is most important is that TDC officials, having misled the Board and the Attorney General for a time, attempted to defend these conditions and surely would not have corrected them but for the intervention of the federal court.

Following a finding of unconstitutionality (after a trail of more than 150 days), the federal court appointed a special master. One of the primary functions of the special master was to help the Board and agency officials negotiate, rather than litigate, remedial plans that were acceptable to the State. Through this informal process, the State of Texas gained much more than it would have through continued litigation.

Without questions, the efforts of the Board and the Governor would have been adversely affected had county sheriffs, troubled by TDC's necessary steps to control its population, been permitted to intervene as defendants in the lawsuit. We and the Attorney General of Texas would have lost all control over the litigation.

Finally, nothing of value could have been accomplished in *Ruiz* if the State had been required to go back to court every two years. Although one can argue that we could simply have repeated admissions of liability to avoid this problem, concerns about the extend of the State's legal exposure, as well as the realities of practical politics, would have forced renewed conflicts in court.

Ruiz was a painful experience for the State of Texas. We emerged from that lawsuit, however, with a constitutional and better managed Department of Corrections. In the last analysis, the court and the special master were not our adversaries, and their cooperation and patience with our efforts redounded to the benefit of our state.

I hope that you and your fellow committee members will take these views into account as you consider this uninformed legislation. Frankly, I would not have expected a bill of this kind to be supported by any senator or congressman truly committed to leaving state concerns in the hands of appropriate state officials, subject only—of course—to the rule of the Constitution we all revere.

Sincerely,

ROBERT D. GUNN.

CONSORTIUM FOR CITIZENS WITH DISABILITIES

Dear Senate Judiciary Committee Member, On behalf of America's people with disabilities, we urge the members of Congress to stop the so-called STOP bill ("Stop Turning Out Prisoners "), S. 400/Title III. H.R. 667.

The bill would drastically undermine protection of the rights of many people with disabilities, both physical and mental; limit the discretion of responsible officials; and overload the courts.

It would "stop" reasonable protection of the rights of people with disabilities in instances such as the following, all of which illustrate actual conditions cases brought under federal law:

- Provision of minimally adequate medical and mental health services, including suicide prevention, in juvenile facilities, jails and prisons.

- Provision of special education for young people with developmental disabilities who are confined in juvenile facilities, jails and prisons.
- Protection of the rights of people who are deaf to fair treatment and equal access to rehabilitation in juvenile facilities, jails and prisons.
- Promoting effective access to such basic facilities as toilets and bathing, and access to rehabilitation programs by confined people with mobility impairments.
- Provision of adequate protection against the spread of tuberculosis, which is easily transmitted in the institutions and poses a particularly deadly threat to those with compromised immune systems.

The bill would undermine the following protections:

- The courts ability to grant emergency remedies when warranted by such urgent conditions as epidemics.
- Consent decrees resulting from settlement agreements regarding alleged substandard conditions in juvenile facilities, prisons, and jails. Settlement agreements deliberately avoid admissions of a violation of law. Hence, government officials are more willing to enter into settlement agreements to avoid exposing themselves to alleged violations. They would rather improve conditions than be required to pay money damages. To date, hundreds of cases have been settled without having to be tried.
- The ability to discover violations, making future enforceable settlements impossible to achieve.
- Court orders would be limited to two years, even after trial, requiring retrial of cases that have been resolved if more than two years are needed to achieve compliance with the law. Two years is often not long enough to achieve compliance in institutional cases.
- The role of court-appointed masters in enforcing orders in conditions cases, grossly tying up the time of courts which rely on masters as their monitors.

This bill would have the effect of placing people in juvenile facilities, jails and prisons further outside the protection of the law than they are today. It would virtually abolish the ability of responsible officials—federal, state and local—to settle conditions cases when they feel it is wise to do so. It would multiply the workload of the courts.

We are joined in other letters opposing "STOP" by a long list of people and organizations not among the "usual suspects" on prisoners' rights matters. They include Michael Quinlan, who headed the federal Bureau of Prisons under Presidents Reagan and Bush; present and former correction commissioners of Idaho, Minnesota, Oklahoma, Washington and Wisconsin; the American Bar Association; the American Friends Service Committee; the Asian Law Caucus; the Bishop of the Episcopal Diocese of New Jersey; the Lutheran Office for Governmental Affairs, ELCA; the National Black Police Association; The National Center for Lesbian Rights; the National Conference of Black Lawyers; the National Commission on Correctional Healthcare; the National Muslim Political Action Committee; the Union of American Hebrew Congregations; and the United Methodist Church, General Board of Church and Society.

We urge you to oppose the "Stop Turning Out Prisoners Act." Thank you for considering our views on this critical issue.

Stop STOP!

Sincerely,

Bazelon Center for Mental Health Law,
National Parent Network on Disability,
Federation of Behavioral Psychological and Cognitive Sciences,
National Association of School Psychologists,
National Association of Protection & Advocacy Systems,
American Association on Mental Retardation,
Justice for All,
Paralyzed Veterans of America,
National Association of Developmental Disabilities Councils,
The Learning Disability Association,
National Mental Health Association,
National Head Injury Foundation,
American Psychiatric Association,
National Association of Social Workers,
American Psychological Association.

March 9, 1995.

DEAR SENATOR,

We urge you to oppose the "Stop Turning Out Prisoners Act" ("STOP ") (S. 400; Title III of H.R. 667). The STOP bill violates the guiding principle of this country that all people, even the least deserving, are protected by the Constitution. This legislation would create a dangerous precedent for stripping constitutional rights from groups of individuals who are in public disfavor.

The bill seeks to deprive the federal courts of the power to remedy proven constitutional and statutory violations. It requires the termination of judgments two years after issuance, regardless of whether the underlying violation is ongoing. This provision would prohibit a court from continuing to enforce a court order even in the face of an ongoing tuberculosis epidemic that threatens staff and prisoners. Similarly, the legislation deprives the courts of their power to issue temporary emergency orders in appropriate circumstances. Equally unwise is the provision that usurps the traditional power of the courts to appoint special masters.

Furthermore, the bill calls for the immediate termination of all settlement agreements, known as "Consent Decrees," in prison and juvenile conditions cases and prevents parties from entering into such Decrees in the future by requiring a court to make constitutional findings before approving agreements. Since the purpose of settlement is to remove the need for such findings, the bill essentially prevents settlements in these cases. This would necessitate the re ening of final orders in numerous cases around the country and would force states and municipalities to litigate cases that they would prefer to settle, thereby increasing their expenses and exposure to a fee award. States and municipalities are entitled to determine their own best interests. Similarly, the provision that amends 42 U.S.C. §1988 to limit the fees that can be awarded to plaintiffs' attorneys forbids a state or municipality from entering into a settlement agreement that includes a fee provision. States and municipalities are entitled to conclude that such an agreement is preferable to the exposure to a far greater fee award after trial. The bill would also significantly increase the burden on the federal courts by necessitating a lengthy trial in each and every case.

We urge you to oppose the "Stop Turning Out Prisoners Act." Thank you for considering our views on this critical issue.

Sincerely,

THE UNDERSIGNED ORGANIZATIONS AND INDIVIDUALS:

Organizations

Alabama Prison Project,
Alliance for Justice,
American Civil Liberties Union,
American Friends Service Committee, Pacific Mountain Chapter,
Asian Law Caucus,
Berkeley Constitutional Law Center,
California Lawyers for Civil Rights,
Center for Community Alternatives,
Citizen's United for the Rehabilitation of Errants (CURE),
Come Into the Sun,
The Correctional Association of New York,
Criminal and Juvenile Justice International,
Criminal Justice Consortium,
Criminal Justice Policy Foundation,
D.C. Prisoners' Legal Services Project, Inc.,
Delaware Council on Crime and Justice,
Families Against Mandatory Minimums,
Florida Academy of Public Interest Lawyers,
Florida Justice Institute,
Fortune Society, Inc.,
Justice Services Program, Travellers' Aid Society of Rhode Island,
Juvenile Justice Center,
Koinonia Prison and Jail Project,
Kolodinsky, Berg, Seitz & Tresher, Daytona Beach, Florida,
Legal Aid Society of the City of New York,
Legal Services of Louisville,
Legal Services for Prisoners, Inc.,
Legal Services for Prisoners with Children,
Lewisburg Prison Project,
Louisiana Crisis Assistance Center,

Lutheran Office for Governmental Affairs, ELCA,
Lynn, Scott, Hackney & Sullivan, Boise, Idaho,
Massachusetts Correctional Legal Services,
Middle Ground Prison Reform,
National Association of Criminal Defense Lawyers,
National Black Police Association,
National Center for Institutions and Alternatives,
National Center for Lesbian Rights,
National Conference of Black Lawyers (NACDL),
National Council on Crime and Delinquency (NCCD),
National Islamic Prison Foundation,
National Lawyers Guild, PA Chapter,
National Legal Aid and Defender's Association (NLADA),
National Muslim Political Action Committee,
National Prison Project of the American Civil Liberties Union Foundation,
National Network for Women in Prison,
National Rainbow Coalition,
National Women's Law Center,
Nevin, Kofoed & Herzfeld, Boise, Idaho,
New Jersey Association on Correction,
New Jersey Prisoner Self-Help Clinic,
Patterson, McHugh & Cautz,
Pelican Bay Information Project,
Pennsylvania Legal Services, Institutional Law Project,
Prisoners' Legal Services of New York,
Prison Law Office, San Quentin, CA,
Project COPE (Congregation Offender Parnership Enterprise),
Public Advocates,
Robinson & Quintero, New Mexico,
Rosenthal & Drimer, Syracuse, New York,
The Sentencing Project,
Southeast Mississippi Legal Services,
Southern Center for Human Rights,
Southern Poverty Law Center,
Spriggs & Johnson, Tallahassee, Florida,
Union of American Hebrew Congregations,
The United Methodist Church, General Board of Church and Society,
The Women's Prison Association,
Youth Law Center,

Current and Former Correctional Administrators

Warren Benton, former Commissioner of Corrections for the State of Oklahoma,
Allen Breed, former Director of the National Institute on Corrections of the Department of Justice and criminal justice consultant,
Robert L. Cohen, M.D., former Medical Director of the New York Detention Facility, Rikers Island,
Walter Dickey, former Commissioner of Corrections for the State of Wisconsin,
Michael Hennessey, Sheriff of the City and County of San Francisco,
Patrick McManus, former Secretary (Commissioner) of Corrections for the State of Kansas and Assistant Commissioner of Corrections for the State of Minnesota,
Dr. Jeffrey Metzner, former Chief of Psychology, Colorado State Penitentiary Eugene Miller, prison and jail security expert, former Director of Jail Operations Project for the National Sheriffs' Administration and former corrections facilities administrator for Alaska Division of Corrections,
J. Michael Quinlan, former Director, Federal Bureau of Prisons,
Chase Riveland, Secretary (Commissioner) of the Department of Corrections for the State of Washington,
Steven M. Safyer, M.D., former Medical Director of Montefiore-Rikers Island Health Services, New York City,
Ellen Schall, former Deputy Commissioner of New York City Department of Corrections, and former Commissioner of New York City Department of Juvenile Justice,

Dr. Steven S. Spencer, former Medical Director of the Corrections Department for the State of New Mexico,
Richard Vernon, former Director of Corrections for the State of Idaho

Other Individuals

Douglas Reed Ammon, Pensacola, Florida,
Michael Barnhart, Attorney, Detroit, Michigan,
Lynn Blais, University of Texas School of Law,
Jeffrey O. Bramlett, Attorney, Atlanta, Georgia,
Mark R. Brown, Stetson University College of Law, St. Petersburg, Florida,
Benjamin Currence, Attorney, U.S. Virgin Islands,
Michelle Deitch, Attorney, Austin, Texas,
Mark Donatelli, Attorney in New Mexico prison litigation,
The Right Reverend Joemorris Doss, Bishop of the Episcopal Diocese of New Jersey,
Dan Foley, Attorney and Hawaii Corrections Expert,
Yale T. Freeman, Attorney, Miami, Florida,
Stacy Gillman, Attorney, Sarasota, Florida,
David Glantz, Attorney, Miami, Florida,
Ralph Goldberg, Attorney, Atlanta, Georgia,
Michael Keating, Attorney and Corrections Expert,
Eric Latinsky, Attorney, Daytona Beach, Florida,
Douglas Laycock, University of Texas School of Law,
Dan Manville, Attorney, Detroit, Michigan,
John B. Morris, Jr., Attorney, Washington, D.C.,
Richard Rosenstock, Attorney, Santa Fe, New Mexico,
Scott Rudnick, Attorney, Susquehanna Legal Services, Pennsylvania,
The Reverend Theodore Schroeder, Evangelical Lutheran Church in America, St. Louis, Missouri,
Joseph Schuman, Leader, Ethical Culture Society, Bergen Co., New Jersey,
Kim Scouller, Attorney, Louisville, Kentucky,
Jeffrey Segall, SE Regional Vice President, National Organization of Legal Services, Workers, Local 2320, UAW,
Brenda Bernstein Shapiro, Attorney, Miami, Florida,
Robert Smith, Attorney, Orlando, Florida,
Thomas M. West, Attorney, Atlanta, Georgia.

February 8, 1995.

DEAR CHAIRMAN HATCH AND MEMBERS OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE: I am writing to express opposition to the "Stop Turning Out Prisoners Act," Title III of H.R. 667. In my capacity as the director of the Federal Bureau of Prisons from 1987 to 1992, I have been intimately involved in prison conditions litigation. No administrator wants to operate an unconstitutional facility. The community, staff and prisoners alike are better served when we assure minimally decent conditions in our nation's prisons. My experience, as well as the experience of correctional administrators around the country, is that prison conditions litigation has often helped administrators improve conditions in their facilities.

I believe that the bill is extremely misguided for two reasons. First, by requiring a court to make factual findings before approving a Consent Decree, the bill essentially prevents federal, state, and other governmental entities from entering into settlement agreements in prison conditions litigation. These entities are entitled to determine that settlement is in their best interests. Requiring them to go to trial, and thereby exposing them to a much greater attorney fee award, encroaches on their autonomy. Preventing states from settling, once they have determined it to be in their best interests, is bad policy.

Second, the provision that requires federal courts to use Magistrates instead of special masters or monitors in prison conditions litigation is extremely impractical. Masters and monitors serve an extremely important role in prison litigation; their duties are complex and time consuming. These individuals have typically worked in the correctional field for several years and have developed expertise in correctional management. Replacing them with Magistrates who are already overworked and have no special expertise in prison management would create inordinate delays, misguided correctional policy, and an onslaught of further litigation.

I urge you to oppose this bill or, at a minimum, to hold hearings at which the views of correctional administrators and others can be heard. Thank you for consideration of my views.

Sincerely,

J. MICHAEL QUINLAN.

Mr. MARTIN. I really appreciate the opportunity to make this appearance because I think that what is under consideration before you in terms of the STOP Act really puts us on the edge of a very seminal point in the history of American corrections, certainly, in the last half century.

I say that because of this. The honorable D.A. from Philadelphia made reference to there were no prison system cases before 1970. I believe she said there were no systems under court jurisdiction. A very ready answer for that, a very plausible answer for that—that is because of a case that was handed down by the tenth circuit in 1954, styled *Banning* v. *Looney,* which basically stood for the proposition that Federal courts were not empowered to intervene in the affairs of prison matters, and that became known as the hands-off doctrine. The hands-off doctrine remained firmly in place through about the 1970's.

Now, what is interesting, and I believe very notable for this committee, and I would urge you revisit or to acquaint yourselves with it, is what happened when the insulating effect of the hands-off doctrine was removed. It subjected prisons across this country to judicial scrutiny. What, in turn, did that judicial scrutiny produce? Well, it produced a litany of horrific conditions that anyone that is involved in this area under consideration of this act should become acquainted with.

We have had a number of horrific statistics set out before us. We have had the horrible tragedy of Mr. Boyle, and my heart certainly goes out to you, as I think any right-minded person would. But I would remind this committee that there was a litany of horrific conditions that emerged from conditions litigation in the 1970's and 1980's.

Just a few brief examples, but hopefully they are colorful enough that they will illustrate that serious and horrific conditions likewise existed when these systems were insulated from scrutiny. You had the Tucker telephone in Arkansas. You had inmates in Mississippi that routinely carried and wielded shotguns with live rounds, and frequently fired that lethal weaponry at other inmates. We had the bat in Texas, which was a huge piece of oak that officers used. Corporal punishments were the rule of the day. Inmates routinely died from inadequate health care. Conditions were such that infecticus disease was routine.

The spate of litigation during that time—I believe most of the commentators and scholars familiar with this area of law would agree that the judicial intervention brought about the reform to a large extent of American prisons across this country, and that is why there was some reference made that 43 States had active cases. Well, you have to ask yourself why? How did that come about? You cannot put it all in terms of renegade activist judges. You cannot put it in terms of renegade irresponsible plaintiffs' attorneys. There had to be a basis in fact; factual findings had to be entered.

So what I would ask the committee is to visit the history of this issue, when the prisons were insulated from judicial review, because it is my view that the practical effects of some, if not all of these provisions will serve to insulate systems and jails from judicial scrutiny. Now, that may be the very intent. It is my impression, at least to some extent, that that is the precise intent of this legislation.

I would just urge a great deal of caution before you adopt—and I will speak to specific provisions momentarily—wholesale provisions across the board, regardless of the merit of a particular case. Let me just go into one quick example because it is fresh—the automatic termination of existing consent decrees. That provision, as written, treats all existing consent decrees alike.

I have been involved in corrections not nearly as long as the Commissioner from Delaware, but almost a quarter of a century. I have never seen two consent decrees or two sets of prisoner jail conditions alike. How in the world would you pass something that, in my view, is almost folly that says we are going to go and find every consent decree that exists in America in prison and jail operation and terminate them?

A lot of what has been said today has been couched in terms of population caps. Now, if this provision is directed at that, it is much too broad. It is going to catch up a lot of conditions that exist in prisons and jails that don't have anything to do with population caps. The point here is that a number of the provisions impress me as being overly sweeping, as being arbitrary.

For instance, I would urge the committee to demand or request why the 2-year period was selected for the consent decree revisit. I mean, where did that 2 years come from? Again, I would agree with our colleague, Mr. Watson, that 2 years in the life of a large bureaucracy like a prison or a jail system is a very brief span of time.

These consent decrees and institutional reforms—I believe, again, most commentators would agree it is complex, it is methodical, and it is slow. So, at best, what you are going to be doing—if you have a commitment and you are moving forward with a compliance agenda, you are going to have needless interruptions that will slow that process down by its very nature.

Let me move quickly through some of the provisions to make my point on the insulation. The removal of special masters—again, Professor DiIulio out of his book recognized that in complex litigation of this type, they provide the eyes and ears of the court, and their on-site presence to assist the court, report to the court, et cetera. If you remove that on-site presence of the Federal court, you insulate that defendant governmental entity from possibly accurate reporting, possibly reports that are disguised. A number of things could happen, but the effect is an insulating effect.

The provision that prohibits the award of attorney's fees for plaintiffs' attorneys during the remedial phase of the litigation—again, plaintiffs' attorneys have a tremendous stake in the remedial effect. That is the essence of their case. They tend to be very diligent and very aggressive in providing direction and oversight. If you pass a provision wherein they will not be able to get attorney's fees, you have, in effect, made it very, very difficult for them

to maintain that activity during the remedial phase. Again, the effect of that is to insulate the defendant governmental entity from that appropriate direction and oversight.

The last provision that I would like to specifically comment on is the prohibition of preliminary or emergency relief absent a finding, which would obviously require a full-blown hearing. I have been in institutions in which conditions were so severe that I believed that death was imminent. In one particular case, I observed a very, very crowded holding cell that I described later in court as a human carpet. A week after I made that observation, 4 inmates died, were taken to the hospital and died from an infectious disease outbreak. This provision, as I understand it, the way it is written, would have made it very, very difficult to have gone in and gotten a TRO or a preliminary injunction to have remedied that condition immediately.

So let me conclude my remarks by just simply urging that you not adopt provisions that are arbitrary and have an across-the-board, wholesale application. Number one, that will send, I think, the wrong message to many correctional administrators because I have got a suspicion here that we are at least on the edge of legislating to the extreme. We are hearing these cases of Michigan and Philadelphia, and I am not intimately involved with those and I have heard some things that I find very bothersome that the D.A. has said, and the gentleman from Michigan. But I have also been involved in hundreds of cases, like cases, over the past 15 years and those cases sound out of the norm to me.

I know there have been some representations made about the *Texas* case here today, but I don't know of an agency official, from the governor to the lieutenant governor to the speaker of the house to the board chairman to the director of prisons, sitting behind me, that has moved to rid themselves of the consent decrees in the *Ruiz* case. They are elected officials. They have not done so.

So my last point is that there are things that can be done in terms of expediting and eliminating some bizarre situations, but across-the-board, wholesale, arbitrary provisions, such as automatic drop-dead date after 2 years of a consent decree, I think, are very ill-advised and will be in the long term very counterproductive, if not set the stage for us to return to that time of the mid-century of the hands-off doctrine, which I would suggest was in part responsible for a lot of the extreme conditions we saw in the later decades of the 1960's and 1970's.

Thank you, sir.

[The prepared statement of Mr. Martin follows:]

PREPARED STATEMENT OF STEVE J. MARTIN

Good Morning. My name is Steve Martin. Thank you so much for inviting me to share with you my views regarding the legislation that this Committee has under consideration. I began my career in corrections in 1972 as a prison guard for the Texas Department of Corrections. After going to law school, I began working with the Department in various positions, among them Chief of Staff to the Executive Director of the Department I ultimately became General Counsel to the department and its governing board. I left in 1985 and joined the visiting faculty at the University of Texas School of Law, where I taught a seminar in institutional reform litigation. While at the law school, I also worked as a Special Assistant Attorney General advising that office on Correctional litigation matters. Since 1987, I have worked as

an attorney and corrections consultant on prison and jail litigation involving hundreds of confinement facilities across the United States.

My primary purpose here today is to urge you not to pass the Stop Turning Out Prisoners Act, otherwise known as "STOP." If passed, the bill will wreak havoc in states, counties, and Correctional systems across the Country. As a preliminary matter, unlike the "frivolous lawsuits" bill that is also under consideration by this Committee, STOP is directed at *all* adult and juvenile prison and jail litigation, even litigation that raises meritorious constitutional and statutory claims. No matter how egregious the conditions, no matter how valid the claim, the provisions of STOP will prevent states from settling litigation, will call for court orders to self-destruct every two years, and will disallow the use by Courts of special masters or monitors with expertise in prison operations.

In my capacity as General Counsel for the Texas Department of Corrections, I assisted in the defense of a longstanding piece of litigation known as *Ruiz* v. *Estelle*. I do not wish to devote the valuable time that I have been given here today to the details of the *Ruiz* litigation, but a brief description of the case will allow me to illustrate the grave problems with the STOP legislation. *Ruiz* began in 1972 with the filing of a civil rights action by eight prisoners detailing a wide variety of constitutional claims in a pro se pleading. At the time, the system was beset by high levels of prisoner-on-prisoner violence and staff brutality, inhumane medical care, and overcrowding so extensive that, at one time, prisoners were housed three and four to a 45-square-foot cell.

After a 1980 trial that took 159 days, Judge William Wayne Justice of the Eastern District of Texas issued a 248-page opinion finding that Conditions in the system were Unconstitutional. The Texas Department of Corrections appealed the ruling and, in 1982, the United States Circuit Court of Appeals for the Fifth Circuit affirmed *in toto* the court's factual findings but held in abeyance certain court-ordered remedies and affirmed others. The primary remedial framework in *Ruiz* was the result of a court-imposed decree. The much discussed consent decrees entered in the case were for the most part simply compliance plans to implement the court's remedial decree. After the 5th Circuit ruling, the plaintiffs moved for further relief, seeking to impose a single-cell requirement on the prison system, a requirement the appellate Court had held in abeyance. This prompted the parties to negotiate a major consent decree in which the system was allowed to double cell its general population inmates. In return for the double ceiling, the prison board agreed on pre-determined capacities at these particular prisons. Those critics of the caps in the Texas case often forget that a court imposed single-celling requirement, which we avoided by entering into a consent decree, would have reduced our capacity by half.

Notwithstanding this long and complicated history, I can say strongly and unequivocally that *but for* the sustained intervention of the federal court in the unconstitutional operation of the Texas prisons, the system would have continued to operate in the disturbing manner that I described Previously. Admittedly, in hindsight, there were many points along the path of the litigation at which the parties, and even the Court, might have conducted themselves differently. Most significantly the department could have elected to settle the litigation at the outset, rather than defending a system that was unlikely to pass constitutional muster. Instead, the State spent millions of dollars defending against the litigation, and was ultimately required to undertake measures that were similar to those proposed by plaintiffs at the outset.

This brings me to the first of my several concerns about this legislation—that it usurps what have heretofore been the prerogatives of state and local jurisdictions to determine that settling litigation is in their best Interests. If the State of Texas were to find itself in the same circumstance today that it was in at the time the *Ruiz* litigation was filed, the STOP bill would have *required* the State to expend millions of dollars on legal costs; the Texas Department of Corrections would not even have had the option of resolving the litigation by negotiating an agreement. The consequences of this are made worse by the fact that negotiated settlements, in my view, are better tailored to achieve remediation than court-imposed remedial schemes.

It is equally indefensible for Congress to legislate the termination of all existing settlement agreements—known as consent decrees—in prison conditions cases. I know all too well that consent decrees are the product of endless hours of negotiations between the parties, carefully tailored to a particularized set of actual circumstances. Simply terminating these decrees arbitrarily by legislative fiat will undo all of that work, and immediately require departments of corrections around the country to prepare for trial in each case that is affected.

The decision to settle a case by a consent decree must be left to correctional officials and State Attorney Generals who are familiar with the conditions in the sys-

tem or facility at issue. It is indefensible for Congress to simply strip the states of this option. To suggest that Congress would be doing the states a favor by passing this legislation is misguided. If a state wishes to go to trial rather than to settle a case, it has that option under current law. And if a state wishes to settle a case rather than to go to trial, it has that option too. I urge you to leave it this way.

I have been told that this legislation has been advocated for by the District Attorney in Philadelphia because a consent decree that applies to the Philadelphia jails has, she alleges, resulted in the release of some persons who would not have been released if the decree was not in place. I would like to inform the Committee that no court order or consent decree in the States of Texas, Washington, Colorado, or Wisconsin, that has capped populations in one or more institutions, has required that inmates be released earlier than the normal release at the conclusion of their sentence. Instead, the Legislatures in all four states responsibly provided additional capacity. This is true in most jurisdictions across the country. Those few jurisdictions suffering court-imposed early release conditions are generally those in which the funding bodies have refused to provide sufficient resources to meet constitutional minima. Indeed, it is my experience that Governors and Legislatures in states that have experienced prison disturbances or been subject to major prison litigation are more likely to be responsive to providing adequate resources.

The second of my concerns, related to the first, is the enormous fiscal impact that the bill would have on state and local governments. On its face, this bill misleadingly appears to relieve states and local jurisdictions of litigation; In fact, it would significantly *increase*, rather than decrease, the litigation expenditures that states will be required to incur. This is so because states and localities will be required to go to trial in every case, even in those cases that they believe they will lose.

It is important to realize that Departments of Corrections elect to settle those cases that they have determined they are likely to lose at trial. They do so because, if they go to trial and, as expected, the court finds that the plaintiffs' rights have been violated, that finding opens the door to numerous damages actions by individual prisoners, and precludes the system from mounting a defense. This bill would require a state to go to trial in almost every case, even those that the state knows it will lose, and consequently exposes the system to Countless damages awards. The Costs to the states that will result from those damage awards would far outpace the costs they presently incur by settling such litigation.

There are only two ways under this bill that a trial could be avoided, neither of which is satisfactory. First, a state could agree to a finding of liability that Was incorporated into the court order granting relief to the plaintiffs. Such a finding would create the same problems that I mentioned previously with regard to a post-trial finding of liability, namely, that it would expose the state to countless individual lawsuits by prisoners for damages, and the admission of liability would prevent the state from asserting a defense. For this reason, prison conditions settlement agreement do not include admissions of liability and, instead, typically include a provision to the contrary.

The other manner in which trial could be avoided would be if the parties agreed to settle the case with a non-enforceable settlement. The House of Representatives passed an amendment to the STOP bill that specifically exempts non-enforceable settlements from the bill's coverage. The Senate version of the bill does not include such an amendment but, even if one were passed, this option is problematic for several reasons. First, plaintiffs' attorneys are unlikely to agree to a non-enforceable settlement agreement precisely because it is non-enforceable. For example, in a juvenile facilities case in Colorado, the plaintiffs' attorneys recently turned down a settlement offer from the state because of the threat of the passage of STOP. Second, this solution only delays the manifestation of the problems with the bill. If a non-enforceable settlement agreement is not successful in resolving the disputes between the parties, the suit will simply be revived or reinstated by plaintiffs' Counsel, thereby creating the very same problems that discussed previously. Finally, a non-enforceable settlement is simply not a viable option in most cases, particularly where the defendants are resistant to remediation.

For these reasons, the bill will result in a trial being held in almost every prison and jail conditions lawsuit around the country. And after the state conducts the trial, it will have to do so again, and again, and again, every two years until the problems are fixed. This is because of the provision that calls for court orders to automatically self-destruct every two years. Institutional remediations by its very nature, is a slow process. The Texas prison system had literally institutionalized unconstitutional practices, some of which had been occurring for generations. Such practices are not eliminated without the enforcement of well designed remedial plans for a sustained period of time. At the very least, the Committee should require

an explanation as to why two years was selected, a figure that to me seems quite arbitrary. Having been involved for the last 15 years in prison and jail litigation, I can categorically state that I have never seen two cases alike. To apply a hard-and-fast two year rule to every case is, at best, counter productive and, at worst, pure folly.

I recognize the concern behind this bill that some prison conditions litigation seems to go on terminally. So that there is no confusion, I would like to let the Committee know the current law on consent decree modification and termination—law that I think should adequately address any reasonable concerns. The Supreme Court established in *Rufo* v. *Inmates of Suffolk County*, decided in 1992, that a consent decree can be modified if a change in circumstances warrants a revision. The year before, in *Board of Education of Oklahoma City* v. *Dowell*, the Supreme Court held that a court should dissolve a decree once a system has achieved compliance with the court's orders and is likely to remain in compliance. This body of law has resulted in the termination of many prison consent decrees; that others have remained in place for a long period of tame is no reason to change this law.

This is so because the longevity of prison conditions cases is by no means due to federal court resistance to releasing defendants; rather, the longevity of these cases depends on the extent to which a prison system resists the implementation of remediation. The Texas case offers a classic example of this phenomenon. The Texas prison officials for a time vigorously resisted implementation of the court's orders. In my view, had these officials known that the remedial decrees would terminate after two years, the reforms would have never been institutionalized or, at a minimum, the implementation would have been even more protracted and expensive than it was because the Department's resources would have been significantly impaired by the requirement that they litigate the issues in Court every two years. These resources are much more wisely and effectively spent on remedying the infirmities of a system.

I would like to briefly address some of the other problems with this bill Section (a)(1) of the bill is extremely vague and, at a minimum, should be clarified. In its current form, it suggests that a court will have to hear from every single class member before the court will be able to issue relief that affects the class. If that is what is intended by the legislation, its absurdity cannot be overstated. The class action device was designed precisely to avoid this consequence, not to mention the amount of time and resources that a state would need to devote to even a single case. It is beyond dispute that there are facilities in this country that are beset with unconstitutional conditions that affect all prisoners housed in the facility. Indeed, the class action rule under which these cases are typically brought—Federal Rule of Civil Procedure 23(b)(2)—already requires, as a prerequisite to certification of the class, that the court find that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In such circumstances, that purposes will be served by requiring the defendants, and a federal court, to hear testimony from every single inmate?

This same section, section (a)(i), would also prevent a Court from issuing any relief until after it finds a violation of law, thereby preventing a court from entering any form of emergency relief, such as a temporary restraining order or a preliminary injunction. Emergencies arise in prison operations, and terrible consequences could result if the federal courts were stripped of the ability to respond appropriately, for example, to an imminent tuberculosis outbreak. I have been involved in litigation in which no emergency relief was granted and inmates literally died from infectious disease. I have been in cellblocks in which crowding was so extreme that inmates formed a human carpet. Conditions such as these do not abate with the passage of time.

The provision that for all practical purposes eliminates a court's authority to appoint a court monitor to engage in informal monitoring and mediation of the remedial process would likewise severely retard implementation of the court's remedial orders. It is important to remember that prison conditions cases are often particularly complex. Again, using the Texas litigation as an example, prison officials early on during the remedial phase, repeatedly concocted superficial remedial plans, some of which were intended to continue the very practices that the Court had ordered to be ceased. The Court monitor, who was actually on-site to monitor these plans, was able to accurately report on remediation and to detect those instances in which facially valid plans were inadequate. The on-site presence of a court representatives was clearly critical in the Texas litigation, especially during times when prison officials were defiant of the Court's orders.

Admittedly, some court monitors and special masters in prison conditions cases, as in other types of cases, may have abused their position. But legislate against

those abuses; don't legislate against the use of masters and monitors altogether. For example, this Committee may wish to consider passing legislation that requires the federal courts to issue an Order of Reference for each appointment that limits the monitor's duties and compensation and requires the monitor to submit periodic reports, at intervals established by the court, regarding his or her fees and expenditures for approval by the court; and the Committee may wish to consider passing legislation that requires the federal courts to give the parties an opportunity to object to the findings, recommendations, fees or expenses of a court-appointed monitor. Simply forbidding the use of monitors altogether would deprive the courts of the vital assistance provided in these cases by individuals with special expertise in prison operations. This provision brings to mind the old adage of "throwing out the baby with the bath-water."

Another provision of the STOP bill that would clearly have adversely affected the Texas litigation is that which prohibits court-awarded attorneys' fees for work done during the remedial phase. As I have often said in writing and speeches over the years, institutional prison reform cases are not won or lost in the courtroom, but rather, in the remedial phase. Complex remediation requires vigilant and sustained direction. Such direction can best be provided by attorneys representing the plaintiff class. Had the plaintiffs' attorneys been effectively prevented from providing direction, due to their inability to recover fees for their work, the remedial framework that was ultimately implemented would have been significantly compromised.

Finally, the provision that allows wholesale intervention by any party potentially affected by any relief limiting a prison's population will clearly cause litigation of this nature to be more costly and protracted. More importantly, it will require federal courts to become immersed in the entire spectrum of local criminal justice affairs, a result that even the proponents of STOP would take issue with.

I would not represent myself as a constitutional scholar, but I know from the reading that I have done thus far, that there are legitimate claims of unconstitutionality that would be fertile ground for litigation for many years to come. Attached to my testimony is a letter signed by 250 constitutional law professors asserting that the STOP bill raises serious constitutional concerns, as well as an analysis done by a local law firm called Covington & Burling that reaches the same conclusion. The uncertainty that will result while the constitutionality of the legislation is being litigated will cause a great deal of confusion regarding, for example, whether a consent decree will be honored, whether a court order remains in effect, and whether states will have to devote the majority of their Department of Corrections' budgets to litigation efforts.

In summary, it is my opinion that this bill unfairly and unwisely strips states and localities of the right to respond appropriately to litigation regarding their own correctional systems. The only option that this bill leaves to the states—going to trial in most, if not all, cases—is an extremely expensive one. And by depriving the federal courts of the traditional tools they have used to ensure compliance with their orders—such as the appointment of special masters with special expertise in prison operations; the enforcement of a court's orders until they are complied with; the issuance of temporary restraining orders and preliminary injunctions to respond to proven emergencies; and the ability to award attorney's fees for work done by plaintiffs' attorneys in the remedial phase of litigation—we would have inadvertently set the stage for the return of our prisons to the horrific conditions of the past.

Prior to the 1960s, judges reacted to prisoners' challenges by adhering to the idea that courts were without power to interfere in prison affairs. This rule of law was often referred to as the "hands off doctrine." I would invite the Committee to examine the history of America's prisons—the conditions that existed when the "hands off," doctrine was in place; and the changes that took place over the course of the dismantling of that doctrine. Passage of this act will create a setting in which we will be destined to repeat the failures of the past.

Also, I would like to share some brief thoughts on the "abusive lawsuit" bill. I share the concern that appears to have engendered this frivolous lawsuits legislation, although I believe that the courts are already equipped to respond to those concerns. In 1989, I wrote a law review article detailing the efforts of the Fifth Circuit Court of Appeals to respond to frivolous lawsuits. While I favor reasonable pleading standards, screening mechanisms, and even the imposition of sanctions for abuse, I urge the Committee to strike a balanced approach that does not single out prisoners as a class to be subjected to greater obstacles in seeking redress than all other persons who file lawsuits. The Committee should keep in mind that legitimate prisoner claims and disputes need to be addressed in an appropriate forum, and so long as this exists, I believe that unlawful means of protest, such as prison riots and work stoppages, are less likely to occur.

Thank you for giving me the opportunity to share my opinions with you.

Senator ABRAHAM. Thank you all very much. I think what we might do is this. I will start off here, and maybe since it appears there will just be two of us during this question phase, maybe we will just alternate until we have each either exhausted our questions or exhausted you, maybe at about 10 minutes apiece.

Let me just begin asking generally this. I think one issue that several of my colleagues who aren't able to be here today but who are concerned about this issue have raised—and it was sort of touched on, I guess, by Mr. Watson—was the whole notion of giving States or communities flexibility; that the STOP legislation would somehow be in contravention of the whole notion of federalism because we would be usurping a lot of the authority that States ought to have and the latitude to enter into choices regarding whether they get into a consent decree or litigate a matter to its fullest.

But it is my impression from getting into some of the allusions made by the initial panelists that there are circumstances that have prompted States to enter into consent decrees where, in fact, there wasn't a tremendous zeal to do so on the part of the State, but rather other factors that sort of forced their hand. It kind of touches on the issue that Senator Biden raised about the contract. I mean, in a sense, a contract is an important document if it was entered into willingly by both parties, but if it was a contract made under duress, as has been suggested, then that is a different story.

So I wondered if maybe Mr. Cappuccio could begin commenting on circumstances that might cause people to enter into consent decrees where, in fact, that wasn't the desire necessarily, but it was coerced in some way or another.

Mr. CAPPUCCIO. Sure, Senator. Let me start by making clear, I think, what my position is here, and I think also, if I can speak for Attorney General Barr, what he thinks. I don't think it is necessarily a good thing to prohibit States from entering into consent decrees unless there is a violation shown first.

I think I agree with some of the panelists at the end that it takes away a lot of discretion from the State and a lot of discretion to avoid expensive litigation if you say, if there has been no finding, a consent decree should automatically be terminated. I think, therefore, I would oppose that provision, but I think you can put other safeguards in place. Why do you need the other safeguards, which is really the point of your question?

I wouldn't say that these are situations where we have collusive lawsuits, but you do have situations where you don't necessarily have true adversity on both sides of the case. The reason for that is that corrections officials quite naturally and quite understandably want a larger piece of the budget. So what I have seen in my experience, while I certainly would not characterize any of it as collusion, I see that oftentimes the interests of the corrections officials are not so different from the interests of the plaintiffs. They want to get a piece of the budgetary pie.

Now, what do you do to protect against that going to far, and how can it go too far? Well, look, no one is suggesting that we shouldn't remedy constitutional violations. You have to do that. The Constitution requires it. The Justice Department is very serious about it. But what you want to make sure does not happen is

that the corrections officials agree to a lot more and to broader things because they want a piece of the State's budget.

What can you do to ensure that doesn't happen? I think the provision in STOP, which I very much support, that says that before a court approves a consent decree, it needs to determine that it is narrowly tailored to the alleged violation—that is a very important safeguard against this problem of not enough adversity.

I think, really, the situation we see now is virtually indistinguishable from the theory of the Tunney Act. Now, you and I are probably too young to remember when the Tunney Act came around.

Senator BIDEN. Whoa, whoa, wait a minute now. Let's ease up here a little bit, all right? I mean, I was with you up to that point. [Laughter.]

Mr. CAPPUCCIO. Surely, Senator Biden is too young.

Senator BIDEN. Thank you. Please proceed. [Laughter.]

Mr. CAPPUCCIO. The idea of the Tunney Act was this. The Congress said, look, in antitrust cases we are afraid about the Government entering into consent decrees that are too soft with companies. Think of Microsoft for an example, the big flack about Microsoft. So what the Government said in the Tunney Act was before a court will approve a consent decree and enforce it with the contempt power of the court, we are going to make the court make a finding, and that finding should be that the consent decree is in the public interest—a very general finding.

I think an important safeguard here which is included in the STOP Act is before a court approves a consent decree between corrections officials and plaintiffs, it ensures that it is narrowly tailored, or you can pick another word, reasonably tailored, to remedy a constitutional violation, or at least the constitutional violation alleged, and that it is not doing all sorts of other things.

Senator BIDEN. Is the phraseology "to remedy a constitutional violation" part of your recommendation, or is that already in the STOP Act? To be honest, I don't know.

Ms. ABRAHAM. I think they use the words "Federal right."

Mr. CAPPUCCIO. I am not an expert on this. I just received the Acts a couple of days ago. I think the House bill differs from the Senate bill. I think the House bill says "to remedy a Federal right," and the Senate bill says "to remedy a Federal right claimed."

Senator BIDEN. And what are you recommending?

Mr. CAPPUCCIO. "Federal right claimed."

Senator BIDEN. It seems to me the precise language is relatively important.

Mr. CAPPUCCIO. Correct.

Senator BIDEN. So what is your specific recommendation?

Mr. CAPPUCCIO. Narrowly tailored—well, I am not sure I can answer the question specifically. I can tell you what I want to do.

Senator BIDEN. OK.

Mr. CAPPUCCIO. I want to make it narrowly tailored to what the court finds would be a constitutional violation if the facts are as alleged.

Senator BIDEN. Thank you. That is what I thought you meant.

Senator ABRAHAM. Thank you. Let me just move ahead here and ask Ms. Abraham if she would also comment on the question I

originally posed, whether there were circumstances that might cause local officials to enter into these consent decrees even though they weren't necessarily desirous of doing so.

Ms. ABRAHAM. There are certain things, and some of them are politically motivated. It is more expeditious to enter into a consent decree than to fight it out in court, and sometimes rather than look like you are bad guy—"Prisoner Files Lawsuit"—and I have never had this; I am just telling you what I perceive to be one of the issues that is brought up.

Rather than have the local governmental body look like they are the bad guys, wanting to deny the rights of oppressed people in prison and be recalcitrant in their desire to make changes, and look as they are forward-thinking and reform-minded as part of a total political package, it seems as though it saves money up front, it saves political capital, and you just sort of agree that you won't fight it and you will just enter into some consent decree.

The problem with entering into the consent decree is that it doesn't anticipate changes. For example, when Philadelphia entered into its consent decree 8 or 9 years ago, we didn't have the scourge of crack. We couldn't anticipate what effect that would have on our prison system. So, number one, we can't anticipate future events. Number two, the person who enters into the consent decree—it is behind him or her. He or she can go on to the next item on his agenda and leave to the next person in office the problem of trying to fix it.

I think also what happens is that when we allow Federal courts, absent findings of constitutional violations, to put a hammer to the heads of succeeding generations of office-holders and limit access to intervenors who have a legitimate claims, like prosecutors, to intervene to show that there are changed circumstances, I think you have a problem.

Finally, I think also the issue of the master that was brought up by Mr. Martin—one of the great problems about prison masters is that they are the eyes and the ears of the court, to the exclusion of everybody else. They hold private, secret discussions with prisoners. There is no record kept. There is no attempt or allowance on the part of the parties to come in and make their statements.

The master is appointed by the court as his or her own personal watch dog at public expense, without any accountability, any record, any access to the records by the complaining people, such as the mayors of the cities, and so forth, and then makes the recommendations to the judge and the judge makes a finding based on something that you have no information on. So this is really like a star chamber proceeding.

We believe that an important provision of the STOP Act is that a master—first of all, a Federal magistrate should do it, not a master. We don't want anybody being the foot soldier of the judge. The second thing is that even if it is a master, that that master, as a last resort, if it is not a magistrate, hold public hearings where there is a record, a proceeding, and an attempt made, at least, to have access to the record by people outside of the prison, such as judges, D.A.'s, mayors, and other intervening or interested parties.

Senator ABRAHAM. Would any of the other panelists like to comment on the pressures that might cause somebody to get into one

of these against maybe their preference? Anybody can answer, really. Mr. Watson?

Mr. WATSON. Yes, Mr. Chairman. I think that the comment that there were politicians who wanted to look as if they wanted to settle, I think, is not a representation of my experience now. I think that probably was true in the 1960's when, as many panelists have said, these things started to unfold. There was an interest in, you know, what is this thing about civil rights for prisoners. That was a new ball game for everyone, and I think a lot of mistakes were made and we are living with those mistakes.

My contention is, however, that I don't see many politicians now, certainly not in our State, who want to do anything but get pretty tough on crime and are, as a matter of fact, very much opposed to looking as if they are wanting to settle things and look good that way. It is the opposite.

Senator ABRAHAM. Anybody else? Mr. Gadola?

Mr. GADOLA. Senator, I would say in answer to your initial question, if the current system is the model of federalism, as has been alluded to, I guess I am ready and the State of Michigan is probably ready for the alternative.

I think I would agree with Ms. Abraham when she said that there are probably political motivations, and in Michigan's case I am quite certain there were certain political motivations for entering into that decree. The problem becomes that at least in Michigan's case, and I am sure with a lot of other States and localities, the decree is so openended and not related to specific constitutional violations that we find ourselves caught in this morass of detail from which we are not able to escape. That is where Michigan currently finds itself.

Senator ABRAHAM. Mr. DiIulio, do you want to respond?

Mr. DIIULIO. All I would add is I can't speak to the political motivations or lack thereof, although there is a fair amount of descriptive work on the subject. I mean, the practical effect in every case going back to 1965, the first major overcrowding litigation, the 64 of the 70 major overcrowding litigations that have been won by prisoner plaintiffs—the practical effect in every case at the end of the day, whatever people's motivations or calculations may have been, is that the corrections department ends up with more resources, more money, and more staff to deal with fewer inmates, which correctional officer unions, and so forth, tend to like.

You have seen that to some extent in the Philadelphia case where one of the groups that is not happy with STOP or STOP-like provisions is the correctional officer unions, for obvious reasons. No one begrudges them that preference, but I think that is the obvious bottom line and has been for the last 3 decades in these cases.

Ms. ABRAHAM. I begrudge them that. [Laughter.]

Senator ABRAHAM. In this round, and then we will go to Senator Biden, I just have sort of a broader question just to put this in perspective. One of the things I think we always have to ask when we are looking at legislation of this type is exactly how many of these problems are out there, and the one thing that none of the testimony has at least focused for me is this. How many of these consent decrees are currently operational, and how many cases that—let's just take, for example, the Michigan case and the Philadelphia

case, which maybe are the extremes, but how many out there, you know, have fallen into this kind of pattern?

I think in trying to piece together a bill here that is a sensible response, it is sort of important, I think, to get a feel for what we are contending with. Does anybody have——

Ms. ABRAHAM. Senator, I think in my prepared testimony, I—and there was a typographical error in my prepared testimony, but I said, "By 1995, 108 municipalities and over 1,200 State prisons," it should read, not "prisoners," "were subject to court orders or consent decrees."

Senator BIDEN. Federal court orders?

Ms. ABRAHAM. Well, some were Federal, some were not, but many of them were Federal.

Senator BIDEN. Well, it is a big deal, though.

Ms. ABRAHAM. Oh, indeed.

Senator BIDEN. All we have the authority to do is affect Federal.

Ms. ABRAHAM. Of course.

Senator BIDEN. So I think the question we need to know is how many affect Federal—how many would be affected by this legislation, is another way of putting it.

Ms. ABRAHAM. I can't answer that question, and I can try to find out the answer for the committee if you would like me to. I am not prepared to answer that right at this moment.

Senator ABRAHAM. We would submit that in written form.

Ms. ABRAHAM. Would you?

Senator ABRAHAM. Of course.

[The questions referred to are located in the appendix.]

Senator ABRAHAM. I am just trying to get a handle on those numbers. Mr. DiIulio?

Mr. DIIULIO. If you look at what the Bureau of Justice Statistics puts out in its annual counts of these things, the statistic that the district attorney just cited was a 1990 statistic, the same statistic that I have in my testimony as well. At that time, 264 of the 1,207 prison facilities that she mentioned were under specific orders to limit their populations.

As to the question of what number is under Federal court order, if you look at some of the ACLU's status reports on the subject and you look at some of the other data, it is sort of like the problem that Attorney General Barr raised this morning with the metaphysics of defining what represents an order and what takes effect under what circumstances.

The statistic is that by October of 1994, 39 States and 300 of the Nation's largest jails operated under some form of Federal court direction. I do not have here with me the precise breakdown of how many were overcrowding, and so forth, but that statistic I have. The entire system was under such orders in 8 or 9 States and overcrowding litigation pending in many others.

Senator ABRAHAM. The last part of my question was this. It was earlier suggested that no judge likes to have these under their domain, although I am not sure that I necessarily agree with that. It is my impression some judges may like to have this. But be that as it may, the instances that we have heard about here from Michigan and Philadelphia—are these totally aberrational or is there at least a significant number of similar kinds of problems of this type

where we have widespread early releases, and so on? Does anybody have an ability to answer that?

Mr. Martin?

Mr. MARTIN. Mr. Chairman, I would like to at least take a stab at it. I think in answering that, it depends on who you ask. I am just totally blank.

Senator ABRAHAM. I realize it is obviously tough. I am just trying to get a feel, though. Again, it goes back to the question of how serious the problem is. Obviously, we have now got a sense that quite a few States in some way or another are operating in response to court orders and consent decrees. But my question is, are these two aberrational or are there other similar instances where the results of these have led to widespread early release or other sorts of responses that—Mr. Cappuccio, do you want to answer that?

Mr. CAPPUCCIO. My knowledge is a bit out of date because I have been out of government now for almost 3 years. But my sense was, while there were a lot of States involved, we have pretty much talked about the worst States, and I don't know if I would call that aberrational, but it is not the norm either.

There is one theory, though, which would broaden this out even more, and that is I am not sure the problems we have talked about today are necessarily limited to prisons. You know, if you had AT&T and the telephone companies in here today, they would have some view on consent decrees, too.

One of the things that the committee may want to consider is whether there isn't another sort of broader bill in here somewhere where we generally think about, when Federal courts get involved in remedying any Federal violations, how far they go and when you reopen them.

Senator BIDEN. We could put busing into that category as well.

Mr. CAPPUCCIO. You could. In fact, I guess the Supreme Court has had a couple of cases on that recently.

Senator ABRAHAM. Any others? Mr. Gadola?

Mr. GADOLA. Senator, I don't think they are aberrational at all. I can cite two examples from the State of Michigan, neither of which is a CRIPA lawsuit, but I think they both demonstrate the longstanding nature of these lawsuits and the inability of the State to get out from under the aegis of judicial control.

We have a class action lawsuit brought on behalf of female inmates in the State of Michigan, the *Glover* case, which has been extant since 1978; a companion to the *U.S.A* v. *Michigan* lawsuit, *Haddix* v. *Johnson*. That lawsuit, in front of a different Federal court in Michigan, has been around, as *U.S.A.* has, since 1984, and the judge presiding over that particular lawsuit recently indicated that he would expect that case to continue into the year 2000. So I think this is not aberrational, at least not in the case of Michigan.

Ms. ABRAHAM. I think also, if I may, Senator, there are a couple of other States, I think, that feature—besides Michigan and Pennsylvania, Florida and Massachusetts. I think there is a court order now that applies to a jail that has been closed in Boston. If you would like me also to submit some information about the fact that—obviously, we wouldn't come to the Federal Government to ask the Senate to act on a bill that would apply only to State issues. Some States have limited the effect of consent decrees. Some

of them have outlawed them because they don't want them. They want other kinds of ways to fix this problem, or at least address it.

I know that if we didn't think this was an important issue—if this was just an aberration for Pennsylvania and Michigan, we wouldn't have been working for over 4 years to get something done in the Congress. This is something that I think this whole country is going to feel the pinch of, and it is either because of some perception on the part of prisoners interpreting Supreme Court cases like, you know, *Monroe* v. *Pape* in the 1960's or the Civil Rights Act, and so forth.

Anything that you are going to allow prisoners to take advantage of is going to necessarily involve the Federal process because I think their chances of success in the Federal process are much likely of success than the State process, and I think that is where people look to go. I think after we give you some information, you will find that we wouldn't be sitting here today if we felt that—I can't speak for Michigan, but I think I get the drift of what Mr. Gadola was saying. We wouldn't be here if we were the only two States, and neither would all these people behind us be here.

Senator ABRAHAM. Well, we are just going to alternate rounds here and I have had more than my share for a while, so let me turn it over. Senator, did you want to make an opening statement?

Senator BIDEN. No. I would like permission to put my opening statement in the record, if I may, Mr. Chairman.

Senator ABRAHAM. Without objection.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Today, the Judiciary Committee convenes this hearing to discuss a number of issues relating to our Nation's State prisons and county and local jails.

As I have stated at every judiciary committee hearing we have convened this year relating to the crime issue, it is my hope that we will build on the achievements of the 1994 crime law.

It is counterproductive to retreat on last year's progress—our attention now must focus first on achieving full implementation of the crime law—including the various prison provisions—and on identifying additional areas, not addressed in that law, where action can be helpful to the fight against crime.

The 1994 crime law contained the first-ever direct Federal grant program to help States and localities *build and operate prisons*—providing $9.7 billion over six years, all fully paid for by eliminating 272,000 Federal bureaucrats.

The overriding goal of the prison grant program was to help States *take violent offenders off the streets and keep them behind bars for as long as possible.*

The law promotes this goal in several ways:

- *First,* almost $4 billion is set aside in a program designed to encourage States to move to a "truth-in-sentencing" system modeled on the Federal system many of us worked on years ago. The program would require that States keep all second-time violent offenders in prison for at least 85 percent of their sentences.

Ultimately, I hope the States will move to keep all violent offenders behind bars for at least 85 percent of their sentences, just as we do in the Federal system. But right now, States are keeping offenders behind bars on average for only 48 percent of their sentences.

But the cost to the States of nearly doubling the amount of time prisoners spend behind bars is, to put it mildly, staggering. I am told that requiring States to keep *all* violent offenders in prison for 85 percent of their sentences would add approximately $60 billion over the next five years to their prison costs.

It makes no sense to think that States will spend $60 billion to get $4 billion from the Federal Government. For this reason, we set a more modest—but attain-

able—goal in the 1994 crime law, we reasoned that it would be better to offer help States could afford to accept, instead of an empty promise.

- *Second,* the law gives the States the flexibility to build either secure prisons or military-style boot camp prisons for non-violent offenders as a cost-effective means to free-up expensive prison cells for violent criminals.

Based on the most recent data available (1992), we know that almost 30,000 *violent* offenders do not spend a day in prison because there is no space for them. At the same time, 160,000 *non-violent* offenders are taking up secure prison spaces.

The flexibility provided by the 1994 crime law allows States to maximize their prison dollars by moving these non-violent offenders to cheaper space—making room for more violent offenders.

- *Third,* the law gives States the flexibility to support the operational costs of prisons—this is particularly important because some States have prisons built, but no funds to open them.
- *Fourth,* the law also requires consultation between the State and counties and local governments—because the Nation's jails are run almost exclusively by counties and cities;
- *Finally,* the law requires assurances that States develop correctional plans which recognize the rights and needs of crime victims, train corrections officers in dealing with violent prisoners, put prisoners to work, educate prisoners, treat drug-addicted prisoners, and assess the danger prisoners may pose to society before they are released;

Earlier this year, the House passed a bill—H.R. 667—which would change many of these features.

Most notably, it added a new "truth-in-sentencing" standard, the effect of which would be that few States would qualify for any of the dollars. Just how few is made starkly clear by a Justice Department report released this week.

This report, "Violent Offenders in State Prison: Sentences and Time Served," is based solely on data provided by the States themselves. The report indicates that only 1 of the 27 States that provided data would meet the new standard proposed by House republicans—and that is my home State of Delaware.

Now, perhaps other States which did not report information could clear the new hurdle. But, based on the data from the 27 States—which reports that violent criminals serve 48 percent of their sentence—it does not seem likely that many of the non-reporting States will meet this new test.

This hearing will also address some key issues relating to litigation by prisoners. All of us want to keep violent offenders behind bars for as long as possible. And all of us want to limit frivolous and abusive prisoner lawsuits.

In fact, a provision in last year's crime law gave States added authority to dispose of prisoner complaints before they could be filed in Federal court. This year, we are faced with several additional proposals to limit prisoner litigation, and I believe we should take a close look at them.

One of these is a new proposal designed to limit the scope of Federal court involvement in prison conditions lawsuits, about which I have serious questions. The eighth amendment to the constitution, which prohibits cruel and unusual punishment, defines what conditions are unacceptable.

The courts have the responsibility of determining in specific cases whether that standard is met. And, where there is a violation of the eighth amendment, our Constitution requires the courts to fashion a remedy.

The proposed legislation would limit the courts' traditional role in correcting constitutional violations. I question whether this is appropriate.

I am also concerned that this legislation would appear to terminate existing consent decrees—contracts between litigants and the States—and would severely limit any future consent decrees.

All of us want to help States improve the effectiveness and efficiency of their prison systems. All of us want to see violent offenders in jail where they can no longer threaten us.

I look forward to discussing how best to meet these goals with our witnesses today. Thank you and welcome.

Senator BIDEN. Let me compliment you on conducting these hearings. You have only been in the Senate a little while now and you have impressed everyone, including me, with what is not always the case with us who come here, your thoughtfulness and

your insight on a number of these problems. I compliment you on that and the way you are conducting this hearing.

As I said, I am sympathetic to this legislation. My staff will be checking out—Lynne, you have enough problems without having to do our work for us and figure out what the rest of the Nation is doing. Anything you have would be helpful, but we can find out the answers to the questions that were just asked.

I would make the point that Mr. Watson made about the change in tone of politics today. In my State, there is a majority of the members of the State senate who have petitioned and introduced legislation and cosponsored it to bring back the whipping post. So if anybody thinks that in my State—by the way, we had the whipping post, where you actually got strung up to the post and got whipped in the courtyard in front of everyone else, until the year 1968. I think the last whipping was in 1964, and there is a call to bring it back. So, if anything, a kinder, gentler, more prisoner-oriented mood does not prevail in my State.

So I have clean hands here, I want to talk about two things here. One is how the STOP legislation fits with truth in sentencing, because they do relate in terms of impact. They don't relate in terms of the law, but they relate in terms of impact.

I want to make it clear I am a little like Brere Rabbit on the idea of the Republican proposal for truth in sentencing. You know, don't throw me in the brambles, but if you do, Delaware gets all the money. So I want to be real clear about it. We do our job in Delaware and we do meet the 85-percent requirement. We don't have to build any more prisons to get the money, and if you make it an 85-percent requirement, I promise you we are going to get your money and we are going to try very hard to get it.

I want to be up front about that. I make no apologies for it, so no one later says, well, Biden didn't fight; even though his crime bill didn't have the truth in sentencing, Biden didn't fight this change, and it looks like the reason he didn't fight it was because Delaware benefits. The answer is right, and right, and right.

So, having said that, let me ask in a less parochial vein, Ms. Abraham, your main problem with the effect of the consent decree is the caps, right? I mean, that is the beginning, middle, and end for you. You helped me write that crime bill. I use the example you gave me years ago where you pointed out, and I use it constantly, I think it is almost every Friday, or almost every Friday, the court of common pleas judges or someone sits down there and they decide, you know, who do they free, Barabbas or Jesus.

I mean, they get a list of people and they are told they have to go down—I am not being facetious. I mean, that is the essence of the problem. They have to put out on the street people who are hardened criminals who are recidivists who end up getting arrested again, but they have no choice because of the existence of the court order. So I think I have an appreciation, and having adopted Philadelphia as my second city, I think I have a sense of the problem, but it relates to the prison caps, right?

Ms. ABRAHAM. It not only relates to the prison caps for new offenders who are, of course, presumed innocent, but that cap also affects probation violations and who gets sent to prison even at sentencing.

Senator BIDEN. It is across the board.

Ms. ABRAHAM. It is across the board. It impinges and impacts on crime and the perception of crime in major American cities, the prison cap does.

Senator BIDEN. Now, let me ask you a question. I am not suggesting that I want to make this change in the legislation, but let me just ask it to you. The question was raised by Mr. Martin about all consent decrees. There are consent decrees in here that relate to conditions that nobody in the world, nobody in the civilized world, would consider should be abandoned, and that is relate to things like no heat in prison cells, like guards that smash the heads of prisoners routinely against walls. I mean, there are consent decrees relating to training for prison guards, consent decrees relating to length of hours they work, consent decrees pertaining to lighting in prisons and the effect dungeons, in effect.

If we altered this legislation to say only those consent decrees which related to prison caps would be automatically reopened, which this legislation calls for, would you have a problem with that?

Ms. ABRAHAM. I think the STOP Act is much broader than just consent decrees or caps.

Senator BIDEN. It is. That is why I am asking.

Ms. ABRAHAM. I think that there are other orders other than caps that need to be addressed, and that is why the legislation was drafted the way it was.

Senator BIDEN. I understand.

Ms. ABRAHAM. I think it would be totally selfish and utterly self-serving for just Philadelphia, since my problem is the cap. There are other problems across this Nation that I think STOP addresses that don't necessarily——

Senator BIDEN. But quite frankly, Lynne, the only one that puts people back out on the street is the caps, and I don't give a damn about the rest. I just don't want these people out on the street.

Ms. ABRAHAM. Well, sometimes, as a way of enforcing, or forcing, depending on your view of things, reform, the court will order a moratorium on prison admissions until, let's say, something is finished; let's say the kitchen is redone or something of that sort. But the hammer that most judges have over prisons like mine is some kind of either prevention of people getting in or release from prison. So, for me, and I am only speaking for me, the cap is the major problem, but there are other problems as well.

Senator BIDEN. Professor, you know your stuff in this area. You have written a lot about it and you are well respected. One of the things that came up 5 years ago, and even earlier, that I found myself having to argue against was a similar argument that three of you made today about, "interfering" with the ability of States to enter into consent decrees with Federal courts, and it went like this.

Everybody knows that the attorney general of the State of Delaware and the attorney general of Michigan and the D.A. of Detroit and the D.A. of Philadelphia and the D.A. of New York—this is how the argument went—enter into these awful plea bargains, letting these awful people out on the street. There was a proposal here in a crime law—and I see a Philadelphia Congressman behind

you; he may remember it when he was here—a proposal that said we are going to outlaw plea bargaining, because there were a number of studies written about, in plea bargaining, the same incentive exists for a D.A. that exists for a prison official, the same exact one; one, their batting average, especially if they are elected; two, their incredibly overcrowded workload.

If we eliminated plea bargaining, Lynne, you would go out of business.

Ms. ABRAHAM. Any district attorney who says he or she is going to eliminate plea bargaining is a fool or a liar, one or the other.

Senator BIDEN. I am with you. Now, the problem I have is the conceptual one. I sat here for 3 years arguing against the attempts of some of my friends, tough law and order folks, saying we are going to get tough and we are going to make sure that we have no more plea bargaining because if someone is accused of first-degree rape, the cops must have had a reason to accuse him of that and to allow them off on simple assault or to allow them off on whatever is an outrage and they are just going back out in the community. There are all these statistics to show that people with whom D.A.'s have to plea bargain, I would argue have to plea bargain, go out and commit a significant number of crimes.

Now, my question is how, conceptually, do we make the case, professor, that it is appropriate for me to intervene between a governor, a mayor—by the way, Mr. Watson, when he ran the prison system in Oregon, had no authority to do anything by himself. He may have been involved in it, but the governor had to sign off on it. He has no authority in the State of Delaware that the governor doesn't have to sign off on.

So I am inclined to vote for this legislation, but I am thinking, OK, I vote for this and I tell the governor he can't enter into plea bargaining, in effect. That is what it is. How do I not turn around and say, by the way, the attorney general has no authority to enter into a plea bargain? Same motivation, Mr. Cappuccio, same exact motivation as the prison official may have. Can you make a distinction for me, professor?

Mr. DIIULIO. Senator, you are a special legislator because you demand that kind of conceptual clarity. That is one of the things that I think is often lacking from legislation.

There are tradeoffs involved in all of this. I think the reason why, if you look at the public opinion survey data on this, most people are willing to have prosecutors make those tradeoffs—they don't like plea bargaining; it is considered by many people to be the seamy side of the justice system. But it is almost without exception, if you look at the survey data, that people believe that big-city prosecutors, like my friend, District Attorney Abraham here—when they make those tradeoffs, the primary value in their calculation is public safety. It is not second, third, or fifth; it is first.

Senator BIDEN. Well, let me interrupt you there. In all the data I have seen, the public overwhelmingly opposes plea bargaining and overwhelmingly would support legislation to eliminate plea bargaining. You may have different data than I have and I would like to see some submitted.

Mr. DIIULIO. No; I would be shocked and amazed if that were not the case.

Senator BIDEN. That is the only point I am making.

Mr. DIIULIO. Yes.

Senator BIDEN. So the public thinks that.

Mr. DIIULIO. Obviously, in this case the public is uncomfortable and is opposed to the notion that people are committing three and four crimes and are getting off with one. But the reason we had the move to mandatory sentencing, in my view, in the 1970's and into the early and mid-1980's was because people were saying this justice system involves an irreducible minimum of discretion. Somebody has got to exercise the discretion.

The 10 million violent crimes committed in 1992, the third of them reported, the 165,000 of them resulting in convictions, the 100,000 that went to prison—we are not ever going to have a system that is going to invest the human and financial resources necessary to go after every criminal and incarcerate every criminal, nor would most people at the end of the day want to do that. So discretion is going to be exercised. The question always becomes who is going to do the sorting, who is going to exercise that discretion.

I think from my perspective, Senator, the conceptual point you raise leads me to the conclusion that most people are more satisfied to have prosecutors exercise that sort of discretion than unelected, unaccountable Federal judges who intervene in cases in local and State jurisdictions and who do not, and this is what we are really talking about here, put public safety first.

Senator BIDEN. Well, I think you are comparing apples and oranges. The prosecutor is to the governor what the State judge is to the Federal judge. It is not the prosecutor to the judge. The fact of the matter is the prosecutor doesn't make a deal with anyone other than the defendant, which then can be overruled by the court. In my State, you can make a plea bargain the court will not allow to be had in my State. I don't know about the State of Pennsylvania.

Ms. ABRAHAM. Well, excuse me, Senator. All plea bargains are subject to the court accepting the plea, so the court must accept it.

Senator BIDEN. Right, OK, that is what I am saying. So it is the same in your State. I just didn't want to speak for every State.

The point is the Federal judge is located in the same spot in this deal between the governor and a Federal court as the prosecutor is between himself or herself and the State court. The person in question is either the defendant or the prisoner, and so I just have great difficulty—by the way, the data I have seen—I share your view about who is going to look at the public safety, but the truth is prosecutors, if you notice, nationwide have not experienced an overwhelming embrace by the American public.

All of them that have run for higher office have gotten beaten, by the way. It tells you a little something about what has happened in terms of where the public thinks prosecutors are. Now, I am not being critical because I am supportive. I don't think there is a single person here in the U.S. Senate who has been more supportive—there are many as supportive—of State and local and Federal prosecutors as I have been. I am not making the case that they aren't responsible. I am making the case in terms of what the public perceives.

In my State, I promise you the people of my State would be more certain that the governor of my State is going to protect their interests relative to prisoners than they think the attorney general would because they know the attorney general wants resources. They know the attorney general, which is the prosecutor in my State—we have no D.A.'s—the attorney general in my State wants more personnel, wants more authority. So every State differs.

I don't want to beat this to death, but I find it difficult for me, and that is why I am so intrigued by what you have suggested, sir. I think if this legislation lays out a predicate—and, unfortunately, I was here when *Tunney* was here. That is how old I am, but I got here when I was 30. The predicate that you are suggesting exists, and that is that there has to be a finding that there is a reasonable prospect that a constitutional violation exists. Then I am much less concerned about me interfering in the State's affairs.

Here we are with this entire movement out there coming from the center-right saying, Federal Government, stop dictating to the States, except when it comes to morals and when it comes to stiffer, meaner, harsher, better punishment. Here we are telling the States, by the way, you, governor—if I vote for this as it is now, I have to go back to my governor and say I don't think you are competent; you are not competent; I don't trust you because you make deals; I don't trust you to make a deal with a Federal court judge. There is no getting around that. That is what it says.

That is what you have all said. You have said these guys, prison officials—and that is what the gentleman from Michigan has implied that a previous administration, whoever it was, Democrat or Republican, entered into this consent decree. It was a political deal. So I have got to sit here as a U.S. Senator and say my governor, who probably knows as much or more than any of you at the table about governing and has an exemplary record—and the one before him, Mike Castle, and the one before him, Governor duPont—that these guys aren't smart enough, aren't honest enough, aren't decent enough, aren't capable enough to decide whether or not they want to enter a decree with the Federal court.

No governor—and, Lynne, you know this—and no mayor, I don't care who they are, is going to let a prison official seal their political fate for them. There ain't a one. Not a single one in America is going to let a prison official say, by the way, this is the consent decree I entered with the Federal court.

Ms. ABRAHAM. Senator, I am not here to quarrel with you. You know I have a great affection for you personally on a personal level, as a Senator, and for the institution of the Senate, and I am not here to argue about perceptions. It depends, first of all, on your view of who people really trust, and some people do trust their local prosecutor more than their mayor and more than their governor.

Senator BIDEN. That is true.

Ms. ABRAHAM. Second of all, when it comes to some of these litigations, the moving party, the plaintiffs, whoever they may be, do not move against the district attorney. They file their lawsuit where the district attorney has nothing to do with it. It is against the mayor or the body of government.

Senator BIDEN. I understand, but you would acknowledge, Lynne, I have to make a judgment. Again, I want to vote for this because I know your problem. I really do. I don't know it as well as you do; not just you. I mean you and your colleagues.

Ms. ABRAHAM. Sure.

Senator BIDEN. I want to vote for this, but there is no getting around it. I have got to say to every governor in the Nation, well, you know, we in the Senate don't trust you enough to make a judgment as to what is best for your State, and that flies in the face of everything that is happening here saying send it back to the States.

My time is up. If I can just ask one more question and then yield, we are going to hear a lot of testimony, and we have—I didn't hear it because I stayed on the floor voting—about truth in sentencing. I want to state for the record, because apparently I am so old people wouldn't remember this, that I am the guy that wrote the Federal sentencing legislation. You are looking at him right here. I am the guy that authored it. I am the guy that authored the Speedy Trial Act. No one else can take blame or responsibility for it. I am the guy. I did it and I am proud of it. At a Federal level, it works very well.

The reason why people don't want to come to Federal court is they go to jail, they go to jail, because Federal politicians, as bad as we are, met our responsibility. It is easier to meet it than State court folks. We came up with the money for prisons. We came up with the money for judges.

The reason I wrote the Speedy Trial Act, Lynne, is I read the statistics. People waiting to go to trial were committing crimes at a faster rate than people who were not already arrested and waiting to go to trial. That is the reason I wrote the law. It wasn't born out of civil liberties. It wasn't born out of any of that. They were committing crimes. So it is working.

Now, we are going to hear, and we have heard from governors and State and local officials talking about they want to be tough on crime, but they don't have the nerve to go back to their officials and say, you want us to put people in jail, it is going to cost money. They all come down here and say, look, balance your Federal budget; by the way, send us the money so we don't have to do this; we want money.

My own governor, God love him, a political ally, makes a speech about balancing the budget and then says to me, you are going to send me $24 million for prisons, right? There is $24 million of Federal money going to the State of Delaware to build prisons over the next 5 years. In the State of Pennsylvania, it is probably going to be more like $350 million.

We have got to have a little truth in legislating here. If we want these folks to go to jail, let's pay to have them go to jail. You don't want us to federalize it, you don't want us to take over all your crimes. You want to have local authority. Let the folks in Harrisburg step up to the ball, like they did in Texas. They doubled them since 1990. They still have a problem and they still can't meet the 85-percent problem.

Now, here is my question. If, in fact, we go to truth in sentencing requiring the States to come up with keeping their folks in prison

for 85 percent of the time sentenced, and the average is 42 percent—Mr. Gadola, do you know what it is in Michigan, average time?

Mr. GADOLA. No, I don't.

Senator BIDEN. I think it is around 40 percent. Correct me if I am wrong. We are getting it now.

If you think you have got a problem now, you wait until we pass this truth in sentencing legislation. You will not get any money in Michigan federally until—the good news is you are going to be able to go to your governor and say, governor, I have got good news for you and bad news. The Federal Government has a pot of $10.2 billion out there for States to have money for prisons. The bad news is, to get our piece of that, you have got to double the prison space in the State before you qualify to get any of that. Or, governor, you have got to cut in half the sentences listed on the books.

You are even worse, 37 percent. You are not nearly as good as Delaware. Pennsylvania is not nearly as good as Delaware. By the way, Delaware is wonderful. Do you know why we are wonderful? We have 750,000 people.

Ms. ABRAHAM. Small State, small population.

Senator BIDEN. We have the second highest incarceration rate—we are not proud of it, but the second highest incarceration rate of any State in America, after Texas. We are tough. We are small. It is easier to be tough when you are small.

But the point I am making here is do you folks, any of you—I want to go down the list and just get a yes or a no—do you support STOP and the Federal requirement that before you get a penny out of the Biden crime law for prisons, you have got to have 85 percent average incarceration time for a sentence? Do you know what I mean? If the statute in Michigan says 10 years for robbery, you have got to have them in 8.5 years.

I will start with Mr. Martin and work our way down. Mr. Martin, do you support it?

Mr. MARTIN. No, I don't, but Mr. Collins——

Senator BIDEN. Well, he is going to testify next and I know he doesn't support it. I know Republican Governor George Bush doesn't support it. He has got his hands full already.

Mr. Watson, do you support it?

Mr. WATSON. No, Senator.

Senator BIDEN. You get more money. Say yes and we will get more money.

Mr. WATSON. Let me put on the hat as a State corrections administrator. That is one of the positions that we have taken unanimously, I believe, that that is something that for many States just isn't worth it, if that is what it takes to qualify for the Federal funds. The field isn't level. Some States have an 80-year sentence for a certain crime, where in another State it is 12. So to have each of them serve 85 percent is unfair from that perspective.

Senator BIDEN. Mr. Gadola, do you support truth in sentencing?

Mr. GADOLA. Senator, that is certainly a sad statistic that you cited from the State of Michigan and that is, I think, why——

Senator BIDEN. I didn't cite it to be critical.

Mr. GADOLA. I understand, but just to make my point, I think that explains why the legislature passed and the governor recently

signed into law truth in sentencing legislation in Michigan that would permit us to meet that 85-percent requirement.

Senator BIDEN. Over how long a period of time?

Mr. GADOLA. Well, the governor has appointed a sentencing guidelines commission, similar to what was done at the Federal law. They are required to make recommendations back some time in 1996; I think at the conclusion of that year. The legislature then has the ability to adopt or reject those recommendations.

Senator BIDEN. I will make you a bet the recommendations come back with lower sentences.

Mr. GADOLA. They may very well.

Senator BIDEN. Which makes sense, I might add.

Mr. GADOLA. They may very well.

Senator BIDEN. Lynne?

Ms. ABRAHAM. Senator, speaking for myself and not the governor of Pennsylvania nor the National District Attorneys Association——

Senator BIDEN. I would like to see you as governor of Pennsylvania.

Ms. ABRAHAM. Well, he is a good man.

Senator BIDEN. Right.

Ms. ABRAHAM. I think the people of this country and the people of my State really want truth, whether it is in sentencing or anything else. I think they would be willing to pay the price if it meant that they could feel free of predatory criminals. I think they are so fed up, they are arming themselves in record numbers. They are scared to death.

I think it is about time that I stop having to send my cases down to my Federal prosecutor because there is pretrial detention, a trial within 60 days, long sentences for felons in possession, and the like. I would like to be able to do that myself rather than having to foist those cases onto my local Federal prosecutor because our jails are full and everybody thumbs their nose at the system. So I would support it. Yes, I would.

Senator BIDEN. Professor?

Mr. DILULIO. I am of the view, Senator, that without STOP or a STOP-like provision, truth in sentencing legislation is going to go the way of mandatory sentencing legislation; i.e., 15 years from now we will be talking about 37 percent here, 42 percent there, for the reasons that have been put on the record here today.

That is why I do support what the House did back in February in splitting that pot of money 50 percent for States that just move in the direction without hitting 85 percent. Fifty percent of that money goes to States to have the incentive to continue to put violent repeat criminals behind bars for longer terms, and the other 50 percent to give an incentive to States——

Senator BIDEN. You know we do that under present law anyway. That is now the law, not the same breakdown. It is for violent offenders, second time, and so on.

Mr. DILULIO. Yes; well, I think we have been here before, but with provisos about the need to develop a more integrated approach to corrections planning, alternatives to incarceration, and so on, which is not in the House bill.

Mr. CAPPUCCIO. With the caveat, Senator, that I am totally unqualified to opine on this——

Senator BIDEN. That doesn't stop any of us.

Mr. CAPPUCCIO. I would support the concept, although I don't necessarily think it is doing it the right way. States ought to pay for their prisons, and Attorney General Barr when he was Attorney General gave that speech 3 times a week. If you are serious about preventing crime, States have to invest in prisons. The corollary to that seems to be the Federal Government shouldn't give money away to the States if they are not going to use it to lock people up and keep them off the street.

That being said, it strikes me that there is a bit of a chicken-and-egg problem here, and you have alluded to it. You can't get more money to lock people up until you have locked them up, at which point you probably run afoul of all sorts of Federal decrees. We have to figure out a way around that problem.

Senator BIDEN. That last was a little gratuitous—afoul of Federal decrees. All you have got to do is build more prisons and she has got no problem with Federal decrees.

Mr. CAPPUCCIO. That is right. You have to come up with your own money.

Senator BIDEN. Right.

Mr. CAPPUCCIO. I am not sure that one rule for every State is going to be feasible. With that, I support it.

Senator BIDEN. I thank the Chair for allowing me to go over my time.

Senator ABRAHAM. Before we proceed, I would like to just also indicate that we have entered into the record a correspondence at the request of the chairman of the committee that was sent to him from Michael Barnes, who is the prosecuting attorney in South Bend and President of the National District Attorneys Association with respect to this legislation, the STOP legislation.

I also would just observe—I may or may not be right about this, but I am sure that the population of Delaware is one reason that you have reached these standards. But from what Lynne Abraham has said, it also might be the case that if I was planning criminal activity, I would not do it in Delaware. I would go to Philadelphia where it sounds like things are——

Senator BIDEN. Unfortunately, they are coming from Philadelphia to do in Delaware.

Ms. ABRAHAM. Senator, we will give your normal get out of jail free card, which everybody has in Philadelphia. [Laughter.]

Senator ABRAHAM. Mr. Cappuccio, let me go back to the consent decree issue one more time. Senator Biden, following up on some of the earlier questions, raised the question of how much authority States ought to have and why we, in an era in which we claim we are going to try to relinquish more Federal authority and let States do more things for themselves, would be considering this type of an approach.

I guess the thing that brought me initially to this issue and I guess drove home to me the importance of at least hearing more about it is the experience we have had in Michigan because there the State doesn't want to be part of the consent decree, and neither does the Department—or at least as of 1992, did the Department

of Justice. So, surely, it would seem to me, and I would like your comments, that when both DOJ and the State and its officials have concluded that the consent decree's purposes have been met, that ought to suffice, it would seem, to bring it to an end. It hasn't, but I guess I would like your thoughts on at least that exception.

Senator BIDEN. That is a good point.

Mr. CAPPUCCIO. Sure. I agree fully. I think the importance here is to keep in mind the framework and the perspective of a Federal lawsuit and what is a Federal lawsuit. When I was at the Department, I kept saying to myself, what do you need to do? You need to remedy real constitutional violations. You need to get in there and fix it and when you are done, you need to go home because you are not in charge. That was sort of the mind set that I had, though I am not sure it is always the mind set that has prevailed at the Department of Justice.

In the case of Michigan, what we saw was it was really undisputed that an enormous portion of what the original consent decree covered was not longer at issue. I forget the particular provisions that were involved—fire safety. I forget whether medical was covered or not. I know mental health wasn't.

The philosophy of Attorney General Barr, consistent with what I said and consistent with the Supreme Court's decision in *Freeman* v. *Pitts*, is as aspects of the system come into constitutional compliance, let them go. So what we tried to do in Michigan is say, all right, there is no dispute as to these 4 categories; that is it, it is over as to that, and we will just have a separate settlement agreement/consent decree on the other thing.

The idea that some Federal judge thinks he can say no to that, I think, is offensive to the notion of judicial power in article III. Again, it goes back to a lawsuit. When the parties to a lawsuit decide the controversy is over, it is over. It is not up to that Federal judge to keep it going. I think he had no authority to keep it going, and I am deeply, deeply saddened and disappointed that a couple of days after we got thrown out of office the Justice Department for some reason flipped position on this. I think that that is disappointing.

Senator BIDEN. Can I interrupt on that point?

Senator ABRAHAM. Sure.

Senator BIDEN. But it is on point, Mr. Chairman. In last year's crime bill that we passed—so much of it, a lot of people aren't aware of the specifics of it, and you may or may not be. In title 18 of the law now, section 3626, subsection (c), refers to periodic reopening and it says, "Each Federal court order or consent decree seeking to remedy an eighth amendment violation shall be reopened at the behest of the defendant for recommended modification at a minimum of 2-year intervals." That is now the law.

Ms. ABRAHAM. Well, it doesn't define what "reopening" means. That is one of the problems. It is a little bit mushy.

Senator ABRAHAM. That was sort of the direction I was kind of going to go in here because I know that there was an effort in the 1994 bill to try to address the early releases and some of these consent decree problems. We are here today to try to figure out whether—it is early in this process, admittedly, but whether or not people who have to deal with this on the front lines feel that we have gotten to the point that we have addressed it effectively.

Could at least Ms. Abraham and Mr. Gadola and anybody else who would like to, but you two obviously have been right in the middle of these——

Ms. ABRAHAM. Well, just briefly about the 1994 crime bill, the crime bill of 1994 addresses eighth amendment claims. There is a difference between an eighth amendment claim for sentenced prisoners and a due process claim for pretrial detainees who are incarcerated.

In looking at that act, the language is somewhat ambiguous and it doesn't really specify what is needed for relief and it doesn't define "reopening." The problem is that for Federal judges who are inclined to do what Mr. Cappuccio said—OK, fellows, you have accomplished what you have set out to do and now it is time for you to pack up and leave—that is fine.

But, unfortunately, there are a number of loopholes in the act and judges who are not so inclined to say, OK, you have accomplished what you have set out to do, go home—they will find the loopholes in the act, and that is why we are back here. We wouldn't be back here in light of the crime bill of 1994 if there weren't what we perceive most respectfully to be an ambiguity in language and a need to make certain definitional changes in tightening up. We wouldn't be sitting here today if we had the problem solved.

Senator BIDEN. Lynne, have you made a motion to go back to court to reopen since the crime bill?

Ms. ABRAHAM. Well, I have to tell you something interesting, Senator Biden. The answer is yes, but I have been found to have no standing because the prisoner sued the former mayor.

Senator BIDEN. Right.

Ms. ABRAHAM. On top of that, in light of what Mr. Cappuccio said, not only has our Federal judge in question had a new prison built, which was—I am not arguing that we didn't need it. We did, but she had control of the whole Federal courthouse that was built which doesn't have one prison cell in it. Her name was on the bond indenture. No change order could be entered. She decided where the flag poles went, whether the furniture got scotch-guarded—fantastic.

Senator BIDEN. I have got that, but could the mayor file? Does he have standing, the present mayor?

Ms. ABRAHAM. The mayor is stuck with the consent decree. He has attempted to get it changed.

Senator BIDEN. Has he attempted to reopen under the new law?

Ms. ABRAHAM. Oh, sure. We have been fighting and fighting and fighting. Of course, as soon as the crime act came down—as his promise was, the very day that the crime bill was signed—we were in Washington for the signing, as you remember—the next day, he walked into court and filed a motion to intervene. But, you see, the judge isn't really moving quickly on it, doesn't have to because there is no time limit on it, and she just puts the motion aside and doesn't rule on it.

Senator ABRAHAM. Would others want to comment on the new bill and what we need to look at or what your experience has been?

Mr. GADOLA. I certainly would. The problem that Michigan faces is that the standard we would have to meet to get out from under the control of the Federal court in our CRIPA lawsuit is not a constitutional standard. We would have to satisfy the court that we have satisfactorily dealt with the very detailed requirements of the State plan for compliance and the associated orders; in other words, all of the minutia that I think you, in particular, Senator Abraham, are familiar with, and some of the things that I detailed earlier.

So it is not enough for us to say that we are complying with constitutional standards. We would have to satisfy the court that we have dealt satisfactorily with each one of these individual myriad State plan requirements. There is a provision dealing with sanitation in the consent decree and the State plan for compliance. Now, it is not good enough for us to say or to agree with the Justice Department, apparently, that the State of Michigan is not violating the constitutional rights of any inmates with regard to sanitation. Rather, what we would have to do is satisfy the court that the temperature of the water in the showers is a certain temperature, and on and on, ad infinitum.

Senator ABRAHAM. Mr. Cappuccio? I am just going to go down the line here if there are any others who want to comment. We will just start over here with Mr. Cappuccio.

Mr. CAPPUCCIO. I think Mr. Gadola put his finger on the problem, and part of what I tried to talk about in my opening statement is one of the things we have to control with consent decrees—and, again, I am not in favor of abolishing them—is that open-ended standards in the consent decree end up replacing the constitutional standard.

What I think we need to find a way to do is to say, after some period of years when this has been going on, it can't go on any longer unless, and it is an important "unless," the Constitution is being violated or the minimum isn't met. I think that is what rule 60(b) requires today, but not every court is in agreement with me on this, and I think if Congress made that clear, it wouldn't be a radical change, but, boy, it would be an important one, and that is if, at any time, Mr. Gadola can come into a court and say here is our evidence and we are not violating the Constitution, you have got to let him go. You have got to let him go even if one of his predecessors was silly enough to agree to a lot more, including professionally trained barbers and hot water temperatures within 6 degrees of 110.

Ms. ABRAHAM. Chunky peanut butter.

Mr. GADOLA. And chunky peanut butter.

You know, you have got to keep your eye on the ball. The ball is remedying constitutional violations, and at some point if he can come in and say I am not in violation of the Constitution, that ought to be the standard on reopening and he ought to be let go.

Senator ABRAHAM. Mr. DiIulio?

Mr. DIIULIO. I think this brings us right back to Senator Biden's incisive conceptual question. I mean, this really cuts right to the heart of it, OK, because what happened on Halloween, which was when Judge Shapiro ruled on the motion, was it that this is not good enough; Congress cannot do whatever it wants. The implication, I guess, was that the Federal judiciary in these cases might be able to do whatever they wanted. I don't know, but it is the context here we are talking about.

When the prosecutors exercise discretion, you end up with fewer violent repeat criminals in custody and fewer costs. When the judges exercise discretion, you end up with fewer violent and repeat criminals in custody and higher costs. That is why, getting back to the question asked earlier by Senator Abraham, the STOP provision or a STOP-like provision deals mainly, in my view, through the prison cap provision with public safety, but it goes beyond public safety and would restrain the growth in costs that have occurred as a result of the interventions.

I mean, the *Texas* case is, I think, a perfect example here. Between 1980 and 1994, the Texas prison population about doubled. Yet, real inflation-adjusted cost per prisoner went up tenfold. Now, in those increases you see the influence of the *Ruiz* orders, as I think former Texas Director Lane McCotter, who is sitting here in the audience today, and others would testify. So I think that is why the 1994 crime bill provision didn't quite do the trick. I think it is clear that that was not medicine that was strong enough.

Senator ABRAHAM. Mr. Watson or Mr. Martin?

Mr. MARTIN. I would add one element to Mr. Cappuccio's recommendation, and that is, in addition to the constitutional findings, that there is a reasonable expectation that that constitutional condition will continue. That simply would be a codification of the current *Freeman* and *Dowell* cases that, as you know, relate to desegregation. If there is a reasonable expectation that that will remain constitutional, then it is time for the Federal court to fold its tent and go home.

Senator ABRAHAM. I have an awful lot of additional questions and we have a whole additional panel, so I am going to turn it back to Senator Biden here and submit a group of additional questions to all of you because I do want to get your thoughts on how we ought to proceed on a number of other matters.

[The questions of Senator Abraham are located in the appendix.]

Senator ABRAHAM. Senator Biden?

Senator BIDEN. Mr. Chairman, you have already been generous with me in the time you have allotted. I will not ask any additional questions to be answered now. I would ask one broad question to each of you and, with your permission, Mr. Chairman, I would like to submit some questions in writing.

Senator ABRAHAM. Please do.

Senator BIDEN. My broad question for you to contemplate to answer in writing, and I will put it in writing as well, is is there a way to remedy without the act the existing section which reads "reopen" along the lines which appeal to me very much which Mr. Cappuccio said, and I thought he was nodding his head in agreement with Mr. Martin's additional suggestion.

It seems to me we may be able to fix what is really in everyone's craw, including mine, the problem of the court staying on long after it has outlived its reason for being involved in the first instance. I don't know whether that can be done. I have no pride of authorship about that, but I am open to and would invite any suggestions you have.

As most of you are lawyers, we can argue in the alternative. We are trained to argue in the alternative. This in no way prejudices, if you answer that question fully, your view that you are for the act and not this shorter fix. But if you conclude that a more targeted fix may be workable, then I would appreciate your input. It may not do all you want, but can we improve subsection 2, "Periodic Reopening?"

I think Lynne makes a point about what constitutes reopening and, to put it another way, when you can close. Mr. Cappuccio, I agree with you. It seems to me that an attorney general, a district attorney, a mayor, or a governor should be able to go back into Federal court and say, look, there are no existing constitutional violations; notwithstanding that the consent decree went beyond that, we want you to reopen this and we want you to fold your tent unless you conclude, judge, that there is an existing constitutional violation.

Due process can be a constitutional violation. I am not hung up on it being the eighth amendment. You may be correct that this should have said—it says "remedy any eighth amendment violation," and it should say "remedy any constitutional violation." There may be ways to fix it. I would just like you to look at it.

I thank you, Mr. Chairman, and let me say that I am very, very parochial. We are really proud of Mr. Watson. He has brought some real talent and expertise from the West Coast back to the East Coast and we appreciate him being there for real.

Mr. WATSON. Thank you.

[The questions of Senator Biden are located in the appendix.]

Senator ABRAHAM. I want to thank the whole panel both for the long period of time you have been willing to sit through today and for your insights because this is very helpful particularly, I think, to those of us who want to see if we can't handle this problem in a way that is satisfactory to all. So thank you very much for coming and we will dismiss you at this time. Thank you.

What I would like to propose is this for some of us who have been sitting for quite a while here, and I know there are a few who would like to take a brief break. I think what we will do is reconvene with the next panel at 2:45. We will stand in recess until then.

[Recess.]

Senator ABRAHAM. Before we start this panel——

Senator BIDEN. Mr. Chairman, I apologize for keeping you waiting. I didn't know you were waiting on me.

Senator ABRAHAM. I was, and I would explain to our panel and those few remaining guests here today that we have Boys Nation in town.

Senator BIDEN. In light of past history, I figured I may be speaking to a future President, so I wanted to be very polite so they remember me. The only commitment I ever ask from these kids is that when I bring my granddaughter by years from now and they are told by their secretary Joe Biden is in the outer office, they won't say Joe who? That is the only commitment I ask and I have got that commitment, so I apologize for holding you up.

Senator ABRAHAM. Before we begin the panel, I just want to say we are trying to cover several diverse, unrelated to some extent

topics here in this panel. Just to give a little backdrop, when we made the initial decision to have at least one hearing on prisons, the legislation that was earlier discussed in the previous panel on STOP was in the forefront of our thinking. But as we moved toward having the actual hearing itself, we became aware of various other bills and interests that were out there, including the issue of privatization, the issue of work in prisons, and so on.

It was my fear that if we didn't include an opportunity for some of those topics to be discussed here today, we could find ourselves getting nearer to the end of the year without ever having had a chance to have at least an opportunity for people who care about those issues to be heard from, and so that is what we are trying to do today.

We have on this panel Ms. Kathleen Finnegan, who is executive director of STOP; Mr. Lane McCotter, who is the executive director of the Department of Corrections for the State of Utah; Andrew Peyton Thomas, who is the deputy attorney general of the State of Arizona; Dr. Timothy Cole, who is chairman of the Board of Wackenhut Corrections Corporation; Mr. Andy Collins, who is director of corrections for the State of Texas; and Mr. Zee Lamb, who is chairman of the board of county commissioners for Pasquotank County, NC. If I got that right, today is definitely moving in a good direction.

We will begin with Ms. Finnegan, and I want to thank you for coming and also indicate that Senator Mack had hoped to be here. In fact, had we been operating on our hoped for schedule earlier, he would have been here and is very sorry that he couldn't be with us to introduce you and make some comments. He had every intention of coming and wanted both to convey his regret to you and to have the statement that he was prepared to make inserted into the record.

[The prepared statement of Senator Mack follows:]

PREPARED STATEMENT OF SENATOR CONNIE MACK

I would first like to thank Senators Hatch and Abraham and the other members of the Judiciary Committee for allowing me the opportunity to come before you today to introduce a friend of mine from Florida who is a living example of why we need to take a tough approach to our nation's current crime crisis. During my time here in the United States Senate, I have placed a high priority on addressing the crime problems which plague both our inner cities and our sprawling suburbs, and I have come to realize that, although many interesting solutions have been proposed, very few of them actually will work.

However, I believe that one way in which violence in our society can be effectively reduced is through Truth-In-Sentencing—keeping violent offenders behind bars where they belong. Convicted violent criminals should not be serving a mere 30 percent of their sentence because the prisons are crowded or 50 percent of their sentence because they're behaving themselves. Rather, they should serve their entire sentence with a minimum of time off for exceptional behavior. Those who consider committing a crime should understand that punishment will be swift and certain. And those who are put behind bars should not be released early, only to commit further criminal acts.

Some people protest that strict and certain punishment is too harsh. They argue that we should provide more prevention and rehabilitation to solve the crime problem. But in recommending this course, these people fail to recognize this problem for the *extreme crisis* that it is. I've seen the tragedy of early release in the faces of Florida residents who have been victimized by criminals who should have been in prison at the time they committed their crimes. I can remember a headline in the *Florida Times Union* newspaper that said: "Prison Math? Life Equals Five Months" about a repeat offender whose name was before the parole board five

months after he was given a life sentence for beating and robbing a pregnant woman. I will never forget the face of Roxanne Grinstead, who told me of her daughter who was brutally murdered by a career criminal who was out on early release. I will always remember the grief expressed to me by the family of Evelyn Gort—an off-duty Miami police officer who was killed by an early release criminal.

The early release crisis is a personal tragedy that has cost our citizens their lives, their safety and their money to re-arrest, re-try and re-incarcerate career criminals. It's wrong. It has to stop.

In 1967, the Justice Department predicated that 83 percent of Americans would be victims of a violent crime at least once in their lives; 25 percent would be a victim of at least three violent crimes. These numbers are astounding for a nation which calls itself the "land of the free." How can we be free when more than 80 percent of our citizens will be violently victimized at some point in their lives? The only way this nation will be able to progress economically, culturally, and spiritually is if people live in an environment in which progress is possible. The fear of crime paralyzes people and stifles their ability to reach beyond themselves and into their community to progress. Freedom is the core of all human progress; but there is no freedom in the midst of violence.

S. 3, the Republican crime bill, provides an incentive to the states to keep the most serious, violent offenders behind bars for at least 85 percent of their sentence. The bill provides additional funds for building prisons to those states which implement these truth-in-sentencing standards. Let me assure you, this is not an unfunded mandate on the states. It is a voluntary incentive grant for those states which decide to really get tough on crime.

Based on our experience in Florida, I have no doubt that many states will rise to the occasion. In my state, due to the overwhelming efforts of Kathleen Finnegan and her organization, "Stop Turning Out Prisoners" there has been a resounding call to keep violent offenders off the streets and behind bars. I will let Kathleen tell her own compelling story, but would like to provide you with some background on the accomplishments which have been made in Florida.

In preparation for the 1994 election, Stop Turning Out Prisoners, a grassroots organization in Florida, collected over 150,000 ballot signatures for a referendum to end early release, signalling the clear support of Floridians for tougher crime enforcement. This past April, both our state House and Senate passed bills which require criminals to serve at least 85 percent of their sentences. This legislation became law in June.

As I said earlier, much of the progress which has been made in Florida can be attributed to the efforts of Kathleen Finnegan and Stop Turning Out Prisoners. She is my friend and an inspiration to us all; and I am thrilled to be able to introduce her to the committee today. I know that you will be as moved by her story as I, and so many other Floridians, already have been.

Senator ABRAHAM. He also just asked me in introducing you to mention and make note of the fact that you are the founder and executive director of Stop Turning Out Prisoners, a successful grassroots organization in Florida. In preparation for the 1994 election, STOP collected over 150,000 ballot signatures for a referendum to end early release, signaling the clear support of Floridians for tougher crime enforcement.

Just this past April, both the State House and Senate in Florida passed bills which require criminals to serve at least 85 percent, a number we have heard about quite a bit in the last panel, of their sentences, and it became law in June. Much of the progress which has been made in Florida, as Senator Mack would have said were he here, can be attributed to the efforts of Ms. Finnegan and the organization which she has put together, STOP. So we welcome you here today.

I will just say for the panel's information we are probably going to have to end at around 4 p.m. today. So maybe if we could limit the opening statements to about 5 minutes, then there would be adequate time for us to get into some questions thereafter.

Ms. Finnegan, if you will begin, thank you for being with us.

PANEL CONSISTING OF KATHLEEN FINNEGAN, EXECUTIVE DIRECTOR, STOP TURNING OUT PRISONERS; O. LANE McCOTTER, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF CORRECTIONS; ANDREW PETTON THOMAS, DEPUTY ATTORNEY GENERAL, STATE OF ARIZONA; TIMOTHY P. COLE, CHAIRMAN, WACKENHUT CORRECTIONS CORPORATION; JAMES A. COLLINS, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ON BEHALF OF THE AMERICAN CORRECTIONAL ASSOCIATION; AND ZEE B. LAMB, CHAIRMAN, BOARD OF COUNTY COMMISSIONERS, PASQUOTANK COUNTY, NC, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

STATEMENT OF KATHLEEN FINNEGAN

Ms. FINNEGAN. Thank you very much, Senator. Because of Florida's revolving door of injustice, I bear the scars of a crime victim. Because of early release, my life was shattered. I would like to share with you my story.

In 1985, I became a lawyer. I believed in our system of justice and the American ideals that I was taught to respect as a child. My first job after law school was an assistant public defender. I usually went way beyond the call of duty to help my clients and, like a social worker, I found homes for them, I gave them money for food, and I helped them get jobs. Unfortunately, none of them changed their antisocial behavior and they ended up back behind bars. After 3 years as a public defender, I had learned enough about the realities of our system to know that I wanted to prosecute instead, so I became an assistant State attorney.

On August 17, 1988, my life changed forever when my path crossed with Sam Pettit, who had been released early from a Florida prison just weeks before. He was 26 years old with 17 prior adult convictions and an extensive juvenile record dating back to when he was 12.

On the day of the crime, I had presented my first murder case to a grand jury. What started out as one of the best days of my career turned into a nightmare that I will never forget. I had gone out with some friends after work and it was a nice evening until Norman Langston and I walked to Norm's car. On our way through the parking lot, we were laughing and happy, just enjoying our lives. But suddenly that changed, for Sam Pettit was lurking in the darkness. He wasn't behind bars where he belonged. He was free and he was pointing a revolver at me and Norm.

Pettit stuck the gun in my side and told us to get into the car. I sat in a small sports car between a violent, habitual criminal and the finest man I have had the opportunity to call my friend. The early releasee made Norm drive to a wooded area, robbing me of my money and jewelry along the way, and I was thankful I was able to keep him from seeing the badge in my purse.

Once we reached a secluded spot, he robbed Norm and then he exited the vehicle. I can remember thinking at that moment, thank God, this is over. But it was really just beginning, for as I let out a premature sigh of relief, Norm said, look out, and I saw the barrel of the gun, a flash of light, and I felt incredible pain in my arms and shoulder. Then Norm Langston made himself a human shield

as he covered my head and upper body with his. Then there were more flashes in the dark, more pain, and I felt my dear friend's body jerk. Then I heard the numerous and continuous clicks of a gun misfiring. I prayed no more bullets would escape that gun and I guess God heard me, but it was too late for Norm.

The gunman fled and I played dead, fearing that he would reload—not a sound, not a movement, not a tear. After a while, I squeezed Norm's hand and he squeezed mine back. In retrospect, I guess I knew that that was our last goodbye. But I had to try to save him as he did me, so I ran into the black of night for half a mile. I didn't know where the gunman had gone, so I rolled into ditches and treaded through ponds, trying to hide from him. I felt like a hunted animal.

Eventually, I was able to reach help, but my greatest fear materialized 2 days later when Norm Langston, a 27-year-old prosecutor and a wonderful man, died, and he died because the State of Florida did not do its number one job of public safety. Were it not for the ridiculous concept of early release, Norm and countless others would be alive today.

Now, Pettit is on death row where he is forced to appeal over and over at our expense. Pettit admits his crimes freely. He brags about them and says that his only regret is that he didn't kill the bitch, too. He didn't shoot us because we were prosecutors. He picked us randomly. This killer wants to die and has even moved to dismiss his own appeal, but the system won't let him do that.

The system that Norm believed in failed him, it failed me, and it failed society. My story is not unique. It is one of thousands. That is why STOP was formed, to give citizens a chance to combat the early release crisis. You see, it is one thing to be victimized by a violent career criminal. It is worse when you are victimized by the same criminal justice system that is supposed to protect you. This is not a partisan issue. No criminal asks your political affiliation before he robs you or rapes you or shoots you.

We in STOP believe that prison should be more than inconvenient pit stop in a criminal's life of crime. It should be a deterrent to crime. It isn't in Florida yet, but thanks to the STOP Act, it will become one soon, and I refer to the Florida STOP Act. That act will require State prisoners to serve at least 85 percent of their sentences, and becomes law October 1. Then judges will no longer be committing a fraud when they sentence someone in our State.

But, you see, early release is not simply a Florida problem; it is a national problem. Last week, through our efforts and the outcry of the public, the State of Vermont agreed not to allow an early released killer, Wayne DeLisle, to transfer his probation to Deltona, FL. If it weren't for STOP and the outrage of the citizens of Deltona, Wayne DeLisle would be loose on the streets of Florida.

In closing, I can sum it up by saying the way to enhance the effectiveness of incarceration is to put truth back in sentencing. We need to stop giving 10-year sentences that really mean 2. Prison should mean deterrence and punishment, but most importantly prison serves to isolate criminals from society whose rules they choose not to follow and it protects all of us. Only when we house prisoners properly will we no longer be prisoners in our own homes. Please help us to stop the revolving door of injustice.

Senator ABRAHAM. Thank you very much.
Mr. McCotter?

STATEMENT OF O. LANE McCOTTER

Mr. MCCOTTER. Thank you, Senator Abraham. I am certainly honored to have the opportunity to be here today and be invited to speak on these two very vital prison reform issues that I have been asked to discuss, one, of course, being truth in sentencing, and the other dealing with inmate litigation. I, too, Mr. Chairman, have provided a detailed paper. I will try to summarize some of my key points in a more abbreviated fashion here.

Senator ABRAHAM. We will enter into the record all statements you might submit today for the whole panel. Thank you.

Mr. MCCOTTER. Thank you, sir.

The concept of truth in sentencing is a justified backlash against the all too common practice of early release of violence offenders. It is my understanding that approximately 18 States currently have early release programs, and in 1993 over 20,971 violent offenders were released early from prison sentences.

It is my opinion that this continued early release of incarcerated violent offenders from prison literally perpetrates a fraud on the victims of crime and law-abiding citizens. It sends a very unacceptable and dangerous message to our citizens. Victims of violent crime feel that offenders are certainly not properly punished.

To perpetrators of the crime itself, I think it sends a message that crime does pay and it is worth the risk, and I think our recidivism rates probably give us that feeling as well. Then, to the average law-abiding citizen, they, I think, are beginning to feel that the entire criminal justice system is broken somewhat. Therefore, truth in sentencing is a very essential element or concept in addressing any war on crime, and I believe that is what we are in right now, a war on crime.

Now, after articulating the significant and vital concept of truth in sentencing and the importance of it, I think it is necessary to express a major concern of the approach taken by both the Senate's proposed bill and House bill 667, which has already passed the House.

Both bills contain wording that dictates to the States Congress' concept of what constitutes truth in sentencing and ties all Federal funding to meeting your definition and standard. State criminal justice systems, State criminal laws, and State sentencing structures all vary considerably. I think one of the greatest strengths of our Nation is that each State is uniquely different.

The concept of one-size-fits-all for truth in sentencing should not be forced on the States. Governors and legislatures have the responsibility to meet the criminal justice needs of their citizens, and if they fail to do so, I think the citizens will express their views in the voting booth.

However, with that stated, Congress does need to provide leadership in this very vital area, and I think send a very strong message on this subject across the Nation. Furthermore, Congress can express leadership in this critical area by example on how you deal with truth in sentencing within the Federal system, particularly

the Federal Bureau of Prisons. You have the opportunity to provide an outstanding model for States to emulate and follow.

One of the flaws in the Violent Crime Control and Law Enforcement Act of 1994 was its failure to recognize such States as Utah that have indeterminate sentencing structures. The proposed revision in both the draft Senate bill and the House bill 667 recognizes this and attempts to correct the problem, and we are grateful for that. However, there are some flaws in it. Based on time, I am not going to get into the exact flaws that I feel are there, but I am very pleased that you are addressing indeterminate sentencing structure States.

Utah's indeterminate sentencing system has done an exceptional job in exceeding the intent and I think the spirit of truth in sentencing. The system, I think, in Utah also has the support of our courts, prosecutors, even some defense attorneys, probably not all, the Department of Corrections, the Board of Pardons and Parole, and most importantly, I feel, it has the support of the general public.

In a recent study of average time served of selected violent offenders within Utah, it is significant to note that we exceeded the national average in homicide, rape, kidnaping, and robbery—all very important violent offenses that our citizens have to face. Utah currently has 215 murderers in prison, and only 30 of them have a parole date and will spend more than 20 years in prison. Presently, 35 percent of Utah's convicted murderers have already served more than 10 years in secure prison facilities. Moreover, some second-degree felons are serving full 15-year sentences.

This significantly skews Utah's statistics and does not show the fact that Utah is extremely tough on dangerous and violent offenders. So based on the problems of qualifying for Federal funds under the proposals and the acts that you are looking at, it is recommended that Congress consider eliminating the strings on Federal requirements placed on States to qualify to receive Federal grants for truth in sentencing.

Each State has different needs and different criminal justice systems. The statistics in one State are often not even comparable to the statistics in neighboring States. States, however, should be accountable and required to have and provide criminal justice plans that address truth in sentencing based on the uniqueness of each particular State when applying for any Federal funding grants.

Oddly enough, States that may need Federal funding the most in order to move toward the true spirit of truth in sentencing could be the ones that could never qualify under the act. The truth in sentencing requirements of the proposed bill, while meant in the best intentions, could actually become counterproductive. The bottom line is that States that are already doing a good job in truth in sentencing should not be penalized or eliminated from Federal funding consideration as we plan for future violent offender population growth and needs.

I would like to just for a second mention inmate litigation. I know my time is almost up. It has already been spoken to by other panelists today about the background dealing with the hands-on doctrine prior to the 1950's and 1960's, so I won't go into any of

the cases that are significant, I think, but I do think it is important that we look at that.

The inmate explosion in prisoner rights began in the late 1960's and early 1970's and 1980's, and it was the October of 1973 term of the U.S. Supreme Court that clearly changed the previous direction of the Supreme Court to totally reverse this hands-off doctrine. I would like to just briefly talk about the extract of the May 22, 1974, Congressional Record that defined the feeling of the Court as it changed this direction. This was an interview with Justice Black.

Justice Black was interviewed shortly before his death and was asked, "In view of the decisions you are handing down here, isn't it almost impossible to convict anybody?" He shocked the reporters by replying, "Of course—that's the purpose. Read the Constitution. The Government has immense power—the FBI, police, prosecutors—and limited funds." Then he went on to say, "So we have built a cordon of rights around him to balance the situation, to protect the individual against the overwhelming power of the Government." Well, I think we certainly built that cordon of rights around inmates and we have swung way too far in that regard. There is a lot of work that needs to be done in that area.

We have, too, in the State of Utah numerous examples of frivolous lawsuits. I have had inmates admit to me personally that if he can hit 1 on 100 lawsuits, it is certainly worth all his time and effort because he really has nothing else to do. All of these cost money to litigate, money that we need desperately for other things.

I have provided in my hand-out some very gross examples of what some of these frivolous lawsuits might be. It is also my understanding that all State attorneys general are now compiling a listing for you of each State's top 10 list of frivolous inmate lawsuits to emphasize the seriousness of this issue to you. The driving force behind this flood of litigation is that they basically have nothing to lose in that regard.

One more point that I feel I must make. The original wording of 42 U.S.C., section 1988, the attorney's fee provision of the Civil Rights Act, states that the prevailing party shall be awarded attorney's fees. The Supreme Court, however, decided that Congress really meant that prevailing defendants would rarely, if ever, obtain fees, while plaintiffs should liberally and generously be awarded fees even when a suit is dismissed without a finding of any constitutional violation. This differential treatment of plaintiff prisoners has created a powerful catalyst and legal force which entices defense attorneys to actively pursue inmate civil rights cases that ultimately cost States and Federal officials millions and millions of dollars.

Finally, I would just like to take this opportunity to express my personal views in support of STOP that is being considered here in the Senate, as well as House bill 667. I won't go into all the reasons, for time, but I think there are many things that have to be changed. I certainly feel that we have many and numerous ill-conceived consent decrees and permanent injunctions that tie the hands of correctional administrators, and have for years.

The majority of State correctional administrators, governors, and legislatures are now hampered with binding consent decrees that were agreed to by previous administrations with no possible end in

sight, regardless of their efforts to be in full compliance. It is significant to note that many of these consent decrees contain requirements or conditions that far, far exceed constitutional conditions of confinement.

With that, sir, I will close my remarks.

[The prepared statement of Mr. McCotter follows:]

PREPARED STATEMENT OF O. LANE MCCOTTER

Chairman Hatch and distinguished members of the Committee, I am honored to have been invited to be here today to speak to one of the most critical issues facing Utah, as well as all States, and that is the protection of all our citizens by insuring that we have adequate secure prison beds to house violent offenders. This distinguished committee and the entire Congress are to be complimented for debating and addressing this critical issue. Safe, secure, adequate, and constitutional prison beds are vital to any successful war on crime.

I have been asked to address two vital issues under consideration for revision in the crime bill before you. First, I will provide my views on Truth In Sentencing, and secondly, provide my views on inmate litigation issues clogging both state and federal courts today.

TRUTH IN SENTENCING

The concept of Truth in Sentencing addressed in the Crime Bill is a justified backlash against the all to common occurrence in some states where violent offenders are released from prison after serving only an unacceptable portion of the imposed sentence by the courts. Reasons for "early release" of violent offenders range from liberal good time and work credits reducing length of imposed court ordered sentences, court ordered releases for overcrowding conditions, and court ordered population caps on prison facilities through consent decrees and other judicial orders. In some states "life sentences" are quantified, such as a life sentence is equated to twenty years, by state laws that can then be reduced by good time credits and other means. The continued "early release" of incarcerated violent offenders from prison sends unacceptable and dangerous messages to our citizens. The victims of violent crime feel that offenders are not properly punished, perpetrators believe that crime does pay and is worth the risk, and the average law abiding citizen feels the entire criminal justice system is broken. Therefore, Truth in Sentencing is an essential element or concept in properly addressing the war on crime.

After articulating the significant and vital concept of Truth in Sentencing, it is necessary to express a major concern of the approach taken in both the Senate's proposed bill and House Bill 667. Both bills contain wording that dictates to the states Congress' concept of what constitutes Truth in Sentencing and ties all federal funding for violent offender housing to meeting your definition or standard. State criminal justice systems, state criminal laws, and state sentencing structures all vary considerably. One of the greatest strengths of our great nation is that each state is uniquely different—particularly when it comes to criminal justice systems. Therefore, one Congressional standard, or "one size fits all" for Truth in Sentencing, should not be forced on all the states. Governors and legislators have the responsibility to meet the criminal justice needs of their citizens and if they fail to do so, the citizens will express their views in the voting booths. Congress does need to provide leadership in this vital area and one great example could be setting standards, such as serving 85 percent of imposed court ordered sentences throughout the federal system, and suggest that states consider this as a model.

One of the flaws in the Violent Crime Control and Law Enforcement Act of 1994 was its failure to recognize states that have indeterminate sentencing structures. The proposed revision in both the draft Senate Bill and House Bill 667 recognizes this and attempts to correct this problem. However, House Bill 667 actually discriminates against indeterminate sentencing states by requiring such states to exceed, by ten percent or greater, the national average of time served for such offenses as murder, rape, robbery, and assault in order to qualify for federal funding. The draft Senate bill, considered to be the more acceptable version for indeterminate sentencing states, addresses this problem by allowing indeterminate states to qualify for federal funding if the average time served for serious violent felonies equals at least 85 percent of the sentence established under the state's sentencing guidelines. Additionally, states must show that the average time served for the offenses of murder, rape, and robbery under the state's guidelines has been increased since

1993. Both of these versions of the crime bill are problematic for the State of Utah as well as most states that have indeterminate sentencing system.

Utah's indeterminate sentencing system has done an exceptional job of exceeding the intent and spirit of truth in sentencing. The system has the support of our courts, prosecutors, defense attorneys, the Department of Corrections, the Board of Pardons and Parole and most importantly the general public. In Utah, capital offenses face the death penalty or life without any possibility of parole. First degree felons must be sentenced a term of five years to life. Second degree felons receive a term of one to fifteen years while third degree felons are sentenced zero to five years.

Once a felon is sentenced to prison, the Board of Pardons becomes solely responsible for determining when or if the felon should be placed on parole. The Board is composed of five members who must agree by majority vote to release an inmate on parole. They have plenty of time to consider victim information, pre-sentence investigations, and behavior while incarcerated. Non-binding release guidelines relied upon by the Board, allow for comparisons for different crimes. This system gives consistency, reliability, and properly protects society. It also allows flexibility to treat a third degree felon as harshly as a first degree felon if necessary to protect society.

In a recent study of average time served of selected violent offenders, Utah significantly exceeded the national average.

Offense	National time served	Utah time served
Homicide	71 months	108 months
Rape	65 months	75 months
Kidnaping	52 months	53 months
Robbery	44 months	54 months
Assault	28 months	27 months

Utah currently has 215 murderers in prison and only 30 of them have a parole date and most will spend more than 20 years in prison. Presently, 35 percent of Utah's convicted murderers have already served more than ten years in secure prison facilities. Moreover, some second degree felons are serving full 15 year sentences. This significantly skews Utah's statistics and does not show the fact that Utah is extremely tough on dangerous violent felons.

Both the Senate's proposed bill and House Bill 667 rely heavily upon various "objective" statistics to test whether a state is sufficiently tough on crime to merit federal grant monies. The problem is that the statistics for determining federal funding eligibility only count violent felons who are actually released or paroled. Ironically, Utah could look even more tough on crime if it began releasing more felons with life sentences that exceed the national average of time served. This would enable Utah to qualify for federal grants, but would contravene the intent of Truth in Sentencing. It is believed that many of these same issues apply to other states.

Based upon the problems of qualifying for federal funds under the proposed Act, it is recommended that Congress consider eliminating the "strings" or federal requirements placed on states to qualify to receive federal grants; Each state has different needs and different criminall justice systems. The statistics in one state are often not comparable to the statistics in even a neighboring state. States should be accountable and required to have and provide a criminal justice plan that addresses Truth in Sentencing based on the uniqueness of each particular state when applying for federal funding grants. Oddly enough, the states that may need federal funding the most in order to move toward the true spirit of Truth in Sentencing could be the ones that could never qualify. In the alternative, the act should consider having a procedure for obtaining an exception to the requirements. The Truth in Sentencing requirements of the proposed bill, while meant with the best intentions, could actually be counterproductive.

It is strongly felt that Utah's criminal justice system meets the intent and concept of Truth in Sentencing for its citizens. Therefore, we ask you why should we have to enhance our state's sentencing guidelines since 1993, in order to qualify for federal funding, if our sentencing structure and time served for violent offenders already meets the intent and goals of truth in sentencing? Additionally, why should indeterminate sentencing states have to exceed the time-served by 10 percent above the national average of determinate sentencing states to qualify for federal funding? The bottom line is that states that are already doing a good job in truth in sentencing should not be penalized or eliminated from federal funding consideration as we plan for future violent offender population growth and needs.

INMATE LITIGATION

The second topic I Was asked to address today was in the area of inmate litigation.

Prior to the 1950's and early 1960's, the courts had adopted a "hands off doctrine" toward inmate rights and prison operations. Some significant examples of the courts position in this regard are the following decisions:

- "Lawful incarceration brings about necessary withdrawal • • • of many privileges and rights, a restriction justified by the considerations underlying our prison system." *Price* v. *Johnson*, 334 U.S. 226 (1948).
- "It is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." *Adams* v. *Ellis*, 187 F.2d 550 (CA9 1951).
- "The power of promulgating regulations necessary for the safety of the prison population and the public as well as for the maintenance and proper functioning of the institution is vested in corrections officials with expertise in the field not in the courts. There can be no question that they must be granted wide discretion in the exercise of such authority." *Long* v. *Parker*, 390 F.2d 816(CA3 1968).
- "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules of regulations. " *Banning* v. *Looney*, 213 F.2d 771 (CA10 1954), *cert den.* 348 U.S. 859 (1954).

The inmate rights explosion began in the late 1960's and early 1970's. It was the October 1973 term of the United States Supreme Court that clearly changed the previous direction of the Supreme Court to totally reverse the "hands off doctrine. An extract of the May 22, 1974 Congressional Record clearly defined the High Courts new direction toward law enforcement and corrections.

> Justice Black was interviewed shortly before his death and was asked, "In view of the decisions you are handing down here, isn't it almost impossible to convict anybody?" He shocked the reporters by replying, "Of course—that's the purpose. Read the constitution. The government has immense power—the FBI, police, prosecutors—and unlimited funds. The individual citizen stands alone. The very title of the action is enough to put terror into the heart of a citizen. The United States of America against John Jones. So we have built a cordon of rights around him to balance the situation, to protect the individual against the overwhelming power of the government. That's our purpose, to make things as tough for the prosecutor as we can."

This new direction or attitude of the Supreme Court and "cordon of rights" Justice Black referred to in the early 1970's advanced the rights of inmates in a steady, ordered and deliberate manner. The result is that today our federal and state courts are literally clogged with thousands of frivolous lawsuits, costing the tax payers millions and millions of unnecessary dollars in a time of dwindling resources.

As prison populations continue to rise dramatically, so does the volume of frivolous inmate lawsuits. Approximately one-fifth of the entire federal court docket is now consumed by prison litigation (i.e., 36,318 of 179,000 private suits filed from June 1993 to June 1994 were federal prisoner civil rights suits). This does not include the numerous civil rights suits and habeas corpus petitions filed in state courts. Over 90 percent of these suits are frivolous and will never go to trial, although significant tax dollars are expended in obtaining dismissals.

In Utah, one percent of the inmate population files forty percent of these federal suits. One inmate at the Utah Prison System filed over 60 federal civil rights lawsuits over the last four years, all of which were dismissed in favor of the state on pre-trial motions. Before obtaining even pre-trial dismissals, however, the state is often subjected to a barrage of frivolous discovery requests and motions. Another inmate filed over 40 frivolous motions in just a few months, wasting thousands of dollars in legal defense costs and court time.

Often these inmates are maximum security inmates who are too dangerous and uncooperative to partake of the prison's extensive educational, employment, and other programming opportunities. One inmate recently admitted to me that he has nothing but time and if he "hits" or wins on only one in a hundred lawsuits, he feels it is all worth it. For many other inmates, filing suits is a way to manipulate correctional officers and harass the "system." The following list of actual claims provides a mere sampling of the wasteful and frivolous suits that are filed in federal court:

1. An inmate received generic form of medication instead of trade name. *Anderson* v. *Jeppson*

2. After refusing to come out of his cell to eat for two days, prisoner sued for failure to feed him. *Glick* v. *Stewart*
3. An inmate sought release from prison because he claimed (falsely) that he had Post Traumatic Stress Disorder (PTSD) from Vietnam and could not be in close quarters. *Glick* v. *Stewart*
4. Every time a hot meal tray was delivered to inmate, he spit on guards, then sued because the substituted sack lunches did not taste as well as the hot meals. *Abbott* v. *Leslie*
5. An inmate repeatedly sued to enforce a claimed constitutional right to play more volleyball and participate in the "Tournament of Cards." *Alverez* v. *Carver*
6. An inmate deliberately flooded his cell, then sued officers who cleaned it up because they got his Pinochle cards wet. *Lane* v. *Avery*
7. Prisoner sued for L.A. Gear or Reebok "Pumps" instead of Converse, claiming a medical necessity. *Winsness* v. *DeLand*
8. An inmate claimed "cruel and unusual punishment" because his cell did not have a desk. *Duran* v. *Vigil*
9. An inmate filed suit claiming he was not allowed to call witnesses at a disciplinary hearing. The record showed he was allowed to call all the witnesses he requested. The court ordered attorney fees and the prison froze his inmate account to collect the fees. The inmate filed another claim arguing that he lost his rental television because his inmate account was garnished to pay the attorney fees. The court ordered fees again. This time the inmate brought suit against the attorney who successfully defended the state. *Gardner* v. *DeLand*
10. Another inmate filed suit and claimed indigent status. It was later discovered that the inmate purchased, with cash, a $60,000 house and a $14,000 Dodge Caravan for a friend and still had thousands of dollars more in different bank accounts. *Treff* v. *Bartell*
11. After a cell search, prisoner sued officers because they did not put his cell back in a "fashionable" manner and mixed his clean and dirty clothes. *Roberts* v. *Hopkins*
12. An inmate sued because officers confiscated his "honey bear" bottle which he needed to give himself enemas. *Houtz* v. *DeLand*
13. One inmate filed suit claiming he was a Thai-Buddhist. However, after the prison met some of his demands for religious materials, he promptly refused them and filed another suit seeking 27 million dollars against eight corrections officials for being denied an opportunity to practice his Native-American beliefs. This case involved numerous motions and discovery and went to the Tenth Circuit Court of Appeals on two occasions before finally being dismissed as frivolous. However, the case had dragged on so long that the Religious Freedom Restoration Act (RFRA) became law just before the final trip to the Tenth Circuit. The Tenth Circuit, on its own motion, immediately applied RFRA and remanded the case to the district court to decide the issues of whether the prisoner was entitled to keep a black medicine bag with various items in it, which could not be inspected or even looked inside by correctional officers. *Werner* v. *McCotter et al.*

There are thousands and thousands of examples of frivolous inmate lawsuits that could be provided which clearly demonstrate absurdity. Unfortunately, the dollars required to even dismiss such lawsuits divert badly needed funding which could be used to construct secure housing and provide operational money to operate new prisons for violent offenders. It is my understanding that all state Attorneys General are compiling a listing for you of each state's "top ten list" of frivolous inmate lawsuits to emphasize the seriousness of this issue.

The driving force behind this flood of litigation is that inmates have "nothing to loss" in filing even the most frivolous case and attorneys have the prospect of obtaining all of their highly inflated fees and costs if they succeed on some technicality. Moreover, the Supreme Court mandated in 1976 that inmates have a right to legal assistance in filing these suits. In this respect, the most violent criminals are treated better than law-abiding members of society who cannot afford to pay for an attorney to vindicate their legal rights.

Although state attorneys pursue attorney fees and sanctions for abusive inmate suits, history shows that courts are reluctant to award fees to the defendants in civil rights cases, even when the courts affirmatively rules that the suit was extraordinarily frivolous. Private law-abiding citizens are required under Rule II of the Federal Rules of Civil Procedure to carefully weigh the merit of their claims before wasting the courts time. Both the private party and their attorney in many cases are sanctioned or required to pay defense costs for filing frivolous suits. However, I am not aware of any case where an attorney was ever sanctioned under Rule II when representing a prisoner in a civil right frivolous suit. Judges tend to treat

these civil suits like criminal cases, where any ridiculous and creative argument is entertained.

It would be most helpful if Congress would require the courts to apply the same standard for obtaining attorney fees to plaintiffs and defendants in all prison cases. Additionally, requiring full or at least some partial filing fee in all cases where the inmate has had any money over the last six months would at least cause some inmates to weigh the validity of their suit. The Civil Rights Act was originally designed to help establish equal rights for minorities. It was never envisioned, however, that this Act would hamper and harass corrections officials and cost taxpayers millions of dollars a year. The original intent of the Civil Rights Act has been made a mockery by frivolous inmate suits.

The original wording of 42 U.S. § 1988, the attorney fee provision of the Civil Rights Act, states that the "prevailing party" shall be awarded attorney fees. The Supreme Court, however, decided that Congress really meant that prevailing defendants should rarely, if ever, obtain fees while plaintiffs should liberally and generously be awarded fees, even when a suit is dismissed without a finding of a Constitutional violation. This deferential treatment of plaintiff prisoners has created a powerful catalyst and legal force which entice defense attorneys to actively pursue inmate civil rights suits that ultimately costs state and federal officials millions of dollars a year. The actions you are taking in both the Senate draft bill and House Bill 667 is certainly a step in the right direction and will be greatly appreciated by correctional administrators across the country.

Finally, I would like to take this opportunity to strongly express my support for the provisions of the Senate draft bill and House Bill 667 that limits consent decrees to a two year time period. Emerging and ever changing case law since the 1970's have resulted in numerous ill-conceived consent decrees and permanent injunctions that tie the hands of correctional administrators for years. The majority of state correctional administrators, governors, and legislators are now hampered with binding consent decrees that were agreed to by previous administrations with no possible end in sight, regardless of their efforts to be in full compliance. Many of the consent decrees contain requirements or conditions that far exceed constitutional conditions of confinement. In the administration of consent decrees there have been examples of overly zealous federal judges, magistrates and court appointed masters (monitors) who have tried to intervene or supplant their judgment in daily operational matters and decisions of professional correctional administrators. Unfortunately, the enforcement of some consent decrees have actually adversely impacted prison security and placed lives in danger.

In Utah, some consent decrees still bind the correctional system that were entered into over a decade ago. Last year an old decree dating back to 1978 was found by an enterprising civil rights attorney that dealt with extra-constitutional provisions regarding inmate disciplinary procedures. The attorney brought a claim on behalf of an inmate regarding an extremely technical violation of this old decree. Although the decree was not even known to present administrators and did not involve a violation of any federal right, the state had to pay $7,500 in attorney fees to resolve the claim.

Based upon another consent decree, entered into nine years and three directors ago, the prison is actually prevented from properly caring for seriously mentally ill inmates because the forced-medication standard in the decree is contrary to good mental health practice and far exceeds Supreme Court standards articulated in *Washington* v. *Harper*, resulting in reduced quality of care for inmates. Absent help from congress, this decree will cost the state thousands of dollars in fees to dismiss or modify, even though it is not in the best mental health interests of inmates.

Therefore, your proposed actions to place time limitations on consent decrees is considered a welcome relief to correctional administrators that is long overdue.

This concludes my remarks. Again, may I express my personal thanks, and the thanks of all of state correctional directors throughout the nation, for your support and assistance in all areas of prison reform in these most challenging times of unprecedented growth in violent offender populations.

Senator ABRAHAM. Thank you, Mr. McCotter.
Mr. Thomas?

STATEMENT OF ANDREW PEYTON THOMAS

Mr. THOMAS. Thank you, Mr. Chairman and members of this committee, for the opportunity and honor to appear before this

body and alongside this very distinguished panel on the urgent subject of crime and punishment.

Before turning to the narrower subject of prison reform, it seems appropriate to note very briefly at the outset that according to polls, crime remains one of the main concerns of the American people. In my opinion, Americans are right to be worried. Although crime rates appear to have stabilized nationally over the last few years, crime rates among juveniles continue to grow dramatically, especially among white juveniles.

According to the FBI, the crime rate among white juveniles is now growing at more than double the rate of growth among black juveniles. This trend is arguably the most underreported story in America today and it threatens to reduce this republic to nothing less than a vast transcontinental ghetto in the near future. The growth of violent crime, it is respectfully submitted, poses the gravest threat to our national future.

Although the explosion of crime in America is mainly cultural and spiritual in origin, there are certain things that government can do to at least arrest the growth of crime. One of these is to repeal the outdated laws that prohibit profitable prison labor, and here I find myself agreeing independently with Senator Gramm and the sentiments he expressed here this morning.

Today, 90 percent of American inmates are unemployed. Yet, a 1991 study by the U.S. Bureau of Prisons found that unemployed prisoners, once released, are more than three times more likely to commit crimes than are employed prisoners.

Prison labor was essentially criminalized at the Federal level more than half a century ago, but prior to that time the vast majority of inmates were employed in a wide variety of menial agricultural and factory tasks. Early Americans supported prison labor because it helped to pay for the cost of prison administration and because it encouraged the spiritual reformation of the prisoners thereby employed. Work, it was felt, consumes opportunities for mischief. It also gives the inmate discipline and direction and eats up otherwise idle time. Importantly, prison labor permitted better living conditions for prisoners as well.

When Alexis de Toqueville and a colleague toured some of the first American prisons in the early 1800's, they noted that, "There was not a single one of them who did not speak of labor with a kind of gratitude and who did not express the idea that without relief of constant occupation, life would be insufferable."

But because prison labor competed with the wages of workers in lower-skilled industries, workers who could vote, prison labor eventually fell out of favor politically. This trend culminated in a series of Federal laws beginning in 1929 that permitted States to ban commerce in prisoner-made goods within their borders. In 1935, Congress actually made it a Federal crime to transport prisoner-made goods in interstate commerce. In effect, these laws made prison labor literally a Federal offense and ended prison labor as an institution.

These laws remain on the books and are the main reason why inmates today are free to spend their time writing appeals of their convictions, bullying fellow inmates, and planning their next offenses. The irony is that most of the jobs that these laws were de-

signed to protect have now been lost to lower-paid foreign workers anyhow.

A repeal of these laws would permit the return of prison labor on a broad scale. If this reform were accompanied by an exception to the minimum wage laws applicable to prisoners employed in certain industries whose jobs already have been overwhelmingly lost to lower-paid foreign laborers, it is quite conceivable that the wages of foreign laborers could actually be underbid for a change, and that many of the jobs lost to workers overseas could be brought back to America. A restoration of prison labor would allow more humane conditions for prisoners, would allow them to help pay for their keep and to compensate their victims, and would reduce recidivism rates.

The genuine terrors that today's prisoners confront daily, cruel and unusual by the standards of most civilizations, are partly the result of the Federal laws thwarting wide-scale prison labor. It is respectfully submitted to this committee that repealing these Federal laws would significantly aid government in the fight against crime. In the meantime, we must wonder what the early prison reformers would say upon peering into our Nation's prisons today and whether they would consider them an improvement over the houses of horror they frequented some 2 centuries ago.

Senator ABRAHAM. Thank you very much.

Mr. Cole?

STATEMENT OF TIMOTHY P. COLE

Mr. COLE. Thank you, Mr. Chairman. My name is Tim Cole and I am chairman of the Board of Wackenhut Corrections Corporation headquartered in Coral Gables, FL. I am here today to support the passage of amendments to the Violent Crime Control and Law Enforcement Act of 1994. Among other things, that statute authorized the expenditure of $10 billion in Federal grants to construct and improve State prisons.

Two bills introduced in this Congress, S. 3 and S. 38, introduced by the Majority Leader, Senator Dole, and Judiciary Committee Chairman Hatch, respectively, would improve existing law in certain respects. However, we believe additional language to encourage greater reliance by the States on the private sector would produce substantial cost savings and other benefits for the American taxpayer.

One proposed amendment which is set out more specifically in my written statement would help to assure that these grants will help the States incarcerate more violent criminals and not make State governments more dependent on Federal tax dollars in the long term.

The contracting-out of the integrated design, financing, construction, and operation of a prison to the private sector began in the mid-1980's. Today, there are more than 90 facilities and 50,000 prisoners under private sector management. With 23 contracts in the United States, Canada, Puerto Rico, England, and Australia, and over 14,000 prisoners under management, Wackenhut Corrections Corporation is a recognized leader in the private development and operation of prisons.

We count among our employees dozens of former Federal and State corrections professionals. Our board of directors includes James Thompson, 4-term governor from the State of Illinois; Benjamin Civiletti, former Attorney General of the United States; and Norman Carlson, the Director of the Federal Bureau of Prisons for 17 years.

Mr. Chairman, prison privatization is not an experiment and it is not a pilot project. Governments throughout the United States and around the world are achieving real cost savings and other benefits by developing and operating prisons under private sector contracts. Public-private prison partnerships can do all of the following: reduce construction costs by 10 to 40 percent; reduce operating costs, which account for more than 80 percent of a prison's life cycle costs, by 10 to 20 percent; accelerate facility construction by as much as 30 to 50 percent; assure high-quality service; and increase budget certainty, including the costs associated with prisoner lawsuits for alleged civil rights violations.

The White House has acknowledged the value of privatization by specifying in its budget request for the Department of Justice in fiscal year 1996 that several correctional facilities will be developed and operated by the private sector for the Federal Bureau of Prisons. In addition, the House Appropriations Committee underscored the value of privatization just last week when it voted to appropriate $500 million for the existing State prison grant program and noted, that "substantial savings for taxpayers in both dollars terms and in the time necessary to make newly constructed facilities operational can be achieved by encouraging States to utilize the private sector."

A prison designed by its private sector operator is the best guarantee of maximum safety, security, and cost efficiency. Although many public sector agencies perform some functions efficiently, public sector efficiencies tend to get absorbed in growth—growth in staff, growth in procurement, growth in bureaucracy. Some governments around the world have tried to emulate private sector methods through a variety of means, but even marginal savings frequently seem unattainable or unsustainable. I suspect this is due to the lack of a profit-based structure. In short, no one has yet devised a better pencil sharpener than the private sector and open competition.

All of the State and foreign governments we have done business with began with one major reservation about privatization. They need to know that privatized prisons are fully accountable. What they have found is that privatized prisons are even more accountable than publicly operated facilities for exactly the same reasons they are more economical.

At least 6 factors contribute to this high standard of accountability. Owners require it in the terms of the contract. There are facility-based monitors. The government conducts annual audits. The contractor conducts in-house corporate audits. Accountability is part of the accreditation system, and competition among private operators guarantees it.

As Chairman of Wackenhut Corrections Corporation, I want to thank you, Mr. Chairman, for the opportunity to testify in support

of the inclusion of privatization language in the Senate crime legislation, and I would be happy to answer questions later.

[The prepared statement of Mr. Cole follows:]

PREPARED STATEMENT OF TIMOTHY P. COLE

Mr. Chairman, Members of the Committee, thank you for this opportunity to appear today to address the issue of prison privatization. My name is Tim Cole; I am Chairman of Wackenhut Corrections Corporation and Executive Vice President of the Wackenhut Corporation, headquartered in Coral Gables, Florida.

I am here today to support the passage of amendments to the Violent Crime Control and Law Enforcement Act of 1994. Among other things, that statute authorized the expenditure of $10 billion in federal grants to construct and improve state prisons. Two bills introduced in this Congress—S. 3 and S. 38, introduced by the Majority Leader, Sen. Dole and Judiciary Committee Chairman Hatch, respectively—would improve existing law in certain respects. However, we believe additional language to encourage greater reliance by the states on the private sector would produce substantial cost savings and other benefits for the American taxpayer. Our proposed amendment [Attachment 1] would help to assure that these grants will help the states incarcerate more violent criminals and not make the state governments more dependent on federal tax dollars in the long term.

The "contracting-out" of the integrated design, financing, construction and operation of a prison to the private sector began in the mid 1980s. Today there are more than 90 facilities and 50,000 prisoner places under private sector management. With 23 contracts in the United States, Canada, Puerto Rico, England and Australia, and over 14,000 prisoner places under management, Wackenhut Corrections Corp. is a recognized leader in the private development and operation of prisons [Attachment 2].

The Committee has heard compelling testimony today about the growing demand by the public for greater safety and security. Most Americans have grown uneasy with what often appears to be a disturbing mismatch between sentences imposed and sentences served. By passing "truth-in-sentencing" laws, states have begun to restore a fundamental sense of justice and fairness to our system of crime and punishment. At the same time, they have taxed their own abilities and challenged some old-fashioned ideas about prisons. Prison privatization has developed in direct response to those challenges.

Mr. Chairman, prison privatization is not an experiment; it is not a "pilot project." Governments throughout the United States and around the world are achieving real cost savings and other benefits by developing and operating prisons under private sector contracts. Public-private prison partnerships can do all of the following:

- reduce construction costs by 10–40 percent;
- reduce operational costs, which account for more than 80 percent of a prison's life cycle costs, by 10–20 percent;
- accelerate facility construction by as much as 30–50 percent;
- assure high quality service; and
- increase budget certainty, including the costs associated with prisoner lawsuits for alleged civil rights violations and the like.

The White House has acknowledged the value of privatization by specifying in its budget request for the Department of Justice in fiscal year 1996 that several correctional facilities will be developed and operated by the private sector for the federal Bureau of Prisons. In addition, the House Appropriations Committee underscored the value of privatization just last week when it voted to appropriate $500 million for the existing state prison grant program and noted "that substantial savings for taxpayers, in both dollar terms and in the time necessary to make newly-constructed facilities operational, can be achieved by encouraging states to utilize the private sector" [Attachment 3].

A prison designed by its private sector operator is the best guarantee of maximum safety, security and cost-efficiency. Although many public sector agencies perform some functions efficiently, public sector efficiencies tend to get absorbed in growth—growth in staff, growth in procurements, and growth in bureaucracy. Some governments around the world have tried to emulate private sector methods through a variety of means, but even marginal savings frequently seem unobtainable or unsustainable. I suspect this is due to the lack of a profit-based structure. In short, no one has yet devised a better pencil sharpener than the private sector in open competition.

All of the state and foreign governments we have done business with began with one major reservation about privatization: they needed to know that privatized prisons are fully accountable. What they have found is that privatized prisons are even more accountable than publicly-operated facilities, for exactly the same reasons they are more economical. At least six factors contribute to this higher standard of accountability:

- owners require it in the terms of the contract (for example, contractors typically assume the risk and costs of prisoner lawsuits [Attachment 4]);
- there are facility-based monitors;
- the government conducts annual audits;
- the contractor conducts in-house corporate audits;
- accountability is part of the accreditation system; and
- competition among private operators guarantee it.

As Chairman of Wackenhut Corrections Corporation and Executive Vice President of the Wackenhut Corporation, I want to thank you, Mr. Chairman, for the opportunity to testify in support of the inclusion of privatization language in the Senate crime legislation. I would be happy to answer questions.

ATTACHMENT 1

PRISON GRANTS: PRIVATIZATION WILL MAXIMIZE PUBLIC BENEFITS

CURRENT LAW SUBSIDIZES INEFFICIENCY AND INCREASES DEPENDENCE ON FEDERAL FUNDS

- The Democratic Crime Bill (Pub. L. #103–322) provides $10 billion in grants to "construct * * * operate or improve correctional facilities" in order to "free conventional prison space for the confinement of violent offenders. * * *
- The new grant program is available for "alternative correctional facilities" and does not recognize the *urgent need for more cells in secure facilities.*
- The traditional state government approach is to separate the responsibilities for design, construction and facility management, which results in the following:
- slow and over-budget construction; and
- unnecessarily high operational costs for the entire life of the facility.
- Current law encourages billions to be spent on new or retrofitted facilities that are not large enough, secure enough or efficient enough to keep the maximum number of violent criminals in prison for the least cost.
- States will therefore need even more federal financial assistance in the future.

PRIVATIZATION WILL MEET THE MOST URGENT NEEDS

With privatization, States have proven they can:

- reduce *construction costs* by 10–40 percent;
- reduce *operational costs* (which now account for 80+ percent of the 20-year life-cycle expenses of a prison) by 10–20 percent;
- deliver *new facilities* 30–50 percent faster;
- assure *quality service;* and
- increase overall *budget certainty.*

THE LAW SHOULD ENCOURAGE PRIVATIZATION, WHILE STILL AFFORDING FLEXIBILITY

The following provisions should be added:

- It should be clear that grants are available to help pay for the *entire range of correctional services* states can provide *in-house or under contract;*
- States should be expected to show that they have all the necessary *legislative authority* to embark upon a comprehensive, integration program and that they will employ the *best technology at the lowest cost;*
- The Attorney General should give top *priority* to the construction of *larger, "harder"* facilities; and
- To hasten construction of the most efficient larger, "harder" facilities, the Attorney General should give *priority* to States that have an executive body dedicated to the review and consideration of *privatization.*

S. _____

SECTION BY SECTION ANALYSIS

Subtitle A of title II of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, authorized the attorney general to award $10 billion in grants to the states through Fiscal Year 2000 for the purpose of assuring prison cells will be available for violent criminals. In part, this legislation was designed to ease the burden on states that are implementing new laws to assure that such criminals will actually serve out more of their sentences or that are otherwise determined to put more violent offenders behind bars and keep them there.

By specifically authorizing grants to "construct * * * expand * * * or improve" correctional facilities, the Act recognized that the states face a basic infrastructure problem. However, the Act did not properly take into account the following two specific aspects of that infrastructure problem. First, many existing state facilities are too small. A state cannot operate efficiently by simply building more small, low-security facilities. Second, due to outmoded state procurement practices, design, construction and management of existing facilities were divorced from each other, instead of being integrated to promote continuity, accountability and efficiency of operation. Since operational costs represent 80 percent or more of the 20-year life-cycle expenses of a prison, any cost savings here will not only guarantee the states and their citizens more "bang" for their buck, but also help prevent them from needing to raise taxes or to seek more federal assistance to keep their prisons operating 10 or 15 years after construction.

Two states—Texas and Florida—have addressed the urgent need for prison space by building larger, "harder" prisons, and by-contracting out to private organizations not only to build new prisons, but to operate what they built. Procurement practices have been revised to emphasize cost savings in both construction and operation, quick delivery of new facilities, quality service reflecting the highest professional standards, and budget certainty. The result is that prisons can be built for 10 to 40 percent less, operated for 10 to 20 percent less and delivered 30 to 50 percent faster than under outmoded procurement practices.

Section 1 of the bill adds language to address both short- and long-term considerations. First, the proposed additions to Sec. 20101(a) would clarify that grants are available to help states pay for the entire range of correctional sentences they can provide in-house or under contract.

Second, the additions to Sec. 20101(a) (3) and (4) would require applicants to show they have all the necessary legislative authority to embark upon a comprehensive, integrated approach, including several types of publicly- and privately-operated corrections programs, and that they will employ the best technology at the lowest cost. The purpose is to assure not only that the new federal money would be used for construction, development, expansion and the like, but that it will minimize life-cycle costs, make prison operation safer and more efficient and not increase the states' long-term dependence on federal funds.

Third, the proposed new subsection (d) addresses short-term considerations by directing the Attorney General to act first on applications for grants that will enable states to construct larger (over 500 bed) facilities for higher-level security prisoners. In evaluating those applications, and to maximize the long-term cost benefits of the prisons to be built, the Attorney General would further be directed to give priority to states that have recognized the inadequacies of traditional procurement methods and have therefore established an executive body to promote integration in design, construction and facility management; accelerate delivery of new facilities; assure professionalism in facility operation and limit a state's exposure to cost overruns in construction or operational expenses.

Section 2 of the bill makes these improvements in the law effective upon enactment.

104th Congress
1st Session

draft 5-9-95

S. ___

To maximize the public benefit of federal prison grants, and for other purposes

IN THE SENATE OF THE UNITED STATES

May _, 1995

Mr./Ms. _____ introduced the following bill, which was read twice and referred to the Committee on the Judiciary

A BILL

To maximize the public benefit of federal prison grants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PRISON GRANTS.

Subtitle A of title II of the Violent Crime Control and Law Enforcement Act of 1994 and the amendments made thereby are amended to read as follows:

"Subtitle A - Violent Offender Incarceration and Truth in Sentencing Incentive Grants.

"Sec. 20101. Grants for Correctional Facilities.

"(a) GRANT AUTHORIZATION. The Attorney General may make grants to individual States and to States organized as multi-State compacts, to construct, develop, expand, modify, operate, or improve, directly or through private-sector contracts, secure correctional facilities, including prisons and jails, for the confinement of violent offenders, to ensure that prison cell space is available for the confinement of violent offenders and to implement truth in sentencing laws for sentencing violent offenders.

"(3) assurances that funds received under this section will be used to

construct, develop, expand, modify, operate, or improve secure correctional facilities at the lowest possible life-cycle cost and with the best available technology.

"(4) assurances that the State or States have a comprehensive correctional plan, supported by all necessary state legislative authority, which represents an integrated approach to the management and operation of correctional facilities and programs and which includes the following types of publicly and privately-operated programs: (i) diversion programs, particularly drug diversion programs; (ii) community corrections programs; (iii) a prisoner screening and security classification system; (iv) appropriate professional training for corrections officers in dealing with violent offenders; (v) prisoner rehabilitation and treatment programs; (vi) prisoner work activities (including to the extent practicable, activities relating to the development, expansion, modification, or improvement of correctional facilities) and job skills programs; (vii) educational programs; and (viii) a pre-release prisoner assessment to provide risk reduction management, post-release assistance, and an assessment of recidivism rates;

. . .

"(d) PRIORITY PROCESSING. The Attorney General shall expedite and otherwise give priority to the processing of applications that would fund construction of new, medium- to maximum-security correctional facilities with more than 500 beds. Among any such applications, the Attorney General shall expedite and otherwise give priority to applications from States that certify, as part of their application, that they have an established executive body with at least the following authority and responsibilities:
(A) to maximize the long-term benefit of state correctional expenditures by (i) integrating design, construction and facility management to reduce both initial construction costs and life-cycle operational expenses; (ii) assuring the quickest possible delivery of new facilities; (iii) assuring quality service and quick accreditation by appropriate, professional organizations soon after a facility becomes operational; and (iv) increasing budget certainty for completion of the facility and for the first three years of its operation; and
(B) to enter into a contract or contracts for the design, acquisition, financing, lease, construction and operation of correctional facilities.

. .

"Sec. 20103. Definitions.

"In this subtitle -

"construct" includes design, financing and physical erection;

"operate" includes (i) the provision of management, health and food services; (ii) the provision of rehabilitative and educational services for prisoners within one year of their anticipated release date; and (iii) the payment of a reasonable per diem or similarly-calculated fee by a State or States organized as a multi-State compact to another State, another multi-State compact or to a privately-operated correctional facility, in consideration of their provision of cell space.

SECTION 2. EFFECTIVE DATE.

This Act shall be effective upon enactment.

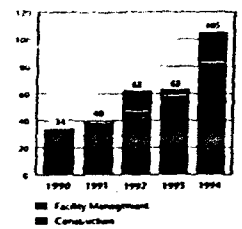
ATTACHMENT 2

WACKENHUT CORRECTIONS

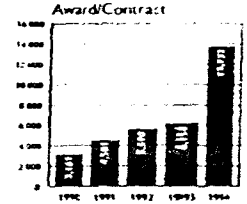
1994 Annual Report

Financial Highlights

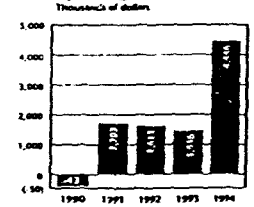
Revenues



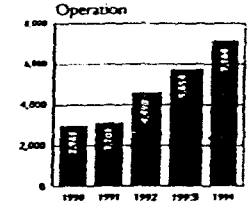
Beds Under Award/Contract



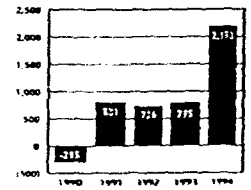
Operating Income



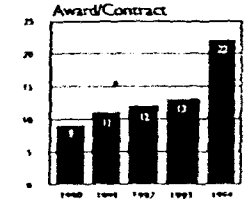
Beds In Operation



Net Income



Facilities Under Award/Contract



WACKENHUT CORRECTIONS

Corporate Profile

Wackenhut Corrections Corporation is a leading developer and manager of privatized correctional and detention facilities. It offers governmental agencies a comprehensive range of prison services from consulting to the integrated design, financing, construction and management of secure facilities.

In addition to facility security, the company provides a wide array of rehabilitative and educational programs, such as chemical dependency counseling and treatment, basic education, and job and life-skills training. It also provides full logistical support, health services, institutional food service, and similar contractual requirements.

Founded in 1984 as a division of The Wackenhut Corporation, Wackenhut Corrections became a public company in 1994. It operates facilities in seven states as well as Australia, Great Britain and Puerto Rico.

Table Of Contents

WACKENHUT CORRECTIONS

Letter to the Shareholders

This is the first annual report to the shareholders of Wackenhut Corrections Corporation (WCC). The initial public offering of approximately 2.2 million shares of the company's stock last July and September was greeted with an enthusiastic response from both individual and institutional investors. From the initial offering price of $9 a share, the price went to $25 a share in the first seven months of trading. In December, our average daily trading volume reached 57,300 shares on Nasdaq's national market.

We are pleased to respond to this shareholder confidence with a report of strong earnings performance. WCC revenues were up 68% to $105 million and net income increased 176% to $2.2 million or 30 cents per share. The substantial increase in revenues and profits is the result of many years of carefully managed company growth.

Since the early 1980's, WCC has pioneered the concept of privatized development and management of correctional and detention facilities. At the close of 1994, there were approximately 47,000 beds under private management in the U.S. and internationally. WCC's 13,732 beds under contract/award represent approximately 29% of the private corrections market at year end.

Our dramatic increase in awarded/contracted beds, along with the corresponding increase in market share, was due to winning ten new contracts during fiscal 1994 which totaled approximately 7,600 beds. These new WCC beds represent 49% of the approximate 15,639 beds awarded to the private corrections industry during 1994. The value of WCC's ten new contracts will add approximately $80 million in one-time construction and design revenues, and $100 million in annual management revenues. The overwhelming majority of the new revenues do not begin until 1996.

We believe the major reason for the large number of new privatized beds during 1994 is attributable to a simultaneous recognition by a number of states of the need to expand their correctional systems in response to growing public demand to incarcerate more habitual criminals. Accordingly, such states as Texas, Mississippi, Florida and others selected the privatization option as one means to add more bed capacity quickly and cost effectively.

It is important to note two market trends relative to the privatized facilities awarded in 1994. First, the majority of the beds were of a medium level security, or higher, possibly indicating a "hardening" of the prisoner population. Second was the fact that contract awards were not made on the basis of the lowest financial bid, but instead on a variety of considerations including company experience, resources and approach to prisoner rehabilitation.

In looking to the future, we see a continuation of the accelerated expansion of privatization in the U.S. and abroad. At the close of 1994, approximately 19 states had privatized facilities within their boundaries but numerous others were drafting legislation to permit privatization. There was particular interest among those which want to expand their bed capacity to meet the Federal Crime Bill's funding requirement that prisoners serve 85% of their sentence. At the federal level the Justice Department has announced plans to privatize five new prisons in the near future and additional facilities thereafter.

The international marketplace still reflects the dominance of the United Kingdom and Australia in their privatization efforts. Under the present ruling Conservative Party in the United Kingdom, all new prisons are to be privately competed. Other countries in Europe and South America are in various stages of considering the privatization option.

We feel that Wackenhut Corrections is uniquely positioned from a financial and organizational perspective to pursue new business opportunities. Present debt is very low at $1,422,000, representing a 7.2% debt to equity ratio. Thus, we are well positioned to take advantage of appropriate business opportunities.

With the support of our major shareholder (at 73%), The Wackenhut Corporation, an international leader in private security, with 150 offices in 50 countries, we have enjoyed entree into U.S. markets as well as those abroad. Internationally, we see additional growth opportunities as new markets open to free enterprise and market barriers fall.

In preparing for the third millennium and the globalization of privatized corrections, WCC has taken a number of important steps. We have established a central corporate infrastructure capable of sustaining global operations with numerous clients. Additionally, we have established two regional offices in the U.S. and have offices in the United Kingdom and Australia. The WCC corporate officers constitute an unparalleled level of professional managerial expertise by individuals who have successfully worked together for five years.

In closing, we feel privileged to continue our pioneering efforts to further establish the privatization of corrections in other states and countries. Our pledge to the shareholders is to conduct our business activities in accordance with the highest standards of managerial professionalism.

We hope that you share our excitement in playing a part in shaping a newly emerging industry.

Timothy P. Cole
Chairman of the Board

George C. Zoley
President and Chief Executive Officer

March 1, 1999

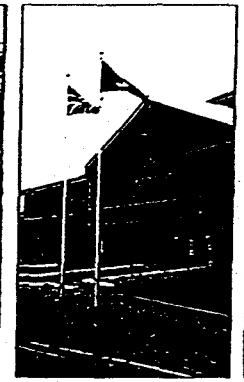
George C. Zoley, left, and Timothy P. Cole

Facility Operations

The twenty-two Wackenhut Corrections facilities under management/development include federal, state and local clients, and span all security levels from minimum to maximum. The following is a sample of many unique facilities under WCC's management.

Lockhart, Texas

Lockhart Work Program Facility receives inmates from the state system who are within one year of release. Private industry is recruited to provide on-site job-training and paid positions to help transition the inmates to a productive civilian life. The state stipulates what portion of the earnings go for housing, victim restitution, and support of dependents.



Doncaster, England

H.M. Prison Doncaster houses adult offenders in pre-trial, convicted and sentenced categories, including category "A" prisoners, the highest security classification in the British system. Physically-separate are 51 spaces for special health care and psychiatric needs, and a population of youthful offenders where emphasis is on counseling and rehabilitation.

Kyle, Texas

New Vision Chemical Dependency Treatment Center, the world's largest in-prison intensive drug treatment center, has 500 inmate residents. It receives individuals from the state system with alcohol and/or drug problems, and places them in group and individual therapy based on a 12-step model for recovery. In addition, academic and vocational programs are provided.

Bridgeport, Texas

Bridgeport Pre-Release Facility accepts minimum medium security offenders from the state's Institutional Division who are within two years of parole eligibility. It concentrates on basic education, job employment and life skills training, counseling and substance abuse programs to enhance each person's chance for a successful return to society.

McFarland, California

McFarland Community Correctional Facility houses technical parole violators for the California Department of Corrections for an approximate six-month period, providing educational, vocational and counseling opportunities. It features direct supervision by unarmed officers and security measures which include a control room with closed circuit TV monitors.

Moore Haven, Florida

Glades County Correctional Facility, now under construction, demonstrates the complete capabilities of the corporation from design and construction through recruitment and training of employees, and management of the facility. The company is presently engaged in the design, financing or construction of seven facilities due to open in 1995 and 1996.

A complete listing of Wackenhut correctional and detention facilities

Facilities

Current facilities under Wackenhut operation:

Facility Name Location	Company Role	Design Capacity	Facility Type	Security Level	Date of Opening
Federal Government Contracts					
Aurora INS Processing Center Aurora, Colorado	Construction/ Management	300	INS Detention Facility	Minimum/ medium	2/87
New York INS Processing Center Queens, New York	Renovation/ Management	105	INS Detention Facility	Minimum/ medium	12/89
State Government Contracts					
Allen Correctional Center Kinder, Louisiana	Management	1,282	State Prison	Medium	12/90
Bridgeport Pre-Release Center Bridgeport, Texas	Construction/ Management	520	Pre-Release Center	Minimum	6/89
Central Texas Parole Violator Facility San Antonio, Texas	Renovation/ Management	623	Transfer Facility; U.S. Marshall Detention Facility	All levels	1/89
Coke County Juvenile Justice Center Coke County, Texas	Construction/ Management	96	Juvenile Offender Facility	Medium	12/94
Kyle New Vision Chemical Dependency Treatment Center Kyle, Texas	Construction/ Management	520	In-Prison Chemical Dependency Treatment Center	Minimum	6/89
Lockhart Female Correctional Facility Lockhart, Texas	Construction/ Management	500	State Prison	Minimum/ medium	9/94
Lockhart Work Program Facility Lockhart, Texas	Construction/ Management	500	Work Program Facility	Minimum	2/93
McFarland Community Correctional Facility McFarland, California	Construction/ Management	224	Pre-Release Center	Minimum/ medium	1/89
North Texas Intermediate Sanctions Facility Fort Worth, Texas	Renovation/ Management	400	Intermediate Sanction Facility	Minimum	[illegible]

Facility Name Location	Company Role	Design Capacity	Facility Type	Security Level	Date of Opening
Local Government Contracts					
San Diego City Jail San Diego, California	Construction Management	2001	City Jail Facility	Minimum	5/92
International Contracts					
Arthur Gorrie Correctional Centre Wacol, Queensland, Australia	Management	516	Remand and Reception Centre	All levels	7/92
Junee Correctional Center Junee, New South Wales, Australia	Construction/ Management	600	National Prison	Medium	4/93
H. M. Prison Doncaster Doncaster, England	Management	226	National Prison	All levels	6/94

Facilities under contract, not yet open:

Facility Name Location	Company Role	Design Capacity	Facility Type	Security Level	Date of Opening*
Bayamon Regional Detention Center Puerto Rico	Design/ Construction	500	Regional Detention Center	Medium	11/96
Glades Correctional Facility Moore Haven, Florida	Construction/ Management	750	State Prison	Medium	6/95
Marshall County, Mississippi	Design/ Construction/ Financing/ Management	1,000	State Prison	Medium	4/96
South Bay, Florida	Design/ Construction/ Financing/ Management	1,318	State Prison	Medium/ close custody	5/96
State Jail Facility Jack County, Texas	Design/ Consultation/ Management	1,000	State Jail Facility	Medium	5/95
State Jail Facility Willacy County, Texas	Design/ Consultation/ Management	1,000	State Jail Facility	Medium	8/95
Travis County Community Justice Center Travis County, Texas	Design/ Consultation/ Management	1,000	State Jail Facility	Medium	8/95

* Estimated

Board of Directors

Timothy P. Cole
Chairman of the Board, Wackenhut Corrections Corporation; Executive Vice President, and President, Government Services Group, The Wackenhut Corporation (a)

Norman A. Carlson
Senior Lecturer, University of Minnesota and former Director, Federal Bureau of Prisons (b)

Benjamin R. Civiletti
Chairman, Venable, Baetjer and Howard, and former Attorney General of the United States (c)

Manuel J. Justiz
Dean, College of Education, University of Texas at Austin and former Director, National Institute of Education (b)

James R. Thompson
Chairman, Winston & Strawn and former Governor of Illinois (b)

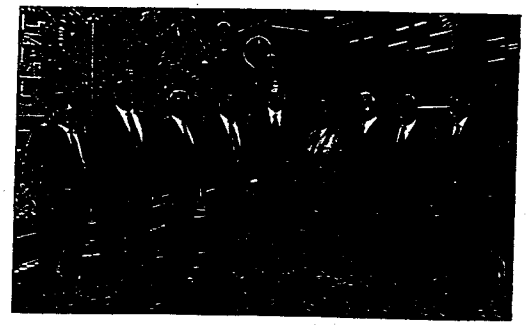
Anthony P. Travisono
Director, International Institute for Correctional Studies, Salve Regina University and Executive Director Emeritus, American Correctional Association (c)

George R. Wackenhut
Chairman of the Board and Chief Executive Officer, The Wackenhut Corporation (c)

Richard R. Wackenhut
President and Chief Operating Officer, and Member of the Board of Directors, The Wackenhut Corporation (a)

George C. Zoley
President and Chief Executive Officer, Wackenhut Corrections Corporation (a)

Committees:
(a) Executive Committee
(b) Audit and Finance Committee
(c) Nominating and Compensation Committee



left to right: Timothy P. Cole, Norman A. Carlson, Benjamin R. Civiletti, Manuel J. Justiz, James R. Thompson, Anthony P. Travisono, George R. Wackenhut, Richard R. Wackenhut, George C. Zoley

ATTACHMENT 3

[FULL COMMITTEE PRINT]

104TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 104–

DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS BILL, FISCAL YEAR 1996

JULY , 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ROGERS, from the Committee on Appropriations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R.]

INDEX TO BILL AND REPORT

90-068

State Prison Grants.—The recommendation provides $500,000,000 for State Prison Grants pursuant to H.R. 667 which passed the House of Representatives on February 10, 1995. The Committee recommendation provides an increase of $475,500,000 above the current year appropriation. In 1995, $24,500,000 was provided for boot camps for violent offenders.

The $500,000,000 recommended by the Committee is available under the provisions of H.R. 667, The Violent Criminal Incarceration Act of 1995. The Committee recommendation supports the changes adopted by the House to the State Prison Grant program included in the Violent Crime Control and Law Enforcement Act of 1994, which strengthen the incentives for States to implement "truth in sentencing" policies and address States' costs due to the incarceration of criminal aliens. Of the $500,000,000 provided, up to $200,000,000 can be used for reimbursement to States for alien incarceration.

After the reimbursement for alien incarceration, $300,000,000 is available for grants to States and to eligible States organized as a regional compact to build, expand, and operate correctional facilities for the housing of serious violent offenders. Funds can also be used to build, expand, and operate temporary or permanent correctional facilities, including facilities on military bases and boot camp facilities, for the confinement of convicted nonviolent offenders and criminal aliens for the purpose of freeing suitable existing prison space for persons convicted of a serious violent felony. Such grants may also be used to build, expand, and operate secure youth correctional facilities. All grants are subject to the distribution and requirements outlined in H.R. 667.

The Committee also recognizes that substantial savings for taxpayers, in both dollar terms and in the time necessary to make newly-constructed facilities operational, can be achieved by encouraging States to utilize the private sector. In reviewing and approving grants under this program, the Attorney General should take steps to assure applicants have considered privatization of both construction and operations, where most appropriate.

ATTACHMENT 4

federal taxes, if any are incurred, with respect to the operation of the Facility.

Section 6.8 Utilities. Contractor shall pay all utility charges and deposits incurred or imposed with respect to the Facility.

ARTICLE 7
INDEMNIFICATION, INSURANCE AND DEFENSE OF CLAIMS

Section 7.1. Indemnification. The Contractor shall protect, defend, indemnify, save and hold harmless the State of Louisiana, all state departments, agencies, boards and commissions, its officers, agents, servants and employees, including volunteers, from and against any and all claims, demands, expenses and liability arising out of acts or omissions of the Contractor, its agents, servants, subcontractors and employees and any and all costs, expenses and attorney's fees incurred as a result of any such claim, demand or cause of action including, but not limited to, any and all claims arising from:

(a) any breach or default on the part of Contractor in the performance of the Contract;

(b) any claims or losses for services rendered by Contractor, by any person or firm performing or supplying services, materials or supplies in connection with the performance of the Contract;

(c) any claims or losses to any person injured or property damaged from the acts or omissions of Contractor, its officers, agents, or employees in the performance of the Contract;

(d) any claims or losses by any person or firm injured or damaged by Contractor, its officers, agents, or employees by the publication, translation, reproduction, delivery, performance, use, or disposition of any data processed under the Contract in a manner not authorized by the Contract, or by federal, state, or local statutes or regulations;

(e) any failure of Contractor, its officers, agents, or employees to observe the laws of the United States and the State of Louisiana, including but not limited to labor laws and minimum wage laws; and

(f) any claim or losses resulting from an act of an inmate while under Contractor's authority.

This indemnification provision shall not be applicable to injury, death or damage to property arising out of the sole negligence or sole willful misconduct of the State, its officers, agents, servants or independent contractors (other than Contractor) who are directly responsible to the State. Contractor shall not waive, release, or otherwise forfeit any possible defense the State may have regarding claims arising from or made in connection with the operation of the Facility by Contractor without the consent of the State. Contractor shall preserve all such available defenses and cooperate with the State to make such defenses available to the maximum extent allowed by law.

In case any action or proceeding is brought against the State by reason of any such claim, Contractor, upon notice from the State, shall defend against such action by counsel satisfactory to the State, unless such action or proceeding is defended against by counsel for any carrier of liability insurance provided for herein.

Section 7.2 Insurance. The Contractor shall continuously maintain and pay for such insurance as will protect the Contractor and the State as a named insured, from:

a) all claims, including death and claims based on violations of civil rights, arising from the services performed under the Contract.

b) all claims arising form the services performed under the Contract by Contractor; and

c) actions by a third party against Contractor as a result of the Contract.

Section 7.3 Types of Insurance. Prior to the effective date of this Contract, the Contractor shall provide insurance policies and endorsements in a form and for terms satisfactory to the State's Office of Risk Management evidencing insurance coverage of the following types, for the following purposes and in the following amounts:

a. Worker's Compensation and Unemployment Compensation Insurance protecting the Contractor from claims for damages for physical or personal injury which may arise from operations performed pursuant to this Contract, whether such operations are performed by the Contractor, by a subcontractor, or by a person directly or indirectly employed by either of them.

b. General Liability Insurance, which shall specifically include civil rights and

medical matters, in an amount not less than five million dollars ($5,000,000) for each occurrence with an aggregate of at least ten million dollars ($10,000,000) per year. Such insurance shall also provide coverage, including the cost of defense, for all state officers and employees, whether in their official or individual capacities, against claims and actions as set forth in Section 7.2.

c. Automobile and other vehicle liability insurance in an amount not less than five million dollars ($5,000,000) per occurrence.

d. Insurance in an amount not less than fifty thousand dollars ($50,000) covering instances of employee dishonesty.

All insurance policies required under this Contract must provide no less than thirty (30) days advance notice to the State of any contemplated cancellation. The State shall have the right, but not the obligation, to advance money to prevent the insurance required herein from lapsing for nonpayment of premiums. If the State advances such amount, then the Contractor shall be obligated to repay the State the amount of any advances plus interest thereon at the legal maximum rate, and the State shall be entitled to set off and deduct such amount from any amounts owed the Contractor pursuant to this Contract. No election by the State to advance money to pay insurance premiums shall be deemed to cure default by the Contractor of its obligation to provide insurance.

Section 7.4 Fire and Property Insurance. The State shall maintain fire and property insurance on the State's buildings and equipment located at the Facility site.

Section 7.5 Defense/Immunity. By entering into the Contract, neither the State nor the Contractor waives any immunity defenses which may be extended to either of them by operation of law, including limitations on the amount of damages which may be awarded or paid.

Section 7.6 Notice of Claims. Within five (5) working days after receipt of summons in any action by the State, or of any agent, employee or officer thereof, or within five (5) days of receipt by the State or of any agent, employee or officer thereof, of notice of claim, the State or any agent, employee or officer, shall notify Contractor in writing of the commencement thereof.

Section 7.7 Financial Strength. The Contractor shall, prior to signing this Contract, file with the State a financial statement showing a net stockholders equity, calculated according to generally accepted accounting principles consistently applied, of not less than five million dollars ($5,000,000). Thereafter, the Contractor shall file annually, on or before October 1 of each

Senator ABRAHAM. Thank you very much.
Mr. Collins, welcome.

STATEMENT OF JAMES A. COLLINS

Mr. COLLINS. Thank you, Mr. Chairman. Mr. Chairman, I am Andy Collins, executive director of the Texas Department of Criminal Justice, and chair of the American Correctional Association's Legislative Affairs Committee. I am honored to be here today to speak to you on behalf of the Association and its 20,000 members, representing a cross-section of corrections professionals.

Thank you for this opportunity to share our views with you on the issue of the Nation's prisons, and particularly the proposals about truth in sentencing and incarceration of violent criminals. I am submitting a detailed statement for the record, but I will briefly summarize my comments for you today.

Earlier today, Mr. Chairman, you spoke about the importance of a balanced approach to dealing with the issue of incarceration of violent criminals. The American Correctional Association believes that we must be more successful in our efforts to reduce crime through a balanced approach, one that places equal importance on prevention, policing, prosecution, punishment, and treatment, while being sensitive to the rights of victims.

One of the most critical issues that is addressed by current legislative proposals for controlling violent crime in America is the issue of providing incentives to States for imposing tough truth in sentencing laws for those who commit the most serious violent crimes. In my view, there are two key principles that should be considered in developing Federal incentives to States.

First, the truth in sentencing incentive should not be mixed or diluted by trying to piggyback other reform incentives to the critical issue of truth in sentencing. We can see in some of the current proposals attempts to tie truth in sentencing to other kinds of reform issues. For example, in S. 930, we see effort to tie truth in sentencing to the issues of inmate work and education requirements. In H.R. 667, we see efforts to tie reimbursement for the cost of incarcerating undocumented felons to truth in sentencing.

These kinds of efforts only detract from the central issue, and in some cases provide mandates that are very costly for States to implement, and they are overly intrusive in the day-to-day operation of State prison systems.

For example, implementing the inmate work and education requirement under S. 930 would cost the Texas prison system about $14 million a year in additional security personnel. Additionally, it would cost about $5 million for additional work supervisors. To meet the mandates of the educational program requirements, it would increase our budget by 400 percent. When these kinds of mandates are included in the legislation, States are forced to rethink the value of the truth in sentencing incentive.

Second, the truth in sentencing incentive should not be tied to an unrealistic goal. If States are to work effectively toward truth in sentencing, the goals set forth in the legislation should not be so impractical to achieve that States are discouraged from trying to attain them. Current proposals would require States to imple-

ment State laws requiring violent offenders to serve 85 percent of their imposed sentences.

We suggest using a formula based on a progressive continuum of truth in sentencing incentives that judges a State on its own progress toward goals set for itself in place of the 85-percent requirement. Also, given that it is nearly impossible to determine the national average percent of time served, we think it is more logical to require indeterminate sentencing States to assure that 85 percent of the minimum sentence imposed will be served. We believe that these requirements will provide a more realistic incentive to States than those offered in current legislation. It will also help to ensure that an optimum number of agencies are eligible to participate in the national crime control initiative.

In Texas, where both sentence imposed and time served tend to be longer than most States, the 85-percent requirement would cost Texas taxpayers an additional estimated $1.5 billion over the next 15 years. How can a State like Texas be motivated to work toward 85 percent when the costs to State taxpayers of doing so would far outstrip the Federal funds we would receive?

Texas taxpayers, without any Federal incentives, have already committed almost $2 billion to expand prison capacity from about 38,000 beds in 1987 to about 135,000 beds by September 1 of 1995. We estimate that another 78,000 would be needed over the next 15 years to be able to implement an 85-percent requirement.

If the overall intent of the truth in sentencing legislation is to motivate States to enact laws that protect citizens from violent crime, the Federal legislation must look at performance measures that are much broader than just served as a percent of sentence imposed. By focusing solely on the 85 percent of sentence imposed, States that are imposing longer sentences and that are requiring longer periods of incarceration for violent offenders may still not meet the 85-percent criteria, but may actually be doing more to meet the goal and the spirit of truth in sentencing legislation than other States.

In a recent study published by the Bureau of Justice Statistics, Texas was shown to have longer sentences imposed and longer time served than any of the 4 States identified by the Congressional Research Service as qualifying for 85-percent truth in sentencing. According to the study, Texas' average sentence imposed for violent offenders was 145 months, with an average time served of 56 months, or 39 percent. However, even though California, for example, showed 85 percent of sentence imposed, their average sentence was only 39 months, with an average time served of only 33 months.

In summary, I would like to make the following points. First, we must be more successful in our efforts to reduce crime through a balanced approach, one that places equal importance on prevention, policing, prosecution, punishment, and treatment, while again being sensitive to the rights of victims.

Second, legislation to provide incentives for truth in sentencing should not be mixed or confused with other reform issues, like inmate requirements for work or education, and should not be laden with requirements that are not cost-effective to implement.

Third, truth in sentencing incentives need to be tied to more flexible, good-faith efforts by States to achieve the goals of imposing longer sentences for violent crimes.

Mr. Chairman, this concludes a summary of the American Correctional Association's testimony. Again, I provide an expanded commentary on these issues, and I would be more than happy to answer any questions that you might have.

[The prepared statement of Mr. Collins follows:]

PREPARED STATEMENT OF JAMES A. COLLINS ON BEHALF OF THE AMERICAN CORRECTIONAL ASSOCIATION

Mr. Chairman, and members of the Committee, I am James Collins, Executive Director of the Texas Department of Criminal Justice, and Chair of the American Correctional Association's Legislative Affairs Committee. I am honored to be here today to speak for the Association and its 20,000 members representing a cross-section of the corrections profession. Thank you for this opportunity to share our views with you on the issues of our nation's prisons and, particularly, the proposals about truth-in-sentencing and incarceration of violent criminals. I am submitting a detailed statement for the record, but I will briefly summarize my comments for you today.

Crime is one of the top issues on the public's mind today. Current sentiment could lead one to believe that the crime rate has increased significantly and that our initiatives have done nothing to control it. The truth is that the majority of persons in this country are law abiding and do not commit crimes. The majority of crime is nonviolent even though violent crime captures the public's attention. A sector of the public tends to think that something drastic must be done to curb the increased trend. Some believe that the most effective method of curbing crime is to take criminals off the street so they can't commit more crime.

While the total number of arrests have remained relatively stable since the mid-1970s, with a minor increase between 1987 and 1990, several factors have led to increases in convictions and thus, incarceration. They include enhanced law enforcement efforts, advances in forensic technologies, abolishing discretionary parole, eliminating good time, and adding or increasing percentage requirements for time to be served in prison before release consideration. In reality, the crime rate has remained flat in the last 20 years while we have increased our prison commitments by as much as 155 percent.

This unprecedented increase in prison population from 1980 to 1992 has largely been due to drug, property and public order offenses (which comprise 84 percent of the incarceration rate increase), and to increasing mandatory minimum sentences. National research on the impact of the Federal Sentencing Guidelines indicates that substantial numbers of low-level drug offenders have been sentenced to Federal prison because of mandatory minimum sentences.

The United States has now reached the point where we are vacillating between first and second in the world in incarceration rates, yet the crime rate has been virtually unchanged.

In 1980, we had 310,000 inmates. By June 1994, we had 945,000. We incarcerated 150 people per 100,000 in 1980; and now, we incarcerate 519 people for every 100,000. Unfortunately, things will get worse. According to Dr. Jeffrey D. Senese, University of Baltimore Department of Criminal Justice, the current consensus among criminal justice research is that we can anticipate an increase in one area of crime—that being juvenile crime. The juvenile crime rate is expected to increase by 25 percent over the next 10 years. This is largely due to the grandchildren of the original "baby boomers" reaching the crime-prone age group of ages 16 to 24. Both demography and policy are working against that crime rate dropping off. As professionals in the correctional community, we share an overwhelming consensus that incarceration, in and of itself, does little to reduce crime or have a positive impact on recidivism.

We have an obligation to acknowledge the public's fears about crime and victimization. We need to help victims obtain true justice in a fair and practical manner. Therefore, we as corrections professionals *and* members of our communities have a responsibility to work hand-in-hand with you as the policymakers, to educate citizens on empowering their communities to maintain public safety. We must be more successful in our efforts to reduce crime through a balanced approach * * * one that incorporates prevention, policing, prosecution, punishment and treatment. It is our

duty to formulate and promote policies based on informed, rational discussion, accurate data and professional experience. Today's hearing is a step in that direction.

There is compelling evidence that indicates that, when polled, four diverse segments of our society gave similar responses to questions regarding crime solutions. Replies by local citizens showed that many favor strategies involving the use of recidivism reduction programs such as literacy training and education to reduce crime.

The first segment was a group of 1000 members of the general public. A national public opinion poll conducted in June 1995 by The Wirthlin Group, an independent research firm, found that three out of four American citizens support the balanced approach involving prevention, punishment and treatment as a way of controlling and reducing crime. These findings are consistent with other national polls.

The members of this Committee are familiar with the results released in December 1994 of a poll conducted by the Senate Judiciary Subcommittee on the Constitution. That survey reached a fourth segment—corrections professionals. It revealed that 85 percent of wardens surveyed do not think that most elected officials in America are offering effective solutions to crime. The wardens polled overwhelmingly support prison programs to reduce recidivism:

- 93 percent favor literacy and other educational programs,
- 92 percent favor vocational training, and
- 89 percent favor drug treatment.

Over 45 national, regional, state and local organizations and individuals have joined the American Correctional Association in support of our position calling for *a balanced public policy on crime control*. We believe that incarceration is an integral part of combating crime when combined with a comprehensive, balanced approach that includes other effective tools aimed at prevention, policing, punishment and treatment.

State and local corrections and criminal justice systems need more flexibility to implement strategies for controlling violent offenders and protecting citizens from violent crimes. Prison reform legislation must contain language pertaining to adult and juvenile offenders that supports:

- using conventional correctional facilities for incarcerating serious violent offenders and persons using a firearm in the commission of a crime.
- using community-based punishments for nonviolent offenders.
- implementing recidivism reduction programs, prevention measures and drug courts.
- requiring offenders to pay victim restitution and imposing community service in those individual cases where 100 percent financial restitution is not feasible.
- reducing frivolous lawsuits filed by inmates [Title II, H.R. 667 and Sec. 103(c) of S. 3].

ACA supports the concept of truth-in-sentencing. Sentencing policies should be based on the principles of proportionality so that the punishment is commensurate with the seriousness of the crime. When these policies fail in fairness and rationality, correctional practice is adversely affected and the public is ill-served.

We urge the Senate to allow truth-in-sentencing grant funds to state and local governments to be used for the construction and operation of correctional facilities and programs. Correctional administrators and criminal justice professionals must be trusted to know what is the best comprehensive plan to address their correctional crises. We believe that we can reconcile truth-in-sentencing requirements with individual states' situations while respecting states' rights to manage their criminal justice and corrections systems according to the unique fiscal, organizational and philosophical circumstances in each state.

States and localities need flexibility to implement strategies for controlling violent offenders and protecting citizens from violent crimes. As Senator Dole stated when he introduced Senate Bill 3 on the Senate Floor in January:

> * * * States and localities, not the Federal Government, are on the front lines in the war against crime and are best equipped to devise effective anticrime strategies. When it comes to fighting crime, the role of the Federal Governments should be to assist the States and localities in their own crime-fighting efforts, rather than impose unnecessary regulations and 'one-size-fits-all' requirements that often do more harm than good.

Generally, ACA supports the 1994 Crime Act. If there are changes to be made, we suggest relaxing the truth-in-sentencing standards rather than tightening them as proposed in pending bills. As states change their laws and implement statutes to assure truth-in-sentencing, offender populations and related costs will dramatically increase for decades to come. A number of state correctional agencies have reported to us the impact that the 85 percent requirement would have on their prison operations. They project that construction-related costs will range from as few as 2000 beds for small states to as many as 44,000 beds for larger states over a ten-year period. This type of expansion may cause states to incur constrution-related costs from $64 million to $773 million. Increases in associated average annual operating costs are estimated to range from $34 million a year to $81 million a year. I will address the specifics of our recommendations regarding truth-in-sentencing later in my testimony.

We suggest using a formula based on a progressive continuum of truth-in-sentencing incentives that judges a state on its own progress toward goals set for itself, in place of the 85 percent requirement. Also, given that it is nearly impossible to determine the national average percent of time served, we think that it is more logical to require indeterminate sentencing states to assure that 85 percent of the minimum sentence imposed will be served. We believe that these requirements will provide a more realistic incentive to states than those offered in current legislative proposals. It will also help to ensure that an optimum number of agencies are eligible to participate in the national crime control initiative.

ACA encourages the members of this Committee and your colleagues in the Senate to resist legislating additional mandatory minimum sentences for nonviolent offenses because they encourage the release of violent criminals to make room for newly sentenced nonviolent adult and juvenile offenders. They also reduce the use of a broad range of less costly and effective sentencing options for nonviolent offenders.

We are committed to comprehensive criminal justice and correctional planning. In order to have a truly balanced approach to prison reform, we must recognize the role of community-based sanctions and other alternatives in creating space for violent offenders in conventional incarceration facilities. Federal legislation should encourage state corrections agencies to develop comprehensive correctional plans that are designed to provide an integrated approach to the management and operation of correctional systems.

The Association is concerned that current proposals no longer require a state to consult with local governments as it develops its application for the use of the prison grants. There must be provisions for states to share funds with local governments that operate correctional facilities. In many states, local jails are used to house state prisoners due to crowding in state facilities. Other factors such as enhanced law enforcement efforts, three-strikes laws and the abolishment of parole have inundated local detention facilities.

ACA supports correctional facility programs that reduce idleness and promote safe working conditions for staff. I know first-hand the value that correctional management tools such as earned time credits and recreational programs have in maintaining secure institutions and protecting public safety. Recent events show us that we are moving toward an austere, punitive and harsh treatment of offenders in this country.

There are citizens who do not realize that these activities are necessary management tools to operate safe and effective facilities for staff and communities. My colleagues and I know that when inmates are involved in constructive activities there is less time for them to think of ways to make weapons, escape or beat up on staff and other inmates. Exercise and recreation reduce idleness, relieve aggressiveness and in the long run will reduce the health care costs in corrections. Treating a physically ill inmate costs three times more than the cost of treating a healthy inmate. It's common sense that healthy inmates mean lower correctional health care costs for the taxpayer. We request that the Senate evaluate the impact of eliminating offender programs before potentially putting our nation's communities and over 800,000 correctional staff at risk as well as increasing costs.

ACA believes that work and education are important elements within the correctional system. We know that vocational training, alcohol and drug treatment, violence reduction programs and cognitive behavioral training reduce recidivism. Over 500 research studies validate the personal experience of corrections professionals. Offenders who successfully complete these programs have a lowered recidivism rate of as much as 50 percent.

For example, in a recent study, only 4.5 percent of the inmates in Illinois prisons who received their degree while incarcerated returned to prison after three years. Also, National Institute of Justice (NIJ) research shows that over one-half of the substance abusers involved in the Miami drug court successfully complete court-ordered conditions.

For the balance of my testimony, I would like to speak in more detail about a key issue of today's hearing, that of truth-in-sentencing. In my view, there are two key principles that should be considered in developing Federal truth-in-sentencing incentives for the States.

First, the truth-in-sentencing incentive should not be mixed or diluted by trying to "piggy-back" other reform incentives to the critical issue of truth-in-sentencing. We can see in some of the current proposals attempts to tie truth-in-sentencing to other kinds of reform issues. For example, Senate Bill 930, attempts to tie truth-in-sentencing to inmate work and education requirements and the state's ability to give or take away inmate privileges. Also, H.R. 667 tries to tie reimbursement for the costs of incarcerating undocumented felons to truth-in-sentencing. These legislative efforts only detract from the central issue and, in some cases, provide mandates that are not conducive to efficient, cost-effective management of state prisons. They are too intrusive into the daily operations of our correctional facilities.

Implementing the inmate work and education requirements under Senate Bill 930 would cost the Texas prison system about $14.7 million per year in additional security personnel costs, $5.3 million per year in additional inmate work supervision costs, and our annual costs of providing educational programs to inmates would increase by 400 percent. When these kinds of mandates are attached to the incentive programs, correctional administrators and policymakers are forced to re-think the value of truth-in-sentencing incentives. They tend to interfere with the day-to-day operations of state prison and local detention systems. State and local correctional systems are too diverse in their composition to be forced into a mold that is not an inappropriate fit for all.

Second, the truth-in-sentencing incentives should not be tied to an unrealistic goal. If states and locals are to work effectively toward truth-in-sentencing, the goals set forth in the legislation should not be so impractical to achieve that we are discouraged from trying to attain them. Current proposals would require States to implement state laws requiring violent offenders to serve 85 percent of their imposed sentences.

In Texas, where both sentences imposed and time served tend to be longer than most states, this 85 percent requirement would cost the taxpayers of Texas an additional estimated $1.6 billion over the next 15 years. How can a state like Texas be motivated to work toward 85 percent when the costs to state taxpayers of doing so would far outstrip the federal funds we would receive? Texas taxpayers, without any federal incentives, have already committed almost $2 billion to expand prison capacity from about 38,000 beds in 1991 to about 135,000 beds by September 1, 1995. We estimate that another 78,000 beds would be needed over the next 15 years to be able to implement an 85 percent requirement.

The U.S. Attorney General estimates that states will spend as much as $20 for every $1 in federal matching funds under the truth-in-sentencing guidelines proposed in H.R. 667. Others have projected varying costs. According to an analysis by Marc Mauer, assistant director of the Sentencing Project, states will need to spend between $2 and $7 of their own money for every dollar they receive in federal prison grants under H.R. 667. The Campaign for an Effective Crime Policy has estimated that anywhere from $3 to $5 of states' money will be required.

The bottom line, from the states' point of view, is that the prison grants have "strings attached." Over the long run, these strings can make the cost of participating in the grant program too prohibitive.

Currently, violent offenders in the states serve about 46 to 48 percent of their sentences, according to Justice Department. Thus, to reach the "truth in sentencing" goal of 85 percent, Mauer estimates that states would need to more than double their time-served figures. For an average state with 8,500 violent offenders in prison (one-fiftieth of the nation's total), that would represent an increase of roughly 8,500 inmates. The 8,500 additional inmates will cost the typical state $425 million for prison construction plus $170 million per year for operations, Mauer calculated. Thus, over the next six years, the state would spend more than $1.4 billion to become eligible for the grants. And the federal grants for the typical state (one-fiftieth of the total) would amount to $210 million.

Furthermore, the federal grants are scheduled to end following the year 2000, after which the states would have to find new ways to pay for, or else abandon, the tougher sentencing provisions and larger prison systems they established in order to qualify for the grants.

Correctional administrators like myself have been asking whether our states can comply with the truth-in-sentencing grant guidelines. We have turned to the Congressional Research Service (CRS), the National Institute of Corrections (NIC) and the Department of Justice Office of Justice Programs (OJP), but as of yet, none have been able to provide a definitive judgement on whether individual states are in compliance with the first standard for truth-in-sentencing incentive grants. They are working tirelessly on this effort, but it is an extremely complicated process.

Several key terms must be defined in the Office of Justice Programs (OJP) regulations, yet to be published. OJP has indicated that the final rule will be out in the fall of 1995. Needed, for example, are a definition of "violent offense" and clarification on what the term "sentence imposed" means for purposes of the 85 percent calculation. Thus, it is difficult to locate a state-by-state analysis of the ability to qualify for grant funds, though exploratory studies are underway at OJP, NIC, and CRS. We commend the Attorney General and the staff of the Office of Justice Programs for their support in providing answers and ongoing technical assistance to the corrections community in our efforts to understand and move toward compliance with the 1994 Crime Law.

According to a May 1995 study conducted by NIC, 19 states were found to have had truth-in-sentencing legislation in place before the 1995 legislative session, and legislatures in 29 states reportedly dealt with proposed truth-in-sentencing legislation in the 1995 session. Having the legislation in place does not necessarily mean that the laws are compatible with the truth-in-sentencing language of the current Federal legislative proposals. In fact, only seven states have been identified as qualifying for Federal truth-in-sentencing funding: Washington, Oregon, California and Minnesota (according to a February 1995 CRS report), and Arizona, North Carolina and Delaware (based on January 1995 OJP estimates).

Actual time served for a given violent offense is longer in some states than in others, yet can appear shorter when presented in percentage terms. It is important for other factors than the percentage of sentence served to be assessed when evaluating the degree of compliance with truth-in-sentencing guidelines.

There is some controversy regarding the compatibility of truth-in-sentencing and earned or good time credits. In many departments of corrections, an earned time or good time system is considered an important tool for managing offender behavior. For example, Connecticut imposes disciplinary action precluding an inmate from classification reductions if the inmate refuses to follow prescribed programmatic work or educational assignments. Massachusetts awards inmates with earned good time as a result of involvement in positive programming such as education. In New Mexico, good behavior is a requirement for participation in all programs including education.

If the overall intent of the truth-in-sentencing legislation is to motivate states and locals to enact laws that protect their citizens from violent crimes, then Federal legislation must look at performance criteria that are much broader than just the percent of sentence imposed. States are imposing long sentences and requiring long periods of incarceration for violent offenders but *still* are not meeting the 85 percent criterion; and yet, they may actually be doing more to meet the spirit of truth-in-sentencing legislation than others.

In a recent study just published by the Bureau of Justice Statistics, Texas was shown to have longer sentences imposed and longer time served than any of the four states identified by the Congressional Research Service as qualifying for the 85 percent truth-in-sentencing. According to the study, Texas's average sentence imposed for violent offenders was 145 months, with average time served of 56 months, or 39 percent. However, even though California, for example, showed 85 percent of sentence imposed, their average sentence was only 39 months, with an average time served of only 33 months.

Additionally, the 85 percent criterion alone does not address another aspect of public safety that may be overlooked. Many states, like Texas, who require long periods of incarceration for violent offenders have crafted their correctional systems so that control can be exerted over violent offenders after they are released into the community.

Not only does Texas require long periods of incarceration for violent offenders, but when those violent offenders are eventually released into the community, they find that they are also facing long periods of community supervision. Moreover, if the terms of their release are violated, they will be returned to prison to serve the remainder of their long sentence.

In closing, I would like to emphasize a few points.

First, we must be more successful in our efforts to reduce crime through a balanced approach * * * one that incorporates prevention, policing, prosecution, punishment and treatment.

Second, Federal legislation to provide incentives for truth-in-sentencing should not be mixed with or confused with other reform issues like inmate requirements for work or education and should not be laden with requirements that are not cost-effective to implement.

Third, we cannot build our way out of this problem. We need a variety of sentencing options including community-based punishments.

Fourth, truth-in-sentencing incentives need to be tied to more flexible, good-faith efforts by states to achieve the goals of imposing longer sentences for violent crimes.

Fifth, correctional management tools such as earned time credits and recreational programs are vital to maintaining secure institutions and protecting public safety.

Sixth, Federal incentive grants should not impose requirements on state prisons that will impair corrections officials in the day-to-day management of their facilities or in their ability to manage their inmate populations in a safe and secure manner.

I will conclude my remarks by emphasizing that incarceration is an integral part of combating crime when combined with a comprehensive, balanced approach that includes other effective tools aimed at prevention, policing, punishment and treatment. We urge the Senate to consider a balanced approach to crime reduction. This approach places as much emphasis on prevention and treatment as it does on punishment. Two-thirds of inmates are illiterate and have limited, marketable job skills. As high as three-quarters of inmates have drug and alcohol programs. As a society, we will either pay now to teach inmates how to read and write, learn a trade and get off drugs or we will pay later in higher crime.

Thank you for your attention today. We appreciate the thought and deliberation that this Committee has given to prison reform issues. We ask that you and your colleagues in the Senate be mindful of our concerns when voting on related measures. The American Correctional Association stands ready to work with you to meet the challenges of today and to better the future of corrections in our nation.

Senator ABRAHAM. Thank you very much.

Mr. Lamb?

STATEMENT OF ZEE B. LAMB

Mr. LAMB. Thank you, Mr. Chairman. In addition to my prepared statement, I would ask that a resolution from NACo, the National Association of Counties, concerning violent offenders, as well as an article and a citizen's guide concerning structured sentencing, be entered into the record.

Senator ABRAHAM. They will be. Thank you very much.

[The information referred to is attached to Mr. Lamb's prepared statement.]

Mr. LAMB. My name is Zee Lamb. I am a county commissioner from Pasquotank County, NC. I am a member of the NACo Board of Directors and chairman of its Subcommittee on Corrections. I am also chairman of the North Carolina Association of County Commissioners' Criminal Justice Steering Committee, and I serve on the governor's Crime Commission for the State of North Carolina.

Mr. Chairman, the problem we face in corrections is not that States and counties are soft on crime or have been reluctant to construct jails and prisons. The fundamental problem is that we have not as a Nation adequately managed and set priorities for existing space. Out of $30 billion spent annually by States and counties on adult corrections, roughly 85 percent is directed to capital and operational expenditures for jails and prisons. Only 11 percent is spent on some kind of alternative program, including probation.

Mr. Chairman, the corrections systems in our country is inherently intergovernmental. For example, when some is arrested and charged with a serious felony, they are not taken to State prisons. They go to the county jail. When Federal judges put population restrictions on State prison facilities to protect the constitutional rights of inmates, their actions inevitably impact on local jails. Today, there are more than 50,000 State-read inmates who are backed up in county jails. What this all means is that since the problems are intergovernmental, so must be the solutions.

Our urban county jails in the United States are at over 100-percent capacity and account for more than half of the Nation's jail inmates. But, Mr. Chairman, the overcrowding of our jails is symptomatic of the larger crisis facing our corrections system. The fundamental lack of partnership between States and counties and a general failure to develop a comprehensive intergovernmental strategy is the core problem. Yes, there is collaboration, but it is nowhere near the level it should be.

In my State, Mr. Chairman, I am pleased to report, thanks in part to the active participation of the North Carolina Association of County Commissioners, a creative partnership has been formed between county and State governments in both community placement and secure incarceration.

Essentially, the North Carolina approach gives the county responsibility for dealing with nonviolent offenders in the community, thereby freeing up valuable bed space for violent and repeat offenders in State prisons. The effect of this new partnership is that serious offenders will be spending more time in prison. The people of North Carolina, and I believe the Nation, got tired of being lied to. Victims of crime got tired of being lied to when in court they were told someone was going to go to prison for 20 years and they would be out in several years.

Misdemeanants sentenced to 2 years in North Carolina were spending 10 to 14 days, and a felon sentenced to 10 years was serving less than 1 year. With structured sentencing, there is no longer good time, no longer gain time, no parole, no early release. Rather, we have bad time. You get a sentence of, say, 80 to 88 months. If you act up in prison, you serve more than 80 months. But if you are good prisoner, you will serve 80 months, no less.

The State has also established a new relationship with the counties under the State-County Criminal Justice Partnership Act that will enable counties to receive State grants to develop a wide range of community programs, including education, job training, and drug treatment.

The National Association of Counties is deeply concerned about public safety, but we also recognize the importance of prevention by focusing on early intervention. In North Carolina, just as the State sees counties as a player in the field of corrections, the State has also recognized the county role in prevention, as evidenced in the Smart Start Program which targets newborns to 5-year-old children.

Under North Carolina's new structured sentencing law, priorities are set in the use of jails and prisons. Truth in sentencing is vigorously promoted and policies are balanced with resources. In short, North Carolina's structured sentencing system ensures that violent offenders are locked up for longer periods of time. However, noncareer, nonviolent offenders are dealt with at the county level in a variety of community programs, such as restitution, work release, drug treatment, intensive probation, community service, and day reporting centers.

Mr. Chairman, in the past, there has been a fundamental misconception by Congress and by the States of the county role in the correctional system. The misconception is that the major partici-

pant is the State and that the counties only have a minor role in finding solutions to our corrections problems.

Representative McCollum's prison bill in the House, for example, would grant counties only up to 15 percent of part II funds for jails, leaving the State with at least the remaining 85 percent. This is surprising in light of the fact that counties incarcerate virtually one-third of the Nation's non-Federal inmates in county jails on any given day, and spend well over one-third of total State and county correctional expenditures.

Under current proposals, because of the lack of a comprehensive planning requirement, counties fear that there is a real danger that governors will take the money and use it solely for State prisons and ignore the corrections needs of counties. How can there be a partnership if one partner gets all the money?

The National Association of Counties offers the following recommendations. One, counties must be recognized as equal partners with States in managing correctional systems. Two, this partnership must be reflected in comprehensive funding and policy approaches. We recommend that relative corrections expenditure data be used as a basis for determining the counties' share of the State allocation and that such funds be directed to local governments.

In summary, there are people who believe that we can simply build our way out of this crisis in order to make sure dangerous people are locked up. For more than 15 years, the National Association of Counties has pursued a management approach that seeks to prioritize our limited institutional resources. Let me suggest that the lack of prioritization and management is at the core of the problem.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Lamb follows:]

PREPARED STATEMENT OF ZEE B. LAMB ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

My name is Zee B. Lamb. I am a county commissioner in Pasquotank County, North Carolina. I am a member of the National Association of Counties (NACo)[1] board of directors and chairman of its subcommittee on corrections. I also chair the North Carolina Association of County Commissioners Criminal Justice Steering Committee and serve on the Governors Crime Commission for the State of North Carolina.

Mr. Chairman, I wish to commend you and Senator Biden for holding this important hearing. The corrections crises in our country is clearly the number one problem facing county government in the area of criminal justice. As of last June, for example, the Nation's jails were at 97 percent of capacity.

Mr. Chairman, the correction's system in our country is inherently intergovernmental in its nature. For example, when someone is arrested charged with a serious felony they are not taken to a State prison—they go directly to jail—the county jail.

When Federal judges put population restrictions on State prison facilities to protect the constitutional rights of inmates—their actions inevitably impact on local jails.

Today, there are more than 50,000 "state-ready" inmates who are backed up in county jails. In short, since the problems are intergovernmental so must be the solutions.

[1] The National Association of Counties is the only national organization representing county government in the United States. Through its membership, urban, suburban and rural counties join together to build effective, responsive county government. The goals of the organization are to: improve county government; serve as the national spokesman for county government; serve as a liaison between the Nation's counties and other levels of government; achieve public understanding of the role of counties in the Federal system.

In the urban areas county jails are now dangerously overcrowded. According to the Bureau of Justice statistics, "the largest facilities, those with an average daily population of 500 or more inmates, were the most crowded—operating overall at more than 100 percent of capacity. More than half of the Nation's jail inmates were housed in these large facilities * * *"(*Jails and Jail Inmates 1993–94*).

But Mr. Chairman, the overcrowding of our jails is symptomatic of the larger crisis facing our corrections system: the fundamental lack of partnership between States and counties and a general failure to develop a comprehensive intergovernmental strategy.

In my State Mr. Chairman I am pleased to report, thanks to the work of the North Carolina sentencing and policy commission and the active participation of the North Carolina Association of County Commissioners, a creative partnership has been formed between county and State government in both community placement and secure incarceration. Essentially, the North Carolina approach gives the county responsibility for dealing with nonviolent offenders in the community, thereby freeing up valuable bed space for violent and repeat offenders in State prisons. The effect of this new partnership is that serious offenders will be spending more time in prisons.

Mr. Chairman, North Carolina's comprehensive legislative package has dramatically changed the States' sentencing policies by establishing truth in sentencing as a primary objective.

The State has also established a new relationship with the counties under the State-County Criminal Justice Partnership Act that will enable counties to receive State grants to develop a wide range of community programs.

Under North Carolina's new structured sentencing law, priorities are set in the use of jails and prisons, "truth in sentencing" is vigorously promoted and policies are balanced with resources. Offenders are classified based on the severity of their crime and their prior criminal record. Based on these two factors, judges are provided with a range of sentencing options.

In short, North Carolina's structured-sentencing system ensure that violent offenders are locked up for long periods of time. However, non-career, nonviolent offenders are dealt with at the county level in a variety of community programs such as restitution, work release, drug treatment, intensive probation, community service and day reporting centers.

Mr. Chairman, in the past there has been a fundamental misconception by Congress and by the States of the county role in the correctional system. The misconception is that the major participant is the State and that counties only have a minor role in finding solutions to our corrections problems.

Representative McCollum's prison bill in the House, for example, would grant counties only up to 15 percent of part II funds for jails, leaving the State with at least the remaining 85 percent. This is surprising in light of the fact that counties incarcerate virtually one-third of the Nation's non-Federal inmates in county jails and spend well over one-third of total State and county correctional expenditures.

One of NACo's major concerns is that in the absence of comprehensive planning requirements in current proposals before Congress, State officials faced with Federal court mandates and the pressure to provide more prison space, will spend corrections funds on State prison needs instead of assisting counties in creating collaborative State-county strategies and in meeting county correctional needs.

RECOMMENDATIONS

1. Counties must be recognized as equal partners with States in managing correctional systems.
2. This partnership must be reflected in comprehensive funding and policy approaches. We recommend that relative corrections expenditure data be used to determine the counties share of the State allocation and that such funds be directed to local governments.
3. Any legislation must contemplate the fiscal effect on county courts and correctional systems. Unless these components are in balance, an inequitable result is likely to occur.

In summary there are some who believe that we can simply build our way out of this crisis—in order to make sure dangerous people are locked up.

For more than 15 years the National Association of Counties has pursued a policy objective that has taken us in another direction—that the best way to ensure that serious offenders are locked up is to prioritize our limited institutional resources.

Let me suggest that the lack of prioritization and management is at the heart of the problem. Out of $30 billion spent annually by States and counties on adult corrections roughly 85 percent is directed to capital and operational expenditures for

jails and prisons—only 11 percent is spent on any form of alternative programs including probation and parole (an additional 4 percent is spent on administration.)

Mr. Chairman, the problem we face in corrections is not that States and counties are soft on crime or have been reluctant to construct jails and prisons. The fundamental problem is that we have not adequately managed and set priorities for existing space.

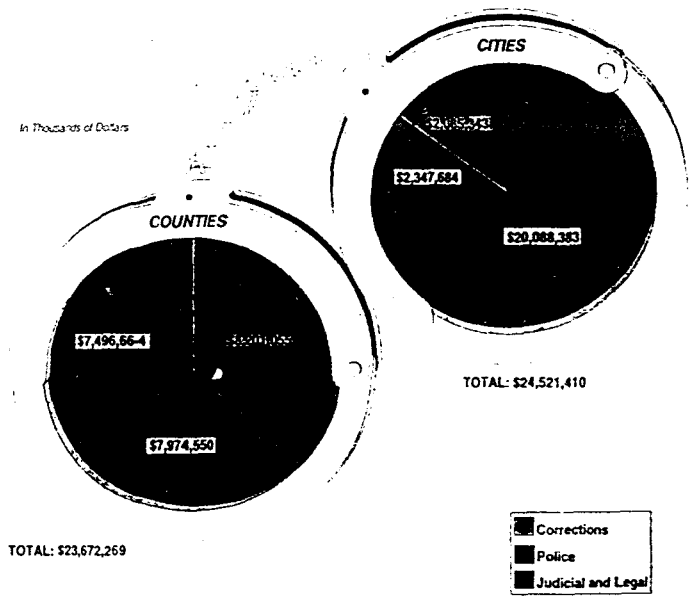
National Association of Counties Policy on Federal-State-County Partnership Program for Community Corrections

NACo supports State-county partnership programs which foster local comprehensive planning and provide a range of community alternatives to incarceration for less serious felony and misdemeanant populations. The Federal Government should provide incentive ends to assist States and counties in developing or enhancing Community Corrections Acts. State governments should assist counties in this process by providing a stable source of ongoing financial and technical assistance. Partnership programs should emphasize the role of the private sector and encourage, wherever feasible, the systematic sharing of resources on a multicounty basis. Inherent in the practice of community corrections is the recognition that the community is the best place to deal with the behavior of less serious offenders and that county governments are uniquely able to coordinate, collaborate, and provide administrative leadership and oversight in developing programs suited for their communities.

The National Association of Counties Policy Linking Sentencing Guidelines to Community Corrections

In order to reduce sentencing disparity, eliminate unnecessary confinement, establish more rational and appropriate sentencing policies, and, in general, better manage limited correctional resources—including jails and prisons—NACo supports the development and enactment of rational and uniform statewide sentencing guidelines. These should be tied to comprehensive community corrections legislation and legislatively predetermined jail and prison population maximums at both the state and local level. Such sentencing recommendations should set fixed presumptive terms for felony and serious misdemeanant populations, indicating who should go to jail or prison, and who should be placed in alternative community programs and for how long. The guidelines should be based on an appropriate combination of offense and offender characteristics and allow judges to depart from the sentencing guidelines only in exceptional cases, when they can provide written reasons explaining why the sentence chosen is more appropriate or more equitable than that provided in the guidelines. A very thorough and rigorous monitoring system should be established.

The County/City Criminal Justice Partnership: Expenditures for FY 1992



Prepared by the National Association of Counties

Note: The expenditures for IFY'92 were obtained from the U.S. Bureau of the Census. The expenditures of the 28 city-county consolidated governments are recorded under city expenditures only. As a result, the figures underreport county expenditures for criminal justice activities.

JUSTICE AND PUBLIC SAFETY STEERING COMMITTEE

RESOLUTION ON VIOLENT OFFENDERS

WHEREAS, the Title II of the Violent Crime Control and Law Enforcement Act of 1994 contains $7.9 billion in corrections funding and also provides for a comprehensive planning requirement to promote collaboration between states and counties; and

WHEREAS, H.R. 667 increases Title II funding to 10.5 billion and eliminates the current comprehensive planning process which assures that states create an integrated approach to the management and operation of correctional facilities and programs and which includes funds for diversion programs, particularly drug diversion programs, community corrections programs and prisoner work activities; and

WHEREAS, H.R. 667 requires states to have in place both truth in sentencing and a requirement that all violent offenders serve 85 percent of their sentences; and

WHEREAS, NACo supports a truth in sentencing requirement that each state publish on an annual basis actual time served for all violent offenders. However, NACo believes that sentencing decisions should be determined by state legislators and not Congress:

THEREFORE, BE IT RESOLVED that the National Association of Counties is opposed to a federal requirement that would specify any particular percentage of time.

BE IT FURTHER RESOLVED that NACo opposes a federal percentage requirement of time served that imposes additional burdens on state and local governments; and

BE IT FURTHER RESOLVED that NACo supports maintaining the current funding level at $7.9 billion for Titie II funding and that the remaining $2.6 billion from H.R. 667 be used to fund prevention programs; and

BE IT FURTHER RESOLVED that the comprehensive planning requirement be maintained and that counties shall actively participate in developing the comprehensive plan; and

BE IT FURTHER RESOLVED that states' associations will be the liaisons between counties and states in this process.

Adopted by Justice and Public Safety Steering Committee
(unanimous)
March 4, 1995

Adopted by NACo Board of Directors
March 6, 1995

Adopted by Justice and Public Safety Steering Committee
(unanimous)
July 22, 1995

Adopted by the NACo Board of Directors
July 23, 1995

Page 1 July 16, 1994 The Washington Post

Making Sentences Fit the Prisons to Control Demand for Prison Space

North Carolina Tries to Balance Punishment, State Resources

By William Claiborne
Washington Post Staff Writer

RALEIGH, N.C.—In the face of increased crime and out-of-control prison costs, judges in North Carolina's criminal courts in October will begin using a simple, one-page chart of letters and numbers to dispense justice that—quite literally—makes the punishment fit the budget.

Officially called the "felony punishment chart" but known by prosecutors and criminals as "the grid," the chart is the centerpiece of an innovative sentencing law that has put North Carolina at the forefront of a nascent but increasingly popular concept of criminal justice: balancing prison sentences with available cell capacity.

For several years, states have been turning to sentencing guidelines in an attempt to gain control over rapidly escalating prison populations. Minnesota pioneered this approach, and presumptive sentencing rules have been enacted in at least 16 other states.

Their budgets strained to the breaking point by rising health care costs and other social programs, states have been taking a second look at the hard-line anti-crime measures and mandatory minimum sentences they enacted in the 1980s—with little regard for future prison costs—and are examining more economical alternatives.

"They're realizing they have to prioritize who goes to prison and who goes into less costly community corrections programs," said Donald Murray, associate legislative director of the National Association of Counties.

States and counties spend $25 billion a year for corrections, 85 percent of which goes to building and

See SENTENCES, A12, Col. 1

SENTENCES, From A1

operating prisons and only 11 percent of which is spent for community-based corrections such as probation and day reporting centers.

North Carolina has spent $550 million since 1985 to build prison space for an additional 16,600 inmates, and the Corrections Department's operations budget has grown from $195 million in 1985 to $472 million last year.

But North Carolina's sentencing structure, unlike those of most states, is a hard and fast list that either has to be followed by judges or scaled down by the legislature to conform to available prison resources.

Known as "structured sentencing" or "capacity-based sentencing," the system recognizes the impossibility of building prisons fast enough to keep up with the influx of offenders. The new system also acknowledges the state's inability to imprison most offenders for anywhere near the duration of the sentences the courts have been handing down.

While abolishing parole for all new offenders and lengthening sentences for violent criminals and repeat offenders, the new law will reduce prison sentences an average of 80 percent to conform more closely to the length of time that inmates actually are behind bars at present.

"What we're doing is setting priorities. We're saying we will use our prisons for violent offenders and career offenders. The converse of that, of course, is that we will have to punish the others in other ways," said Superior Court Judge Thomas W. Ross, chairman of the state's Sentencing and Policy Advisory Commission, which proposed the reforms enacted last year by the legislature.

The "other ways" are community-based alternatives such as closely supervised probation, day reporting centers, halfway houses, boot camps, drug treatment facilities, electronically monitored house arrest, fines and restitution.

But the heart of the new law is the grid, a compilation of ranges of maximum and maximum sentences for 10 categories of felonies that are matched to a defendant's criminal record through a point system.

On the left side of the chart is a list of crime categories, ranging from level A (first-degree murder) to level I (fraud, forgery and lesser drug offenses). The numbers across the top correspond to the number of points a defendant has accumulated through prior convictions.

When ready to impose sentences, a judge matches the severity level of the crime to the defendant's prior record to find a square containing the corresponding sentence range. An offender must serve at least the minimum sentence listed.

For example, level D, which includes first-degree burglary and armed robbery, has a first-offender range of 44 to 55 months without aggravating or mitigating circumstances. The total range for level D is from 33 months for a first offender with mitigating circumstances to 158 months for a multiple offender with aggravating circumstances.

First and second offenders of some nonviolent felonies can, at the judge's discretion, be given suspended sentences provided they complete an alternative punishment, such as intensive probation, house arrest or boot camp.

Persons convicted of first-degree murder will continue to receive a death sentence or life without parole, and repeat offenders convicted of first-degree rape can get life without parole. Drug traffickers will continue to receive preexisting mandatory minimum sentences.

Besides balancing sentences with available resources, the grid system provides truth in sentencing for the first time in North Carolina, Robin L. Lubitz, executive director of the sentencing commission, said.

He recalled that when the state began releasing prisoners early to comply with a 1987 federal court order that required it to reduce prison overcrowding, the legislature put a ceiling on the total inmate population, setting it at 97 percent of capacity.

"That temporarily solved the problem of overcrowding, but it had an obvious effect on sentencing practices," Lubitz said. Judges issued shorter sentences and parole boards released inmates at such a rapid rate that between 1987 and 1990 the average time served declined from 40 to 25 percent of the original sentence. Actual time served now has fallen to 18 percent of the original sentence, and the commission projects that without sentencing reform it would have fallen to only 12 percent within several years.

For some crimes, Lubitz said, a person sentenced to two years of imprisonment typically would be out in five days because of the pressure to make cell space available.

North Carolina has 22,115 inmates in state prisons, which is 113 percent of capacity. An additional 748 prisoners are being housed under contract in out-of-state institutions.

It was against this backdrop of a criminal justice system nearing collapse that the state commission developed a computer simulation model of sentences that, at least until the year 2000, will not cause an excess of inmates over the number of prison beds available.

"If two or three years from now it looks like we will exceed our capacity, the legislature can either reduce sentences further or build more prisons. That is for society to decide," Lubitz said.

"It's easy for people to talk tough about putting criminals behind bars. But when you have to back it up, you begin to see the dollar cost associated with the public policy. If you think sentences should be tougher, okay, provide the resources," he added.

State Rep. Phil Baddour, who helped shepherd the sentencing reforms through the legislature, said that at the moment the public appears to want to use prison resources on violent and repeat offenders and is willing to allow nonviolent offenders to be punished more lightly.

However, Alvin J. Bronstein, executive director of the American Civil Liberties Union's National Prison Project, said, "There's a schizophrenia going around the United States on this [sentencing]. Many states realize corrections costs are out of control and they're looking for ways to save money. But at the same time they're talking about 'three strikes and you're out,' treating juveniles as adults and jamming through other laws that will jack up the [prison] costs."

Noting that several states besides North Carolina have enacted requirements that any new law that affects the prison population be accompanied by a cost impact analysis, Bronstein said, "That looks like a step toward capacity-based sentencing. Maybe that's where they are headed."

But Kenneth F. Schoen, director of criminal justice programs at the New York-based Edna McConnell Clark Foundation, said the key to successful capacity-based sentencing is committing sufficient funds to alternative community-based punishment.

"They are beginning to introduce some discipline to that very expensive enterprise—building prisons. There's more predictability in when Sluggo goes to prison and how long he'll be there. But what they [North Carolina legislators] are doing that others are not doing is putting money into alternative punishments," Schoen said.

A central element of North Carolina's reforms is the $20 million the legislature appropriated to hire 514 additional probation officers and $12 million a year for grants to counties to develop community-based alternatives to prison sentences.

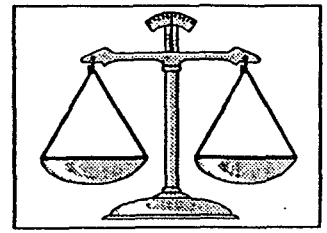
"It may become expensive, but it's still a lot cheaper than building new prisons," said Nancy C. Lowe, director of the Corrections Department's criminal justice partnership program.

Although the new sentencing law received support—from liberals who favor alternatives to incarceration to conservatives who applauded the tougher sentences for violent criminals—it was not without its critics. These included some North Carolina judges who felt the grid was too rigid and took away their discretion, and victims' rights advocates.

"What I worry about is some bureaucrat sitting at a computer saying, 'Well, let's see. What space do we have available next week?' And then a memo goes out saying that only 200 beds are available and we need to lower sentences some more," said Catherine G. Smith, executive director of the North Carolina Victim Assistance Network.

"We appreciate the fact that they are addressing truth in sentencing, but you look at that grid and you see that there are going to be a lot of people who aren't going to do any prison time," Smith said.

A CITIZEN'S GUIDE TO STRUCTURED SENTENCING
FOR FELONIES



PREPARED BY:

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The Honorable Thomas W. Ross
Chairman

Robin L. Lubitz
Executive Director

INTRODUCTION

For several years, the criminal justice system in North Carolina has been in crisis: sentences have lost meaning, offenders serve only a fraction of their sentence, misdemeanants spin in and out of prison, probation violations have escalated, and alternative punishments are undermined by a lack of credible enforcement.

Against this background, the General Assembly created the North Carolina Sentencing and Policy Advisory Commission in 1990 to make recommendations to restore rationality, order and truth to the criminal justice system. The recommendations of the twenty-eight member commission were reviewed, amended, and adopted by the General Assembly in 1993. These new laws, called "structured sentencing", were further revised and refined during the Special Crime Session in 1994. The new sentencing laws apply to all felony and misdemeanor crimes (except Driving While Impaired) committed on or after October 1, 1994. The laws are based on the following principles:

- Sentencing policies should be consistent and certain: Offenders convicted of similar offenses, who have similar prior records, should generally receive similar sentences.

- Sentencing policies should be truthful: The sentence imposed by the judge should bear a close and consistent relationship to the time actually served. Parole release should be abolished.

- Sentencing policies should set resource priorities: Prisons and jails should be prioritized first for violent and repeat offenders and community-based programs should be first utilized for nonviolent offenders with little or no prior record.

- Sentencing policies should be supported by adequate prison, jail and community resources.

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QUESTIONS AND ANSWERS

WHAT IS STRUCTURED SENTENCING?

Structured sentencing is a new way of sentencing and punishing criminals in North Carolina. Offenders are classified based on the severity of their crime and on the extent and gravity of their prior criminal record. On the basis of these two factors, judges are provided with a range of sentencing options. These options prescribe the type and length of sentences which judges may impose.

WHY WAS STRUCTURED SENTENCING ENACTED?

Structured sentencing is designed to help the State regain control over the criminal justice system and to restore credibility to sentencing. Structured sentencing sets priorities for the use of expensive correctional resources and balances sentencing policies with correctional capacity. Under structured sentencing, parole is eliminated and truth in sentencing is restored.

HOW ARE OFFENSES CLASSIFIED?

Offenses are classified into letter categories (from Offense Class A through Class I) depending on the severity of the offense. Crimes which involve victim injury or the risk of victim injury are assigned to the highest offense classes. Property crimes and other crimes which do not normally involve the risk of victim injury are assigned to lower offense classes.

HOW ARE OFFENDERS CLASSIFIED?

Offenders are classified into one of six prior record categories (from Prior Record Level I through Level VI) depending on the extent and gravity of their prior record. Offenders with violent or extensive prior convictions are assigned to the higher levels, while those with no prior convictions are assigned to the lowest level.

HOW IS THE TYPE OF SENTENCE DETERMINED?

Under structured sentencing, there are three types of punishments: active prison sentences, intermediate punishments, and community punishments.

Offenders convicted of crimes in high offense classes or who have high prior record levels must receive active prison sentences. Offenders convicted of crimes in low offense classes and who have low prior record levels must initially receive intermediate or community punishments. For offenders who fall somewhere in between, the judge may elect to impose either an active prison sentence or an intermediate punishment.

WHAT IS AN ACTIVE PRISON SENTENCE?

An active prison sentence requires felons to be incarcerated in a state prison facility.

WHAT IS AN INTERMEDIATE PUNISHMENT?

An intermediate punishment requires the offender to be placed on supervised probation, and the term of probation must include one or more special conditions. These special conditions may include boot camp (a regimented military style training program), a split sentence (a stay in jail followed by supervised probation), electronic monitoring (monitoring the offenders movements through the wearing of an electronic device), intensive supervision (requiring very close supervision and daily monitoring), commitment to a residential center (a highly supervised and structured program requiring overnight residence), or commitment to a day reporting center (a highly supervised and structured day and evening program). These intermediate punishments are more restrictive and controlling than regular probation but less costly than prison. They generally require offenders to behave, work, pay restitution, and participate in drug treatment or other rehabilitative programs.

WHAT IS A COMMUNITY PUNISHMENT?

A community punishment is any other type of sentence which does not involve prison, jail, or an intermediate punishment. Most people think of this as regular probation. A community punishment may also include fines, restitution and/or community service.

HOW IS THE LENGTH OF THE PRISON TERM DETERMINED UNDER STRUCTURED SENTENCING?

Today, judges impose a single prison term. Under structured sentencing, judges impose both a minimum and a maximum prison term. The length of the minimum and maximum terms depend on the offense class, the prior record level, and the presence of any aggravating or mitigating factors.

For each unique combination of offense class and prior record level, three sentence ranges are prescribed: a presumptive range for normal cases, an aggravated range for cases where the court finds aggravation, and a mitigated range for cases where the court finds mitigation. The judge selects a minimum prison term from one of these three ranges. Once the minimum term is set, a maximum term is automatically set by statute (at least 20% longer).

HOW MUCH OF THE PRISON TERM MUST BE SERVED UNDER STRUCTURED SENTENCING?

Today, felons sentenced to prison serve less than one-fifth of their sentence due to reductions for good time, gain time, and parole. Under structured sentencing, good time, gain time, and parole are eliminated. Felons sentenced to prison must serve their entire minimum term and may serve up to their maximum term if they misbehave, fail to work, or refuse to participate in specified programs. Upon release, offenders convicted of more serious offenses must be placed on post-release supervision.

WHAT IS POST-RELEASE SUPERVISION?

Post-release supervision is a mandatory term of supervision following release from prison. The offender's behavior is monitored in the community and supervision is provided to help the offender reintegrate into society. The offender may be returned to prison and serve additional time for violating the post-release conditions.

HOW DOES POST-RELEASE DIFFER FROM PAROLE?

Like parole, post-release supervision requires the offender to be supervised and monitored in the community. Unlike parole, however, the offender is not released from prison early. Post-release supervision only applies after the offender has served his prison sentence.

WILL THE LIKELIHOOD OF IMPRISONMENT CHANGE UNDER STRUCTURED SENTENCING?

Under structured sentencing, imprisonment is mandatory for all offenders convicted of crimes which carry high offense classes and/or have high prior record levels. Compared to today, the probability of going to prison will increase for these violent and/or career criminals. Conversely, offenders convicted of crimes which carry low offense classes and who also have low prior record levels will be less likely to go to prison than they are today.

WILL THE AMOUNT OF TIME SERVED IN PRISON CHANGE UNDER STRUCTURED SENTENCING?

In most cases, the sentence imposed by the judge will sound shorter than under current law, but the time actually served in prison will be longer (because of the elimination of parole and other early release mechanisms). Compared to today, the average actual time served in prison will increase for most offenders, especially for violent and career criminals.

HOW WILL NON-PRISON PUNISHMENTS CHANGE UNDER STRUCTURED SENTENCING?

The minimum and maximum prison term is suspended if an offender is sentenced to an intermediate or community punishment. However, if these offenders fail to obey conditions required as part of their punishment, they may be held in contempt of court and be incarcerated for up to 30 days in jail, or the judge may activate the minimum and maximum prison terms. If the prison terms are activated, the offender must serve the entire minimum term and may serve up to the maximum term. Offenders will now know that if they fail to abide by the conditions of their non-prison punishment, they face certain imprisonment.

HOW WILL STRUCTURED SENTENCING AFFECT PRISON POPULATIONS?

Structured sentencing is calibrated to make sure sufficient prison capacity exists to back up the sentence imposed. When current authorized prison construction is completed, the State will have capacity for over 30,000 inmates. This represents an increase of more than 50% compared to just four years ago. Populations are projected to remain within expected prison capacity over the next five years. However, after five years, additional prison construction will be necessary to support structured sentencing.

HOW WILL STRUCTURED SENTENCING IMPACT ON NON-PRISON POPULATIONS?

Structured sentencing is expected to increase the number of offenders initially sentenced to intermediate punishments. In response to this increase, the General Assembly has funded the hiring of about 500 new probation positions to provide enhanced supervision of these offenders. Furthermore, under the recently enacted "State-County Criminal Justice Partnership Act", counties are eligible to receive financial grants to help develop supplemental community and intermediate programs tailored to local needs.

SUMMARY

Structured sentencing is designed to restore credibility, rationality, truth and cost efficiency to our criminal justice system. It is intended to help accomplish the following:

- Increase consistency in sentencing. Similar sentences are prescribed for offenders who commit similar crimes and have similar prior criminal records.

- Increase the certainty of the sentences. The system means what it says. Offenders will know that there are real and certain consequences for failure to obey the law or to comply with criminal justice conditions.

- Establish truth in sentencing. The system says what it means. The offender must fully serve the minimum sentence imposed by the judge. There is no early release. Parole is abolished.

- Increase punishment for violent and career offenders. Prison is mandatory for most violent and career criminals. Once imprisoned, career and violent offenders will serve significantly more time.

- Efficiently use existing correctional resources. Use existing resources intelligently and cost-effectively. Prison is first reserved for violent and career offenders. Non-violent offenders with little or no prior record are channeled into less expensive intermediate and community punishments.

- Plan for future criminal justice resource needs. Allow for long range planning of future criminal justice resource needs. This is essential to assure that sentencing policies are supported by adequate correctional resources.

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Senator ABRAHAM. Thank you all very much. I would like to start maybe by focusing on the issue raised by Mr. Thomas, and at least I would like to ask a couple of the panelists here who are on sort of the front lines of this issue what your general views are. We have legislation right now, of course, that Senator Shelby has raised and introduced with respect to work in prison.

So, Mr. Collins and Mr. McCotter, would you two take a minute to just give us your opinion from the perspectives you represent as to the notion of putting some tough prison work requirements into play?

Mr. COLLINS. Well, I would say that what is most important is to eradicate the misconception. Inmates do work. I think there has been a lot of discussion about the fact that there is a perception that inmates generally don't work, and that is simply not true. Virtually every State in the Nation has a very sophisticated system of job placement for inmates.

Those jobs are based on the needs, in great part, of the system, as correctional administrators were very sensitive to budgets and the fact that inmate labor should be used appropriately to offset the cost of confinement, and we try to do that and we try to do that in a businesslike atmosphere.

To expend money on makeshift jobs that have no real meaning, I think, is totally inappropriate. To arbitrarily set a number, whether it be 48 or 60, as the work week may not necessarily speak to the needs of the system or to the citizens that that system serves. So I think it is very important that we look very closely at any requirements that tie correctional administrators' hands to some goal that may or may not be achievable or realistic.

Senator ABRAHAM. Mr. McCotter?

Mr. MCCOTTER. I would also speak to that perception. I think that anyone that runs a prison system that doesn't require all work-capable inmates to work is asking for some very, very severe problems in security, everything from problems with inmate-on-inmate situations, et cetera. So inmate work programs are absolutely essential to any good, safe, secure, constitutional prison system.

I think that any legislation that ties our hands—and I certainly agreed with a lot of the comments that Mr. Thomas made—those restrictions really hurt us. Prison industry programs—and this was very, very big in the Federal Bureau of Prisons years ago—I think have been cut back a lot because of Federal regulations that have been passed.

I think right now we average about 5 percent of all inmates in the Nation are involved in some kind of prison industries program. In the State of Utah, we have increased that over the past 4 years to approximately 15 percent, but we are in competition, then, with private industry and they have a tremendous lobby and we have a lot of problems in that regard.

But I think we need to do everything that we possibly can to try to reduce the costs of incarceration through inmate work programs, and I hope that we do not get our hands tied any further with Federal regulations that keep us from doing that.

Senator ABRAHAM. I was going to ask Mr. Thomas to respond, so please go ahead.

Mr. THOMAS. Thank you, Senator. I didn't mean to beat you to the punch. In the comments made, a couple of points were raised that I thought might deserve some elaboration. I certainly didn't mean to suggest that prisoners today do not work. Certainly, some prisoners work. The problem is that because of the Federal statutes I discussed, the percentage who work is very small. The figures I have seen most recently in Texas showed that only 8 percent work, and that is because of Federal laws. That is not because of State prison officials. Their hands are tied at the Federal level in a classic instance of Federal big government which has clearly outlived its usefulness. We are talking about New Deal laws that, if they made sense 60 years ago, clearly do not now.

I also agree make-work is not a good solution. Prisoners generally, like the rest of us, are no dummies. They know when they are being given just make-work and they know when they are being given something that is meaningful and productive, and I would certainly urge that they be given full-time productive jobs of the sort that I refer to where prisoners will be involved in industries that are competing not with workers in Detroit and Pittsburgh, which might have been the case 30 years ago, but with workers in Hong Kong and Mexico City, as it would be today if the proposal that I outlined and that Senator Gramm has endorsed were considered and implemented.

Senator ABRAHAM. Mr. Collins?

Mr. COLLINS. Just one point of clarification. Only about 8 percent of our entire population is actively involved in one of the 45 different industrial plants. Overall, 84 percent of our inmates are actively involved in either some kind of construction work, agricultural work, or a variety of types of occupations that are required to maintain our facilities. In fact, the State of Texas actually has a program where we work our death row inmates. They have a garment factory where they make clothing.

Senator ABRAHAM. Mr. Cole, would you want to comment on that at all?

Mr. COLE. We do have one of the only private programs that I am aware of, a work industry program where we have brought people into the facilities, businesses, to produce printed circuit boards, eyeglass lenses. The wages that these employees earn go to the cost of incarceration. They go to victim restitution. They go to support their families while they are incarcerated in a trust fund to be used upon their release. So these are all good purposes and the program seems to be working well.

Senator ABRAHAM. Would anybody else like to comment on this? I don't want to limit other panelists.

[No response.]

Senator ABRAHAM. Let me switch a little bit here to Ms. Finnegan. Would you just comment on how your experience has changed your lifestyle and the extent to which—I mean, one of the things that I think happens when we have these hearings and people come in with a personal experience to share is that people sometimes dismiss these things and suggest, well, it is an aberrational circumstance; this is a one-in-a-million kind of circumstance and it is not something that affects a lot of people.

So could you comment just a little bit about your own life and how it has changed and the extent to which, based on your STOP program, you have discovered other people have similar types of experiences as well?

Ms. FINNEGAN. Sure. As I said, this incident shattered my life. My entire sense of security has been stripped from me. I don't go out at night anymore if I can help it. I have security alarms in my home, my car, and my office. I am scared all the time when I am out in public on the streets. I have a permit to carry a firearm that I carry at all times, even when I take my dog for a walk. Of course, I couldn't bring it to this fine city, but I have to tell you, since I have been here for 3 days I haven't left the hotel room other than to come here because I am scared to walk on the streets without protection.

I spend a lot more money on hotels because I can't stay in ones with exterior hallways. I have nightmares, horrible nightmares. I have depression from time to time, and insomnia. My whole personality changed for quite a while after the incident. In fact, my nephew probably summed it up best when he said to my brother, why did that bad man have to take Aunt Kathleen away from us, too, because I no longer wanted to play with them or have fun with them anymore. So it totally changes your life. Your sense of security is gone.

I am, as I said, one of thousands. As the spokesperson for STOP, I travel throughout the State of Florida, and there has not been a town that I traveled to that I have not heard what I call an early release horror story similar to mine, many of them very much worse. It is overwhelming in the State of Florida.

In our office, for instance, we have an 800 number for people to call in. A day does not go by where we do not have a victim calling in telling us they were victimized by an early-release criminal, or someone calling to say, the person who killed my son or daughter is about to be released, what can we do. It is a huge problem in the State of Florida, and because of that and because of our public awareness campaign to get this out to the people, I think that is why Florida reacted with this tough litigation, the Stop Turning Out Prisoners Act, requiring prisoners to serve 85 percent.

Senator ABRAHAM. The number in your referendum was 85 percent, which is the same number that we have been talking about here today with regard to the 1994 crime bill. What are your thoughts with respect to some of the difficulties States have hitting this number? I mean, how is Florida going to try to meet this target, and what comments would you have on how we might address some of the concerns that Mr. Collins and Mr. McCotter and others we saw on the earlier panel—I think anybody who worked in this area sort of said they felt that the number was either unattainable or unattainable in a timeframe that would allow them to benefit much from the bill that was passed.

Ms. FINNEGAN. Well, I can tell you in 1991 when we first started STOP, inmates in Florida were sometimes serving less than 10 percent of their sentences. As public awareness grew and our legislature started to bit the bullet, they are now up to about 50 to 60 percent, and they have said they are spending the money for the prison beds to make sure they serve the 85 percent.

I think the reason is because, finally, the State of Florida has realized that the cost of housing prisoners pales in comparison to the cost of crime. You have to take into account the increased insurance rates. The cost of products is higher. Medical care is higher. So when you look at it in those perspectives, I think you can see that the cost of housing the prisoners is not that great in comparison to that.

Senator ABRAHAM. Mr. Collins, what is the sentiment in Texas? I mean, you indicated earlier you didn't think the voters would be satisfied or would settle for a situation where you spent an additional, I think you said $1.5 billion over 10 years.

You know, I think in my State people might not equate it the same way. I mean, you have higher levels, though, of incarceration than most of us do. Do you think the voters feel that Texas is at a reasonable level? I mean, just give me some thoughts on that.

Mr. COLLINS. This construction program, I guess, really began in earnest about 4 years ago, and there was a perception by most, if not all, citizens that Texas was an unsafe place to be. You are very correct. The citizens at that point in time came out and voted overwhelmingly for huge bond obligations to construct prison beds, to date to the tune of about $2 billion.

In my remarks, I did not want to insinuate that they would not again pass the needed bonds to build the additional 78,000 beds. I believe there still is a sentiment on the part of a number of Texans that they will continue to pay for confinement. Our own projections indicate, regardless of the 85-percent rule, that we will have to continue to build beds, as many as 20,000 additional beds, under our current sentencing structure by the year 2000. So we are still not out of the construction business.

Senator ABRAHAM. How much of that is demanded by this court order or the consent decree that we heard about earlier from Senator Hutchison? I mean, is that a problem?

Mr. COLLINS. There are certain aspects of the Federal litigation that impact and actually have had a financial impact on, obviously, the cost of construction. The actual pressure for beds was created by the Texas Legislature by strengthening sentencing and requiring to date a 50-percent minimum mandatory of sentence served before parole eligibility.

One factor that I didn't bring up that actually will tend to in the future cause longer sentencing, maybe not to the 85 percentile, is the fact that we have a parole release rate for violent offenders of under about 12 percent. So even though they are becoming eligible after 50 percent of sentence, there are probably going to be many years of parole denial ahead for each one of those people.

Again, I think the real issue is—again, in our position, the fact that Texas does give longer sentences makes the 85-percent rule unworkable because I think you reach a saturation point. At some point, 50 percent of long sentences gets so long that the person committing that kind of crime will be in prison the rest of their life anyway just trying to satisfy the minimum mandatory sentence.

Mr. LAMB. If I may just say one thing from the North Carolina perspective, we have built more prison beds and probably increased the number of prison beds 25, 30 percent. We have also come up with the community corrections legislation which seeks alternatives to incarceration for those who are not necessarily a threat to society.

Also, whereas a class H felony used to be a maximum of 10 years, and they would serve a year, under structured sentencing it may be now that the grid takes them anywhere from community penalty to 8, 10, 12 years, or somewhere in between. So I think it is hard for legislators in these States to cut what was a 10-year sentence and potentially cut it down for a second offender to a maximum of 4 or 5 years. But the fact is, under the 10-year sentence, they were only serving a year anyway, so truth in sentencing is what it is all about.

Senator ABRAHAM. We are coming up to the very end. I just want to go back to Mr. Thomas for sort of a final comment. I am intrigued by the notion of trying to identify prison industries that would be noncompetitive. We in my State have, of course, as one of our proud indigenous industries the furniture manufacturing industry. So, clearly, there are a lot of people in my State who would not be happy if suddenly we made building furniture a prime occupational activity of the people in the Michigan prison system.

But I think the notion of trying to identify the kinds of work that maybe have left our shores is the right way to go. Have you thought through and has your State looked at the feasibility of trying to target those kinds of industries as a way of kind of getting the best of both worlds?

Mr. THOMAS. Yes; in Arizona, for instance, the Department of Corrections does have one program that is run out of Winslow, AZ, which was made famous by a rock song, but not much else, and it is attempting to take back, I believe, a minor electronics niche in the market from Taiwan, I believe.

I spoke to the deputy director of the department recently and he said that they are having some success. He thinks that once they expand and become a bigger operation, the economies of scale will kick in and they will be able to compete better. But, again, that has to be done within the purview of the current law, and that only allows for, for instance, 50 non-Federal work pilot projects to be doing that sort of thing. It is on a very small scale, and what I am talking about is just taking these laws off the books, period, and having Congress perhaps target certain industries where there are numerous jobs that could be brought back to American shores.

Senator ABRAHAM. I recently saw a little story about the fact that one of the longtime American success stories in terms of business manufacturing had gone, I think, to Korea or to China, and that was the manufacturer of Barbie dolls. It occurred to me that if we had prison inmates in this country manufacturing Barbie dolls inside the prisons, and took photos of them doing this, we could certainly affect their ability to go back into their old neighborhoods and be very intimidating if pictures of them with little Barbie dolls were widely distributed. So the idea, in general, appeals to me as a way of trying to deal with this.

We are at about 3:55, and I regret to say that I actually have another event I have to be in charge of here in a few minutes. So although I have some additional questions, which we will submit to all of you in writing, I have to bring the hearing to a close.

[The questions of Senator Abraham are located in the appendix.]

Senator ABRAHAM. I would also like to just apologize to this panel, as well, because other members clearly, because of this morning's votes, got, I think, off on different derailments here and could not participate. But we will certainly make all of the other members of the committee aware of the nature of the hearing, make available to them the hearing record, and also encourage them to submit questions pertinent to the issues that were brought before us.

I thank you all very much for being here, and the hearing is adjourned.

[Whereupon, at 3:56 p.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES TO QUESTIONS FROM SENATOR ABRAHAM TO LYNNE ABRAHAM

Question 1. I understand that the 1994 Crime Bill made some extort to address the release order problem. Why had this failed to do so and what more does Congress need to do to make sure that we really put a stop to this?

Answer 1. To my knowledge no jurisdiction had successfully used the 1994 Crime Bill to halt prisoner releases required by a federal court order. Legislative limits on federal court orders are especially needed to ensure reasonable limits in some federal litigation. Those cases where controls are most essential often before those judges most likely to seize on legislative loopholes. The 1994 Crime Bill provision contains some ambiguities, making it easier for judges to avoid the statute. On September 13, 1994 Philadelphia filed a motion to vacate two consent decrees entered in the Philadelphia prison litigation. The federal judge has refused to consider the City's arguments based on the 1994 Crime Bill.

I urge the Senate to amend the 1994 Crime Bill provision relating to appropriate remedies in prison litigation to addresses some loopholes in that legislation. For example, the 1994 Crime Bill addresses Eighth Amendment claims, the standard for sentence prisoners, but did not explicitly address due process claims, the standard for pre-trail detainees. The 1994 Crime Bill did not clearly define the term "reopening", thereby permitting courts simply to review rather than modify or vacate existing order. Congress needs also to set clear standard for federal court injunctive relief. Federal injunctive relief must take into account important public safety and state law enforcement interests. Congress needs to set time limits on judicial orders, especially consent decrees, to insure that court-mandated correctional practices are based upon current information and do not inappropriately bind successor political administration. Congress needs to expand intervention rights in order to allow other state officials, who are not necessarily parties to the litigation, to raise appropriate challenges to those consent decrees, like Philadelphia's, that violate state law or disregard the state's own system of checks and balances. Congress needs to limit abuse of attorney fee practices and confine the role of Special Masters.

Question 2. Are there any circumstances in which a release order is the appropriate response to prison conditions? What about inmate caps? What alternative remedies are available for overcrowding?

Answer 2. Federally ordered releases of state and local inmates are almost never defensible. Often these orders reflect a federal court's desire to substitute its own judgment as to appropriate detention or corrections policy. This is an appropriate role for the federal courts.

The federal courts have many options that are all to often ignored before population caps are imposed, leading to prisoner releases. Federal courts have the power to issue declaratory judgments, compensatory monetary damages, and monetary fines to remedy any unconstitutional violations. If these measures fail, the federal courts can issue limited injunctive relief, often addressing issues such as prisoner classification, prisoner management, medical care and social service, that mitigate any adverse effects from increases in the prison population. Prison caps and prisoner releases, if necessary at all, must be a remedy of absolute last resort.

Question 3. Are you aware of any correctional facilities where genuinely uncivilized conditions persist? Do we need federal judicial oversight to prevent this from occurring?

Answer 3. No. The presumption that federal judicial oversight is necessary to prevent uncivilized prison conditions is inaccurate. Given the rise of corrections professionalism, prisons today are a far cry from the abusive and inhumane prison systems found decades ago. While some abuses still exist, they are the exception. If federal intervention is necessary, it should be focused and limited to identifiable violations of federal law. Sweeping federal court orders that micro-manage state or local prison systems are almost never necessary. State courts and inmate grievance procedures also provide adequate remedies for most inmate claims.

Question 4. Under what circumstances, if any, do you think local authorities should consent to ceilings enforceable by release orders?

Answer 4. Never in the federal courts. If any population limits are necessary they should be the product of self-regulation by state correctional officials in accordance with state law. Federal consent decrees with population ceiling often disregard state law limitations and do not permit corrections officials to readily change their policies when the circumstances change.

Question 5. Can you imagine circumstances where consent decrees would actually impinge on prisoners rights?

Answer 5. Yes. Consent decrees often are the product of plaintiff's lawyers bargaining away immediate remedies for immediate problems in exchange for long-term control of prison management. In Philadelphia, for example, the federal court order did not address substantial problems with medical care, but instead focused on issues clearly unrelated to prison conditions. The Philadelphia federal; court became extensively involved in the construction of a new criminal justice center, even though that facility did not contain one prison bed. The federal courts should be focused on whether there is a violation of federal law and, if so, the expeditious and narrowly tailored remedy for that violation. Permitting federal courts to micro-manage prisons removes the federal courts from its proper role—adjudicating constitutional questions and remedying them.

Question 6. How do decrees infringe on state and local authorities' powers? Does that distinguish these decrees from plea agreements in individual cases?

Answer 6. Consent decrees routinely infringe on state and local authorities' powers. Often parties to consent decree do not have the power, under the state's system of checks and balances, to agree to many provisions routinely contained in a consent decree. Our states have a delicate system of checks and balances which is designed to prevent one branch of a government from exercising power in a way that is not monitored or controlled by another branch of power. For example, there is no one segment of local state government that usually has the power to appropriate and spend without restriction, taxpayer money. Corrections officials can, however, essentially give themselves that power by agreeing to a consent decree that requires them to expend funds in a particular manner.

Consent decrees vastly from settlements agreements in individual cases. Consent decrees often bind persons who were not originally parties to the litigation. Consent decrees often have no time limit, and therefore affect prisoners who were not even incarcerated at the time of the consent decree.

At the recent hearing on Senate Bill 400, people analogized consent decrees to plea bargains in criminal cases. Consent decrees are really quite different. With consent decrees, attorneys bind persons who are not parties to the litigation or the agreement. This is more closely equivalent to a prosecutor agreeing to not prosecute a particular defendant based upon his agreement that his children will be on probation and pay restitution. Consent decree practices allow parties to settle litigation by agreeing to give up rights of other persons.

Question 7. Are consent decrees the only mechanism for settling litigation? What about private settlements? I understand Pennsylvania has specific limitations on consent decrees. Could you attach those and describe how cases are nevertheless settled consistent with these limitations?

Answer 7. Consent decrees are not the only mechanism for settling litigation. Parties retain the ability to settle civil actions through a monetary settlement or private settlement agreements. Private settlement agreements permit the parties make contractual agreements that are treated simply as ordinary contracts. In a settlement agreement, for example, a plaintiff may agree to dismiss the action in exchange for a monetary settlement, or an agreement that the corrections officials will change a particular practice. The parties could also agree that the civil action will be reinstituted if the parties do not abide by the terms of the settlement agreement. These settlement agreements are often preferable because they allow the government defendants some flexibility to modify terms of agreements that, based upon

subsequent experiences, appear to be unwise or unworkable. Private settlement agreements, as opposed to consent decrees, also get the federal courts out of the business of enforcing contractual minutia that is often far remove from constitutional requirements.

Pennsylvania, for example, limits the consent decrees that may be agreed to by counsel for the Commonwealth. Attached please find a copy of the Commonwealth Attorneys Act that describes these limitations. These limitations have not precluded the Commonwealth from settling cases. Rather, they encourage private settlement agreements as opposed to consent decrees. The *Austin* litigation, involving a class action challenge to the state correctional system, was settled by a lengthy settlement agreement.

Question 8. Please describe in as much detail as you believe would be useful to the Committee, what Philadelphia is required to do as a result of these consent decrees.

Answer 8. The two consent decrees in Philadelphia have two major components. One is a prison population control mechanism, whereby the prisons are precluded from admitting or incarcerating pretrial detainees charged with certain crimes. For the most part this is a "charge based" detention system. As a result of these consent decrees, Philadelphia cannot detain persons charged with crimes such as voluntary manslaughter, vehicular homicide, most robberies, burglary, stalking, terroristic threats, drug dealing or gun charges, pretrail issues such as the defendant's dangerousness to the community are not considered. Issues such as whether the person is alcohol or drug dependent, how many times they've previously failed to appear for court, mental health history, and prior criminal record are irrelevant to the question of the person's admittability to the prison.

The second major aspect of the consent decree is a prison planning process that requires the Philadelphia prison system to create and implement massive and detailed plan under the control of the federal court. These consent decrees give the federal court, for example, total control of the construction process of the Criminal Justice Center, even though that Center had no prison beds. Federal court control all operational policies, all renovation and construction plans, plans for expediting criminal cases, and plans for alternatives to incarceration.

The consent decrees also require an extensive bureaucracy which is very costly to the City of Philadelphia taxpayers. Each and every prison operational policy must be formulated by a consultant, hired with the approval of the federal court. After the consultant and the prison's own internal review formulate an operational policy, it must be reviewed by the city's lawyers. After this review, the prisoners' lawyers and the prisoners' consultant (who are all paid at prevailing market rates by the City) review the policy. If the prisoners' lawyers or consultants propose changes in the operational policy, and the City does not agree to these proposed changes, the operational policy is then sent to the Special Master. The Special Master (who is an attorney also paid by the City taxpayers) then reviews the proposed policy with a court consultant (who is also paid by the City taxpayers). The Special Master, based on the report of the court's consultant, then makes recommendations to the federal court. The federal court then either approves or disapproves the policy. If the federal court disapproves the policy, the process starts all over again.

As a result, each and every operational policy proposed by the City of Philadelphia prisons must be reviewed by three separate sets of lawyers, three separate consultants, all at City taxpayers expense. As a practical matter, the federal judge, rather than the Mayor, has the final say on fundamental criminal justice policies.

As a practical matter, the Philadelphia prison consent decrees handed over significant state law functions to a federal judge. Successive political administrations are powerless to overturn those agreements.

Question 9. In your view, are the Philadelphia prisons subject to consent decrees in continuing violation of any federal statutory or constitutional requirement? If so, is everything mandated under the decree necessary to remedy the violation or violations? Or do some or all of the requirements stem only from the decree itself? Please specify which, if any, you believe are required to remedy or address a federal statutory or Constitutional requirement or standard that the Supreme Court would be likely to apply.

Answer 9. In the Philadelphia prison litigation there has never been a trail or any finding that there has been a Constitutional violation. I am also unaware of any specific Constitutional violation that is presently occurring in the prisons. In fact, I find it would be very difficult for anybody to succeed in claiming that the Philadelphia prison system has been deliberately indifferent to the needs of prisoners. Not only do the consent decrees lack the fundamental foundation of a Constitutional violation, the requirements of these consent decrees are far beyond what any federal court could order in a litigated case where a Constitutional violation was found. It

is clear that the majority of the provisions in these consent decrees are completely unrelated to any federal interest.

Question 10. How much has Philadelphia spent to date in connection with these consent decrees? How much do you anticipate spending?

Answer 10. I do know the precise amounts of money that Philadelphia has spent on these consent decrees. The direct expenditures for Special Masters, attorneys and consultants is several million dollars. The new construction of the courthouse and new prison is hundreds of millions of dollars.

The consent decrees have also led to many financial costs that are impossible to quantify. Persons released because of the consent decrees have been rearrested for tens of thousands of new crimes. These new crimes result in police expenditures, court time to process new criminal cases, as well as prosecutor and defense attorney costs. In addition, the increased crime has resulted in untold financial losses to the victim of crime. In addition to direct theft losses, crime victims also face medical expenses, loss of earning capacity, increased security costs, and increased insurance premiums. The cost of this kind of crime, especially crimes that affect businesses in Philadelphia, causes businesses to relocate out of the City of Philadelphia. There is no way to estimate at this point in time, the exact financial toll of these unwise criminal justice policies. Philadelphia is a large City with a declining tax base. Unwise criminal justice policies encourage businesses and citizens to leave the City. There is no way that I can calculate those losses.

Question 11. How much has Philadelphia spent to date on Special Masters in connection with these consent decrees? Are you aware of other instances involving Special Masters that should be brought to the attention of the Committee in considering their legislation?

Answer 11. Philadelphia currently spends approximately $120,000 per year in Special Master's fees and expenses. Attached is information relating to inappropriate expenses by a Special Master in Florida.

Question 12. Questions were raised at the hearing regarding the consistency of the proposed legislation with *Plaut* v. *Spendthrift Farm, Inc.* Do you believe *Plaut* suggests a Constitutional problem with any aspect of the legislation? If not, please explain. If so, please suggest what can be done to avoid this difficulty. *See especially* the court's discussion of *Wheeling & Belmont Bridge Co.*, slip op at 22, and *Counsel* v. *Dow*, slip op at 25.

Answer 12. No. *Plaut* addresses the problem of Congress essentially setting itself up as a "super" Supreme Court to overrule an unpopular decision of the Supreme Court. In *Plaut* the Supreme Court rules that Congress attempted to change the Supreme Court's decision by a purely retroactive change concerning the statute of limitations. *Plaut* did not address the issue raised by S. 400 of whether Congress can change the underlying substantive law which may ultimately terminate existing injunctions. The Supreme Court in *Rufo* has made clear, however, that courts can be required to modify or vacate consent decrees based upon changes in the law. S. 400 proposes to do exactly what *Rufo* permits.

Question 13. What would be the effect of limiting the legislation to purely prospective remedial orders and consent decrees?

Answer 13. I recommend that the legislation limiting appropriate remedies in prison conditions litigation should address litigation where the federal courts can, in the future, enter orders affecting state and local prison systems. Even where consent decrees have been approved prior to the enactment date of this legislation, these cases are not "final" in the traditional sense. Because these are ongoing injunctive actions with ongoing federal oversight over local prisons, they do not implicate the same sort of questions involved in *Plaut*. If one was to limit the legislation to orders entered after the effective date of the legislation, this would not address the overwhelming number of inappropriate consent decrees that are being used to micro-manage state and local prisons.

Question 14. What would be the effect of replacing the 2 year limitation on remedial orders with some kind of an obligation on the courts to terminate orders unless they find them necessary to remedy a Constitutional violation?

Answer 14. Consent decrees should contain time limits so that parties can terminate remedial orders. Long-term consent decrees effectively preclude local government officials from changing operational policies based upon changed circumstances, priorities, or funding. The current standards make it extremely difficult for a government defendant to modify consent decrees.

A two-year time limitation clearly notifies all parties that these orders will be subject to review every two years. This type of time limit helps prevent subsequent administrations from being bound by agreements of prior administrations. The two-year time limit would not preclude a court from continuing to enforce an order if necessary to remedy a Constitutional violation.

RESPONSES TO QUESTIONS FROM SENATOR BIDEN TO LYNNE ABRAHAM

Question 1. U.S. District Judge Milton Shadur has suggested that S. 400 raises concerns based on impairment of the right to contract.

Answer 1. Caselaw is extremely clear that parties to a consent decree have different legal entitlements than contracting parties. Consent decrees are orders of the court that can be modified by the court at any time. The courts consistently reject claims that modification of consent decrees violates the contractual rights of a party.

Question 2. Are you concerned about the Constitutional separation of power issues?

Answer 2. The separation of powers issue is not implicated by S. 400 as that it seeks to address only orders where prospective relief is being implemented. S. 400 is not designed to overturn a judgment that is truly final, and *Plaut* v. *Spendthrift Farms* does not preclude legislation designed to limit injunctive remedies that have an ongoing impact. It is very clear that the courts have always retained the power to modify ongoing injunctive actions and can do so on the basis of changes in law by Congress. The United States Supreme Court has made that clear in the *Rufo* opinion that the courts can be required to vacate injunctive orders based on subsequent changes in the law.

S. 400 would automatically terminate all remedial orders, whether entered by consent decree or after a trail, after two years.

Question 3. Doesn't this create a danger of a continuing Constitutional violation would exist without a judicial remedy? Would courts be required to hold a complete new trail in order to continue the order?

Answer 3. S. 400 would not create a danger of continuing constitutional violations existing without a judicial remedy. S. 400 does not preclude a party from moving to reimpose or continue relief based upon an ongoing constitutional violation. In my view, no court would ever agree that it was powerless to continue an injunction necessary remedy an ongoing violation.

It is also clear that the courts would not be required to hold complete new hearings in order to continue relief. This sort of issue arises frequently when parties seek to enter a final injunction following the entry of a preliminary injunction. Often, evidence introduced in the preliminary injunction hearing entered into the record by stipulation at the hearing on the final injunction. S. 400 does not require duplicative testimony.

STATE OF MICHIGAN,
OFFICE OF THE GOVERNOR,
Lansing, MI, September 8, 1995.

Senator ORRIN G. HATCH,
Chairman, U.S. Senate Committee on the Judiciary,
Washington, DC.

DEAR SENATOR HATCH: I would like to express my thanks to you and the Committee for allowing me to testify on the important issues addressed during the Committee's prison reform hearings. The following comprises my responses to the written questions propounded by Committee members subsequent to the hearing:

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO MICHAEL GADOLA

Question 1. My question to the panel is, do you believe that we should dedicate a portion of prison funds for juvenile facilities? If so, would you support a bill that Senator Specter and I introduced (along with Senators Cochran and Kassebaum) entitled the Juvenile Corrections Act of 1995, which would dedicate 10 percent of adult prison money to juvenile facilities?

Answer 1. The State of Michigan supports federal legislation which does not tie the States' hands with respect to the use of federal prison funds. Rather, we support legislation which would provide States with complete discretion as to the allocation of federal prison funds, ie., if Michigan wanted to use all or none of its portion of federal funding on juvenile facilities, we could and should be allowed to do so. It is our position that the State, through its Department of Corrections, knows best how to allocate prison funding.

Question 2. Do you share my concern about the current law, and do you think we can come up with a reasonable compromise between the need to protect accused juveniles from a hardened adult criminal class and the need to properly conserve scarce law enforcement resources?

Answer 2. Michigan shares your concern over the unreasonable results stemming from the current requirement that States separate "by sight and sound" juvenile

prisoners from adult prisoners. Similar to Wisconsin, Michigan and other States' have been subject to unreasonable "sight and sound" regulations promulgated by the Office of Juvenile Justice for Dellinquency Prevention, such as not allowing juvenile prisoners to use the same eating utensils as adult prisoners. These and other restrictive regulations are an unnecessary strain on Michigans correctional and law enforcement systems. Michigan has and continues to propose that the "sight and sound" requirement be eliminated, and be replaced by a less restrictive "physical separation" requirement. This or a similar amendment to federal law would provide the necessary balance of protecting juvenile prisoners while at the same time eliminating the onerous and unnecessary federal regulations.

RESPONSES TO QUESTIONS FROM SENATOR BIDEN TO MICHAEL GADOLA

Question 1. S. 400 would automatically terminate all remedial orders—whether entered by consent decree or after a trial—after two years. Doesn't this create a danger that a continuing constitutional violation would exist without a judicial remedy? Would courts be required to hold a complete new trial in order to continue the order?

Answer 1. The current version of S. 400 requires a court to end prison litigation involving prospective relief once the prospective relief has reached two years in duration. This provision will ensure that all prospective relief in prison condition cases will be limited to a reasonable and certain time period, resulting in the protection of states' Tenth Amendment rights from overly intrusive federal courts, while at the same time protecting prisoners constitutional rights. This result will be achieved under S. 400 for two reasons. First, courts will always have the ability to closely monitor compliance with any order it issues in a case. Thus, judicial remedies and powers currently available to a court (contempt, sanctions, etc.) will help ensure that any unconstitutional acts are remedied during the two year period.

Second, given Michigan's decades long history with continuing federal court oversight of certain prisons, this limiting provision within S. 400 will ensure that judges do not extend their jurisdiction beyond proper limits. Michigan's prison litigation history reveals a need for specific Congressional limitations on prospective relief, as the judiciary has been unwilling to recognize the constitutional infirmities of a federal court attempting to micro-manage a state prison.

Question 2. S. 400 allows broad standing to challenge an order which limits prison populations. Specifically, it allows prosecutors, elected officials, and any other governmental officials who "is or may be affected by" the order to intervene. Please comment on the impact of this section of the bill.

Answer 2. Providing standing to public officials or governmental units which are or may be affected by remedial orders of the court will ensure that political subdivisions of the state-one of the governmental units most affected by court ordered prisoner releases-have their interests placed before and litigated by the court prior to the ordering of any remedial relief. Political subdivisions of the state, which house the prisons and are directly responsible (along with the state) for the safety of the residents near any prison, have an obviously significant interest in ensuring that any remedial order will be the least restrictive and will adequately take into account the safety of nearby residents. Hence, allowing intervention by any of the persons or entities set forth in Section 2 of S. 400 would enhance the litigation process.

RESPONSES TO QUESTIONS FROM SENATOR ABRAHAM TO MICHAEL GADOLA

Question 1. Please describe in whatever detail you believe would be most useful to the Committee what Michigan is required to do as a result of these consent decrees.

Answer 1. As outlined in my written testimony to the Committee, Michigan is subject to innumerable consent decree requirements which, as interpreted by the courts, go well beyond what is constitutionally required. Examples of these extraordinary requirements, each taken from the CRIPA consent decree case of *United States* v. *Michigan*, USDC case no. G84–63 CA, include: equipping all cells with new electrical outlets and overhead lighting; maintaining consistent hot and cold water temperatures; replacing old kitchen cutting boards; purchasing a new door for the walk-in freezer; repair/replace inoperative final rinse monitoring thermometer for mechanical dishwasher; replacing old metal tray inserts in segregation so that food on the trays do not touch top of metal slot when inserted into cell; food and debris removed from a can opener blade; and out-of-cell activities such as group counseling, therapy, prisoner associational group meetings, as well as other extra curricular activities. There are many more examples of similarly egregious requirements. The re-

quirements set forth above, however, clearly reveal how far the courts will reach into the daily operations of state prisons, in the name of enforcing CRIPA.

Question 2. In your view, are the Michigan prisons subject to consent decrees in continuing violation of any federal statutory or constitutional requirement? If so, is everything mandated under the decree necessary to remedy the violation or violations? Or do some or all of the requirements stem only from the decree itself? Please specify which, if any, you believe are required to remedy or address a federal statutory or constitutional requirement or standard that the Supreme Court would be likely to apply.

Answer 2. No, the Michigan prisons which are subject to overreaching federal court scrutiny are not in violation of any constitutional or statutory requirement. In fact, Michigan is in full compliance with all constitutional and statutory requirements. As evidenced by the record compiled in *USA* v. *Michigan*, the Civil Rights Division obtained, through the threat of a CRIPA lawsuit, a consent decree which outlines general unconstitutional conditions (eg. unsanitary conditions) but provides a remedy which goes far beyond what is necessary to alleviate the unconstitutional condition (eg. "adequate" lighting in cell). However, although the consent decree states that it is meant to remedy only constitutional violations, the courts have interpreted the consent decree and state plan for compliance to require Michigan to remedy much more than is constitutionally necessary. Thus, compliance with requirements as minute and unsupported by law as those detailed in my answer to question one stem only from the consent decree as interpreted by the courts, and not from the constitution. Michigan has satisfied its obligations under the Constitution.

Question 3. How much has Michigan spent to date in connection with these consent decrees? How much do you anticipate spending?

Answer 3. Since 1990 Michigan has spent over $325 million in complying with the terms of two of the consent decrees. Between fiscal years 1990 and 1995, costs have almost quadrupled as the state has continued to seek compliance and an end to these decades long cases. A substantial portion of the fiscal 1995 costs have been for psychiatric services, which continue to climb as the court and its experts push for the opening of more mental health beds for which there is no current need.

Question 4. How much has Michigan spent to date on Special Masters or independent court-appointed experts in connection with these consent decrees?

Answer 4. Since 1990 Michigan has spent over $100,000 on court appointed expert fees. Attorney fees paid to plaintiffs consent decree attorneys totals approximately 6.5 million dollars since 1987.

Question 5. Do you have anything you would like to add to the record regarding the Department of Justice's failure actively to support the stipulation Michigan and the Department had previously agreed to resolve the Michigan prisons litigation?

Answer 5. The Civil Rights Divisions failure to actively support the stipulation to dismiss major portions of the *USA* v. *Michigan* case is clear evidence that prison litigation against states is not driven solely by the facts or the law. The Civil Rights Divisions reversal of position did not result from a change in the facts of the case; rather, it was a change in administration. Hence, artificial limitations placed on prospective relief by Congress are exactly what is needed to preclude the Civil Rights Division or the courts from making decisions, not premised upon the facts or law, which prolong these cases.

Question 6. What Reforms of CRIPA would you propose?

Answer 6. Many of the amendments to CRIPA which are necessary to strike a proper balance between a states constitutional right to operate its prisons without federal intervention and a prisoners right to be free from unconstitutional conditions, are set forth in S. 400. A specific time period for consent decrees and other prospective relief, and providing standing to local governments most affected by prison relief orders, are what is needed to ensure that CRIPA is interpreted and enforced as intended-to provide the least restrictive remedy available to redress a constitutional violation. Other appropriate amendments would include: requiring the payment of costs and filing fees via a prisoners prison account, thereby reducing the financial burden placed on taxpayers by "indigent" prisoner lawsuits; requiring the Attorney General to provide a state with specific facts-including the name of any prisoner subject to the allegedly unconstitutional misconduct-prior to bringing a CRIPA action as well as allowing a court to review the substance of the Attorney General's pre-filing certification so that the Attorney General can proceed with the CRIPA suit only if he/she has sufficient facts to do so.

Question 7. What would be the effect of limiting the legislation to purely prospective remedial orders and consent decrees?

Answer 7. The effect of limiting federal legislation to only prospective remedial relief would appropriately limit the over extension of federal courts into the management of prisons. At the same time, lawsuits for compensatory damages to remedy unconstitutional deprivations would remain a vital component to protect a prisoner's constitutional rights. S. 400 would not alter a courts power to award damages in such cases.

Question 8. What would be the effect of replacing the 2 year limitation on remedial orders with some kind of an obligation on the courts to terminate orders unless they find them necessary to remedy a constitutional violation?

Answer 8. Without an artificial cut-off period for a courts jurisdiction over prospective relief, the efforts by the courts and Civil Rights Division will most assuredly continue. As discussed below, CRIPA currently places specific limitations on a courts jurisdiction, yet courts continue to go well beyond the jurisdictional constraints in adjudicating CRIPA actions. Hence, Congress must go beyond simply stating that courts should dismiss unless constitutional violations exist. A combination of this standard with a mandatory review period (eg., every year) may be an appropriate avenue to follow.

As currently written, CRIPA would appear to place a very high threshold for finding a statutory violation. Furthermore, CRIPA specifically outlines that only the minimum corrective measures necessary to remedy the constitutional violations should be implemented by the courts. Unfortunately in practice these are hollow words to the courts Michigan and other states have faced in defending against CRIPA lawsuits. As the Committee is aware, courts and the Civil Rights Division have gone well beyond "the minimum corrective measures" necessary to alleviate constitutional violations. Judges are only too willing to continue consent decree cases until even the smallest, most minute aspect of each prison is to a level which the court (rather than the constitution) considers appropriate. Faced with this situation, Michigan has been subject to three continued consent decree cases which have lasted eleven years, fifteen years, and eighteen years. Amazingly, the judge in the case which has lasted eighteen years recently ruled that he anticipates continued jurisdiction until the year 2000! In the same ruling the judge declared that a court is not the appropriate forum for handling the daily prison issues which arise in a consent decree case (an argument long posited by Michigan), but rather than declining further jurisdiction, the court established a committee of non-lawyers to *abjudicate* all claims/motions which would have otherwise been presented to the Article III court.

Question 9. Can parties settle litigation through private settlements? Would the House bill's limitations on consent decrees, which _____, interfere in any way with private settlements? Is there any benefit from consent decrees that cannot be obtained by simple contractual settlements, not subject to court enforcement?

Answer 9. It is my understanding that under the House Bill private settlements would not be subject to the limitations imposed upon prospective relief orders. As such, if a state and the party prosecuting the case wish to agree to a settlement of the case which provides for remedial efforts beyond two years, they may do so. As is the case in private litigation, the settlement agreements are not subject to continued court supervision. Instead, if a party believes the agreement is being violated, it may seek to rescind or otherwise void the agreement, and return to the court for continued litigation proceedings. If settlement is the course chosen by the parties, the most appropriate vehicle would be a private settlement. As opposed to a consent decree, a private settlement eliminates the inherent conflicts which arise in court proceedings, allowing for a more amicable resolution, and reduces the courts and parties costs associated with obtaining the settled results.

Senator Hatch, I hope my answers are useful to you and the Committee as you continue to work on these very important issues.

Sincerely,

MICHAEL GADOLA.

STATE OF DELAWARE,
DEPARTMENT OF CORRECTIONS,
Smyrna, DE, August 15, 1995.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: In the morning mail, I received your kind letter thanking me for my attendance at the Committee hearing on July 27. I thank you for the opportunity to share my thoughts about the matters before the Committee that day.

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO ROBERT J. WATSON

Answer 1. Juvenile funding, in my opinion, should focus on areas other than construction of facilities. And, though I am head of a state agency responsible for adult offenders only, I believe the priority for government at all levels should be juveniles. More should be dedicated to prevention, early detection, making children safe, and providing life experiences that produce contributing adults.

If the focus of federal funds is construction of juvenile facilities, the emphasis is in the wrong area for effective long-term management of youth.

Answer 2. Separation by sight and sound is difficult to implement for many local officials across the country. Many thousands of dollars have been spent building jails and local detention facilities to comply with this requirement. To back away now would be unfair to the hundreds, if not thousands, of local jurisdictions that have complied by spending more on construction than would have been necessary without this provision.

I support the provisions of the Juvenile Justice and Delinquency Prevention Act requiring separation. This is a provision of the federal law that is clearly designed to protect juveniles who come into conflict with the law and require detention. Though it is a problem for local law enforcement officers, the alternative is worse. A return to the days when juveniles had to be detained, then were victimized, sodomized, raped, brutalized and permanently injured, for a relatively minor law violation, should be avoided. My advice is to keep this provision.

RESPONSE TO QUESTION FROM SENATOR BIDEN TO ROBERT J. WATSON

Question 1. S. 400 allows broad standing to challenge an order which limits prison populations. Specifically, it allows prosecutors, elected officials, and any other governmental official who "is or may be affected by" the order to intervene. Please comment on the impact of this section of the bill.

Answer 1. I oppose opening the challenges to orders which in my opinion are crafted after long and difficult hearings. Opening the challenges to an array of elected officials has the potential of turning a respectable order of a federal judge into a "political football." In my experience, some local officials do not have a long-term commitment to government and could use the headlines of challenging a federal order for the sole purpose of being elected or re-elected, only to fail to provide resources, support, assistance, or any ongoing involvement in the matters being litigated.

A Governor is the chief executive officer of state government. Other elected officials have more limited roles, even those elected to statewide office. My recommendation and advice is to not broaden the opportunity to challenge, leaving this difficult to administer sector of government to those specifically responsible.

Again, I appreciate the opportunity to provide input as the Senate Committee on the Judiciary gives consideration to these important matters.

Sincerely,

ROBERT J. WATSON,
COMMISSIONER.

STEVE J. MARTIN,
ATTORNEY AT LAW, CORRECTIONS CONSULTANT,
Austin, TX, August 28, 1995.

Hon. ORRIN HATCH,
U.S. Senate, Committee on the Judiciary,
Washington, DC. 20510-5275

DEAR SENATOR HATCH: Thank you for inviting me to testify before the Senate Judiciary Committee regarding the Stop Turning Out Prisoners Act. I also appreciate being given the opportunity to assist you by answering the following question, posed by Senator Biden, that accompanied your August 9, 1995 letter:

RESPONSE TO QUESTION FROM SENATOR BIDEN TO STEVE J. MARTIN

Question 1. S. 400 allows broad standing to challenge an order which limits prison populations. Specifically, it allows prosecutors, elected officials, and any other governmental official who "is or may be affected by" the order to intervene. Please comment on the impact of this section of the bill.

Answer 1. I strongly believe that prison conditions cases should be handled by correctional officials and State Attorneys General who are familiar with the conditions in the system or facility at issue. Wholesale intervention by District Attorneys and others will cause litigation of this nature to be more costly and protracted. Intervenors who have no responsibility for the operation of correctional facilities may be motivated to take unreasonable and irresponsible positions because the negative consequences of those positions will not affect them. Moreover, intervention by the prosecutorial arm of the state may cause, and indeed require, federal courts to become immersed in the entire spectrum of local criminal justice affairs.

The provision for wholesale intervention is one of many misguided aspects of the STOP bill. I am also greatly concerned with the provisions that limit attorney's fees and prohibit the appointment of special masters. These provisions do not appear to be in response to any identifiable problem or concern with prison conditions litigation and will effectively hinder the resolution of these cases and increase the burden on the federal courts. These provisions should be changed to allow the award of appropriate attorney's fees and the appointment of special masters when needed.

Again, thank you for considering my views on this important issue. Please do not hesitate to contact me regarding this, or any other, matter.

Sincerely,

STEVE MARTIN.

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO KATHLEEN FINNEGAN

Question 1. Although the Senate sought to address the problem of overcrowded juvenile facilities in last year's crime bill, a provision dedicating a portion of prison funds to juvenile facilities was deleted during the House-Senate Conference. So, over the next five years, we are planning to spend $8 billion on adult facilities, with *none* of the money set aside for juveniles. My question to the panel is, do you believe that we should dedicate a portion of prison funds for juvenile facilities?

If so, would you support a bill that Senator Specter and I introduced (along with Senators Cochran and Kassebaum) entitled the Juvenile Corrections Act of 1995, which would dedicate 10 percent of adult prison money to juvenile facilities?

Answer 1. Although I have not reviewed the specific provisions of the Juvenile Corrections Act of 1995, I am able to make some general statements about the issue. Please consider my remarks in that context.

First, I applaud the recognition that juvenile crime is a big problem across America and one that is growing. States should (and many are) spend more dollars than they have been on juvenile detention facilities and alternatives for delinquents. However, I believe that the first priority of our criminal justice system must be truth in sentencing for adult criminals. Early Release sends a clear message to our youth. * * * do the crime and you *won't* do the time. Children learn from example and a prison system that acts as a deterrent is essential to the effort to reduce juvenile crime.

For these reasons, I believe that the federal government needs to put every possible resource into the adult prison facilities. Only when we properly house adult criminals will we send a message to our youth that our society will no longer tolerate criminal victimizations. We cannot fix everything at once, so we must prioritize and I believe the $8 Billion is best spent on adult prisons. However, I would encourage finding other funding sources for juvenile facilities that do not take the money that is so desperately needed away from the adult system.

Question 2. Under the Juvenile Justice and Delinquency Prevention Act, in order for states to receive grants, they must separate juveniles from adults in jails. This creates large problems in some rural communities, and I have heard from many Wisconsin sheriffs regarding these problems. For example, in some counties, sheriffs must use two deputies to drive juveniles up to six hours one way to place them overnight in an adequate separate juvenile facility. That's quite a strain on their resources. Do you share my concern about the current law, and do you think we can come up with a reasonable compromise between the need to protect accused juveniles from a hardened adult criminal class and the need to properly conserve scarce law enforcement resources?

Answer 2. Yes, I absolutely share your concern and do believe that there must be a reasonable way to protect both the juveniles and our scarce public resources. Since STOP does not really involve itself in the juvenile system, I am sorry to say I am not sure what the solution is, but I do agree that one needs to be sought.

RESPONSES TO QUESTIONS FROM SENATOR ABRAHAM TO ANDREW PEYTON THOMAS

Question 1. Please respond to the concern that prison labor will inevitably lead to large-scale displacement of free workers by prison laborers. Do you have any

ideas for creating a more punishing environment in our prisons without concomitantly punishing our citizenry?

Answer 1. In response to concerns that prison labor will displace free workers, it should be noted that a mere repeal of the federal laws prohibiting interstate commerce in prisoner-made goods (i.e., the Hawes Cooper and Ashurst-Sumners Acts) would likely displace few if any free workers. This is because, without an exception to the Fair Labor Standards Act (the minimum-wage law), prisoners would still be required to receive the minimum wage. Employers would, in all likelihood, continue to employ free workers under those circumstances because there would be no advantage to hiring prisoners. Only if prisoners could receive less than the minimum wage would employers be likely to employ them in any significant numbers.

Moreover, Congress should create an exemption to the minimum wage *only* for those prisoners who are employed in industries identified by Congress as having already lost the overwhelming majority of their jobs to foreign laborers. Thus, only foreign workers would have their jobs endangered. By narrowly targeting such industries, Congress could allow for the retrieval of many lower-skilled jobs to America while safeguarding the jobs of free American workers. Given the international economy in which America now competes, the restoration of prison labor would mean that prisoners would be competing with workers not in Detroit or Pittsburgh, but in Hong Kong and Mexico City.

Question 2. Please elaborate on your argument that prison labor is actually beneficial for inmates.

Answer 2. According to a 1991 study by the U.S. Bureau of Prisons, the Post-Release Employment Project (PREP), employed inmates are half as likely to commit additional crimes once released than are unemployed inmates. Employed inmates are also more likely to secure employment upon release. Prison labor reduced recidivism; it also instills in inmates discipline and direction, which people need to be happy and productive in society. Employment of inmates is far more humane than the current system of enforced idleness. Historically, inmates have been much happier when permitted to work in a meaningful-way.

Question 3. Please comment on the advantages and disadvantages of privately-operated prisons.

Answer 3. Like most institutions, privately operated prisons tend to be more efficient economically than their state-run counterparts. However, if prison labor were permitted once again under the lease system, prisoners could be leased out to private companies add allowed off-site, under close supervision, with much the same savings. That is, since private employers would be using prisoners in either case, a profit motive would be in place under either scenario. If prisoners were allowed to keep a certain percentage of their pay depending on the quality of their performance on the job, as well as other perks such as better food and rooms within the prison, the incentives would exist to elicit from prisoners the quality of work necessary to satisfy private employers.

For further analysis of the benefits of prison labor, please see my book, *Crime and the Sacking of America: The Roots of Chaos*, pp. 117–23.

RESPONSES TO QUESTIONS FROM SENATOR BROWN TO ANDREW PEYTON THOMAS

Question 1. You indicate in your testimony that there are three laws which inhibit the expansion of Federal Prison Industries work programs. Please describe these laws, why they were enacted, and explain their effect on prison industries. If these limitations were restricted or repealed, what would the effect be on prison industries?

Answer 1. Ninety percent of American inmates are unemployed, according to the most recent statistics that I have seen. I do not know the percentage for the federal prison system alone. The U.S. Bureau of Prisons should be able to provide this information.

Question 2. Given the unique factors of prison life that must be taken into account when devising prison work programs, please describe the types of work that are best suited for Federal Prison Industries programs.

Answer 2. According to the 1991 PREP study, federal prisoners who were employed were roughly, half as likely to commit crimes upon release than were unemployed inmates. A year after release 6.6 percent of study offenders had committed additional crimes, in contrast to 10.1 percent of comparison offenders. In other recidivism studies conducted by the Bureau, about 20 percent of released inmates were revoked or rearrested within a year of their release.

Please note that I erred when I stated previously to the committee that employed prisoners are three times less likely to be recidivists. Kathleen Hawk, Director of the Bureau of Prisons, has personally confirmed these revised figures. I apologize for the error.

Of course, even a one-half reduction in recidivism is a substantial accomplishment that few other prison programs can claim. The study also found that employed prisoners are more likely to be employed once released. These findings militate in favor of prison labor.

Answer 3. Two federal laws prohibit prison labor on a broad scale. The Hawes Cooper Act (49 U.S.C. Section 11507), passed in 1929, permits states to bar the importation of prisoner-made goods, despite the usual rule that forbids local interference with interstate commerce. The Ashurst-Sumners Act (18 U.S.C. Section 1761), passed in 1935, makes it a criminal offense to knowingly transport prisoner-made goods in interstate commerce. The penalty for violating this statute is a maximum fine of $50,000 or two years in federal prison or both. The only exception to this prohibition are prisoner-made goods produced for use by federal or state governments or those goods generated by one of fifty non-federal work pilot projects whose inmates are paid the prevailing wage (i.e., the union scale). These workers also must participate voluntarily.

These laws were enacted at the behest of organized labor to protect low-wage jobs than were then threatened by prison labor. Most of these jobs have now been lost anyhow to lower-paid foreign workers. For further discussion of the history of these restriction and the need for their repeal please see my book, pp. 117–23.

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO ANDREW PEYTON THOMAS

Answer 1. Those juveniles who are prosecuted as juveniles should be incarcerated in juvenile facilities. This will require separate juvenile facilities supported by appropriate expenditures. As I have not read the bill referenced in the question, I cannot state whether to support or oppose the bill.

Answer 2. Limited exceptions for rural communities under the scenario presented would seem appropriate, However, in general, it is of course not a good idea to incarcerate juveniles with adult offenders.

RESPONSES TO QUESTIONS FROM SENATOR ABRAHAM TO TIMOTHY P. COLE

Question 1. What protection does any government, state or federal, have against "low-balling" bids to provide correctional services?

Answer 1. The best protection the government has against "low-balling" is a well planned procurement process conducted by professionals who have the total interests of the agency in mind. Solicitations for correctional services should have specific evaluation criteria established with points awarded for price, employee compensation, company experience and the quality of the technical proposal. Proposals should be evaluated by several professionals (i.e., procurement, legal, correctional, financial, etc.) so that no one factor can unduly skew the process and resultant decision. Once the evaluation committee has completed its task the findings should be presented to a higher organization for review and ultimate selection.

Question 2. Among government contracts, are correctional services especially susceptible to "low- balling"?

Answer 2. We do not feel correctional services are anymore or less susceptible to low-balling than any other government requirement.

Question 3. Wackenhut withdrew its protest, the contract was awarded to Esmor, and a recent 72 page INS report concluded that the company's pursuit of profit had thwarted the government's need for properly performed services. What assurance can you offer that state governments won't be at least as likely to experience the same outcome?

Answer 3. To a very great extent we feel that the Regional Office of the INS inflicted this damage upon themselves as a result of a flawed procurement process and insufficient review at the national level. If an agency is predisposed to only consider price there is no assurance to be given by Wackenhut Corrections or any other company that would prevent it from happening again. If state governments accurately state their requirements and then conduct the procurement process in a fair and equitable manner geared to meaningful evaluation criteria there should never be an instance of low-balling. We would suggest that the model Florida has developed is a great example of how to ensure equity and fairness in the procurement of private correctional services.

Question 4. Is the profit motive the "best pencil sharpener", as you put it, or is it a double-edged sword?

Answer 4. Our free enterprise system has produced the most efficient and effective market for goods and services the world has ever seen. A cornerstone of this system is the profit motive. Qualified and motivated companies competing in the open market will deliver. A clear statement of work coupled with a point system for scoring the important features of a proposal along with proper oversight by government officials will allow private companies to deliver their services in a measurable way and at a price the marketplace will allow. There are swift and severe remedies the government agencies can use if contract performance is not adequate. This discipline is an essential part of the process. However, the great majority of companies are managed and operated in a manner so that a well-run project becomes the testimony to their capabilities and allows further success. Companies that take the shorter view and maximize profits on a singular project will not survive in a competitive marketplace.

Question 5. What hope does the Elizabeth experience offer that the General Accounting Office or any other government oversight agency will be effective, either in awarding contracts to the best qualified bidder or correcting non-performance of contract requirement when that occurs?

Answer 5. The Elizabeth experience is a failure of the process. It has clearly been the exception if you review the history of private corrections procurements. I'm hopeful that the INS will learn from this and as a consequence the process will be improved and there will be no recurrence. However, there are dozens of agencies who have years of successful experience behind them in the awarding and performance of private corrections contracts. It would be a grave injustice to allow the experience in Elizabeth to negate the preponderance of successful projects.

Question 6. Before states should be allowed to use federal money for construction and operation of private correctional facilities, should they first be required to show that their procurement and contact management procedures are adequate to the task?

Answer 6. Wackenhut Corrections would endorse this approach. Once again, we would point out the Florida approach to privatization. The creation of a Privatization Commission that would be charged with the responsibility to develop solicitations, evaluate proposals and make recommendations for awards is a very positive and proactive approach.

COUNTY OF PASQUOTANK,
Elizabeth City, NC, September 8, 1995.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN HATCH: In response to your letter of August 10, 1995, enclosing two questions submitted by SenatorHerb Kohl as a follow-up to the Committee's July 27 prison reform hearing, my responses are as follows:

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO ZEE B. LAMB

Answer 1. On behalf of NACo, we would support a 10 percent set-aside for juvenile facilities, provided that it was the outgrowth of a comprehensive assessment and management process. We are concerned that such a provision not be used to "widen the net" for status offenders and other juveniles. One additional and necessary protection would be to require that grant recipients comply with the mandates of the Juvenile Justice and Delinquency Prevention Act.

Answer 2. While counties favor flexibility, I am impressed by the creativeness of counties in complying with the mandates of the Act. In rural Michigan, North Dakota and other states, for example, retired police officers sit with children in local public buildings until the child is required to appear in court. This system has worked very well.

Many thanks for inviting me to testify as a representative of the National Association of Counties.

Sincerely,

ZEE B. LAMB,
Chairman, Board of Commissioners, Pasquotank County, NC,
And Chair, Corrections Subcommittee of the National Association of Counties.

RESPONSES TO QUESTION FROM SENATOR KOHL TO THE U.S. DEPARTMENT OF JUSTICE

Question 1. Although the Senate sought to address the problem of overcrowded juvenile facilities in last year's crime bill, a provision dedicating a portion of prison funds to juvenile facilities was deleted during the House-Senate Conference. So, over the next few years, we are planning to spend $8 billion on adult facilities, with none of the money set aside for juveniles. My question to the panel is, do you believe that we should dedicate a portion of prison funds for juvenile facilities? If so, would you support a bill that Senator Specter and I introduced (along with Senators Cochran and Kassebaum) entitled the Juvenile Corrections Act to 1995, which would dedicate 10 percent of adult prison money to juvenile facilities?

Answer 1. The Attorney General shares the Committee's concern that state and local jurisdictions be able to provide secure confinement and alternative corrections facilities and programs for serious juvenile offenders who are often overlooked in any corrections debate. Also, recognizing the increase in serious juvenile crime, the Department would support Senator Kohl's efforts to set aside funding to the area of juvenile corrections and looks forward to working with him and other Senators on this in the future.

It should be stressed, however, that programs relating to the confinement of juvenile offenders are already a major focus of the Department's corrections initiative being administered through the Office of Justice Programs' (OJP) Corrections Program, and that considerable resources have already been committed to this area.

Over the last year, OJP's Corrections Office has been moving forward in implementing the several corrections programs authorized under both the Department's fiscal year 1995 appropriations bill [Public Law 103–317], and the Violent Crime Control and Law Enforcement Act of 1994 (Crime Law) [Public Law 103–322]. Through these programs, states and localities are able to provide confinement space for both violent, and non-violent, juvenile offenders.

Under the Justice Department's fiscal year 1995 appropriations, $24.5 million was made available to jurisdictions to plan, renovate, and construct boot camp facilities, including boot camps for juvenile offenders. Under this program, such boot camp facilities, although targeted for non-violent offenders, would have to meet the requirement of making additional secure space available for violent offenders within a state's overall corrections system.

To date, as a result of the fiscal year 1995 Boot Camp initiative, grants have been awarded to 34 jurisdictions for the planning of boot camp facilities; to 7 jurisdictions for the renovation of facilities for use as boot camps; and to 10 jurisdictions for the construction of new boot camps.

Further, more than half the awards made during this fiscal year have been to facilities which will serve non-violent juvenile offenders. Of the 34 planning grants, 12 were for the planning of juvenile facilities. Of the 7 renovation grants, 5 were for juvenile facilities. Of the 10 construction grants, 8 were for juvenile facilities.

For Fiscal Year 1996, the Administration has requested $500 million to implement the Truth in Sentencing Grant Program, and the Violent Offender Incarceration Grant Program, as authorized under Title II of the 1994 Crime Law. Under the statutory requirements of both these programs [see: 42 U.S.C. 13701 (b)], each recipient state must develop and have approved a comprehensive corrections strategy which, among other things, addresses the needs of their juvenile justice systems at the state, county and municipal levels. With the inclusion of juvenile justice systems in the overall planning process, states may then, at their discretion, fund juvenile corrections programs from any monies received under these programs.

In addition, Title II of the 1994 Crime Law authorizes the Punishment for Young Offenders Program [see: 42 U.S.C. 1379(ee)]. This program, also administered under OJP's Corrections Program, will provide formula grant monies directly to state and local governments to assist in the provision of alternate sanctions for young offenders. Such sanctions could include community-based incarceration, electronic monitoring, restitution programs, and community service programs. For fiscal year 1996, the first year in which this program would be implemented, the Administration has requested $9.63 million for the Punishment for Young Offenders initiative.

Question 2. Under the Juvenile Justice and Delinquency Prevention Act, in order for states to receive grants, they must separate juveniles from adults in jails. This creates large problems in some rural communities, and I have heard from many Wisconsin sheriffs regarding these problems. For example, in some counties, sheriffs must use two deputies to drive juveniles up to six hours one way to place them overnight in an adequate separate juvenile facility. That's quite a strain on their resources. Questions: Do you share my concern about the current law, and do you think we can come up with a reasonable compromise between the need to protect

accused juveniles from a hardened adult criminal class and the need to properly conserve scarce law enforcement resources?

Answer 2. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is certainly aware of the difficulties faced by rural law enforcement in complying with the jail removal requirements of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), as amended. You and other members of the Wisconsin congressional delegation, as well as a number of rural sheriffs, have communicated these concerns to OJJDP recently and in the past.

Under current law, OJJDP has no authority to extend or waive the congressionally mandated time restrictions on holding juveniles in jails or lockups. However, over the years, OJJDP has consistently worked with Wisconsin state officials to help resolve a variety of juvenile justices issues, including the jail removal requirements. We will be pleased to meet with you and Wisconsin officials to review the state's status with regard to jail removal. We are also prepared to offer on-site technical assistance to the state and localities.

The State of Wisconsin has recently been awarded $1,220,000 in Fiscal Year 1995 Formula Grant funds, and their revised comprehensive plan has allocated $600,000 toward compliance with the jail removal core requirement. The state might wish to consider the feasibility of providing transportation subsidies to rural sheriffs, which could be used for additional personnel or reimbursement.

Finally, the JJDPA is due to be reauthorized in 1996, and OJJDP expects the jail removal requirement to be thoroughly reviewed and examined as part of the process. Beginning this fall, OJJDP intends to hold two field meetings with OJJDP's constituent groups to receive first-hand feedback on implementation of the Act. We anticipate that jail removal will be raised as an issue of concern.

RESPONSES TO QUESTIONS FROM SENATOR ABRAHAM TO THE U.S. DEPARTMENT OF JUSTICE

Question 1. Is it the Department's position that the Michigan prisons subject to the Consent Decree are in continuing violation of any federal statutory or constitutional requirement? If so, is everything mandated under the decree necessary to remedy the violation or violations? Or do some or all of the requirements stem only from the decree itself? Please specify which, if any, you believe are required to remedy or address a federal statutory requirement or standard that the U.S. Supreme Court would be likely to apply.

Answer 1. First, CRIPA specifically does not permit the Attorney General to enforce federal statutory rights in actions brought pursuant to the statute, 42 U.S.C. § 1997a(a), so whether Michigan is in compliance with various statutory obligations is not at issue under the Consent Decree.

Second, compliance with the Consent Decree is under continuing assessment. The District Court has already dismissed large portions of the Decree and State Plan pertaining to the Marguette Branch Prison and the Michigan Reformatory at Ionia. Michigan's compliance with outstanding provisions is presently under review.

The United States Court of Appeals for the Sixth Circuit has specifically found that the Consent Decree addressed physical conditions of confinement that rose to the level of constitutional prohibitions against cruel and unusual punishment:

1. Medical and mental health care;
2. Fire safety;
3. Sanitation, safety and hygiene;
4. Crowding and protection from harm; and
5. Access to courts and legal mail. *United States* v. *State of Michigan*, 940 F.2d 143, 147 (6th Cir. 1991).

Pursuant to the Decree, Michigan promulgated a State Plan for Compliance detailing the measures to assure constitutional conditions and "other matters designed to improve conditions of confinement." Consent Decree, ¶H. Under the two step procedure adopted by the district court and approved and upheld by the Court of Appeals, in order to obtain dismissal of a consent decree provision, the parties most show compliance with the State Plan. If the court does not find compliance, the parties may show that constitutional standards are met nevertheless. *United States* v. *State of Michigan*, 18 F.3d 348, 352–353 (6th Cir. 1994)

Question 2. Has the Department of Justice retained the guidelines on prison litigation former Attorney General Barr promulgated in January, 1992? If so, are they being observed? If not why did you get rid of them or modify them? What have you replaced them with?

Answer 2. Although we are unaware of formal guidelines promulgated by former Attorney General Barr in January, 1992, we are aware that he made speeches similar to his testimony before the Committee regarding his approach to prison litigation.

In general, flexibility governs our approach to resolution of unconstitutional conditions. The Department does not initiate prison litigation or intervene in such litigation unless it determines that unconstitutional conditions of confinement exist. In seeking relief, we seek relief that will remedy the constitutional violations. Not every provision in and of itself may be constitutionally mandated. The relief that we seek, however, is necessary to bring about constitutional conditions.

The Department does not rule out court supervision of prisons through injunctive relief resulting from litigation on the merits or through enforcing and monitoring compliance with consent decrees where such action is appropriate in bringing conditions into compliance with the constitution. Similarly, we do not rule out the use of special masters or monitors should we view these devices as helpful or necessary in a particular case.

Each of our consent decrees has a termination clause providing for dismissal of the decree when substantial compliance with its terms and/or the state plan have been met. As the 6th Circuit noted in the Michigan case, determining compliance with the constitution may be a more difficult issue than determining whether the specific provisions of a state plan have been met. In any event, when we are satisfied that compliance has been attained and will be maintained, we seek dismissal of the decree or those portions no longer at issue.

Question 3. What is the Department's position of the following proposals for reform of CRIPA?

a. Requiring the prisoner to exhaust administrative remedies before filing a lawsuit.

Answer 3a. We support enactment of such a provision.

3b. Removing the inmate advisory role to a prison's grievance procedure as a minimum requirement for certification of a grievance procedure;

Answer 3b. Such a revision is unnecessary. By clarifying that states do not have to permit inmates to sit on panels, the Department has already eliminated the condition that had been the greatest impediment to the willingness of state and local jurisdictions to seek certification of their grievance systems. See 28 CFR § 40.7(b).

3c. Including a provision allowing federal judges to issue sua sponte dismissals of frivolous prisoner lawsuits;

Answer 3c. A rule of this type is desirable to minimize the burden on states of responding unnecessarily to prisoner suits that lack merit.

3d. Given the federalism concerns raised by these suits, replacing the "reasonable cause to believe" standard for DOJ lawsuits under CRIPA with a "clear and convincing" standard;

Answer 3d. The Department opposes changing CRIPA's "reasonable cause to believe" standard (42 U.S.C. § 1997a), the standard by which the Attorney General of the United States may institute a civil action for a pattern or practice of constitutional violations under CRIPA, with a "clear and convincing" standard. First, a "clear and convincing" standard is an evidentiary standard, used as a specific burden of proof at trial. Typically, it is the burden of proof for a finding of civil contempt. *See Jordan* v. *Wilson*, 851 F.2d 1290 (11th Cir. 1988); *Whitfield* v. *Pennington*, 832 F.2d 909 (5th Cir. 1987). The burden of proof in a civil action is the "more likely than not" or "preponderance of the evidence" standard, a less stringent standard than the "clear and convincing evidence" standard. The imposition of a clear and convincing standard as a pre-filing requirement under CRIPA, would result in the anomaly of requiring a higher standard to file a suit than would be required to ultimately prevail in the case on the merits.

Second, Congress' enactment of CRIPA's "reasonable cause to believe" standard is consistent with other civil rights statutes. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3614 (reasonable cause to believe standard for Attorney General to bring pattern or practice litigation for violations of the Act).

Third, given the requirement that the Attorney General must personally sign the complaint (42 U.S.C. § 1997a(c)) and personally sign a certification that all prefiling requirements have been met, 42 U.S.C. § 1997b, no CRIPA action is going to be initiated on any but the strongest factual and legal basis.

3e. Statutory restrictions on judicially-created remedies?

Answer 3e. The Department is committed to preserving meaningful redress for unconstitutional conditions of confinement. While Congress may validly enact proscriptions on the nature and extent of prison condition remedies, it must assure that any measures adopted do not deprive prisoners of effective remedies for real constitutional wrongs.

Question 4. How many state correctional cases is the Department of Justice presently involved in? Include all past cases that are still ongoing. How many has the Department initiated since January 1993? Please attach a copy of all court papers and attachments the Department has in its possession in connection with both the ongoing cases and the cases initiated since 1993, as well as any court orders or consent decrees entered in connection with all these cases.

Answer 4. The Department is involved in 8 state correctional cases:

1. *United States* v. *Montana*, C.A. No. 94–90 (D. Mt.). Complaint attached.
2. *Williams* v. *Lynn*, C.A. No. 92–1 (E.D. La.). Private attached. United States participates as amicus.
3. *United States* v. *Michigan*, 1–84–CV–63 (WD Mi.) Consent decree attached.
4. *United States* v. *Virgin Islands*, C.A. No. 86–265 (D. VI). Consent decree attached.
5. *United States* v. *California*, C.A. No. 89–1233 (E.D. Ca.). Consent decree attached.
6. *United States* v. *Territory of Guam*, C.A. No. 91–20 (D. Guam). Consent decree attached.
7. *Battle* v. *Anderson, C.A. No. 72–95–5 (E.D. Ok.). United States Court of Appeals for the Tenth Circuit, June 27, 1995 Order and Judgment attached.*
8. *Ruiz* v. *Collins*, C.A. No. H 78–987 (S.D. Tx.). Final Judgment Approved December 12, 1992 attached.

One case has been initiated since January, 1993 resulting from an investigation begun in 1992.

Question 5. How many state correctional institutions are under federal court supervision as a partial result of the litigation referenced in question 4. Please list all the facilities, separating them by state. Please summarize the terms of the federal court supervision.

Answer 5.

Michigan: Marquette Branch Prison, Michigan Reformatory, State Prison of Southern Michigan.

Virgin Islands: Golden Grove Adult Correction Facility.

California: California Medical Facility at Vacaville.

Guam: Adult Correctional Facility.

Oklahoma: State prisons.

Texas: State prisons.

See also answer to question 4.

Question 6. How many other state correctional facilities are under federal court supervision, in whole or in part, whether or not the Department of Justice is involved? Please list all the facilities, separating them by State.

Answer 6. Because the Department is not involved in all of the cases, we do not complete information.

Once again, we would be pleased to share the results of our constituent meetings with you, and continue to work with you to find a solution that strikes the appropriate balance between juvenile protection and law enforcement resources.

RESPONSE TO QUESTION FROM SENATOR HATCH TO THE U.S. DEPARTMENT OF JUSTICE

Question 1. We appreciate the Department's support of legislation aimed at curbing inmates' abuse of the judicial system, as well as its support in principle of legislative initiatives to alleviate the burdens imposed on states by prison population caps and excessive remedial decrees.

Obviously, however, the Justice Department has a significant ability to affect these issues as well, in its role as a complainant or intervenor in prison litigation. What steps, within its discretion, is the Department taking to address these problems? In answering this question, please provide the information required of the Attorney General under 42 U.S.C. 1997(f), and compare this information for the present Administration to similar reports provided by prior Administrations. Additionally, please provide details of the Department's compliance with the requirements of 42 U.S.C. 1997 (h).

Answer 1. The Department seeks remedies designed to correct unconstitutional conditions of confinement. The Department does not seek population caps in its prison consent decrees and litigation. For specific information, please see the attached Attorney General Annual Reports to Congress.

The Department routinely complies with 42 U.S.C. 1997(h) by sending a copy of the notification of the commencement of a CRIPA action to the Department of Health and Human Services and the Department of Education, as appropriate for the type of institution involved.

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO WILLIAM P. BARR AND PAUL T. CAPPUCCIO

Answer 1. We believe that States should dedicate a portion of their corrections budgets to facilities that will prevent juvenile offenders from maturing into habitual adult violent offenders by teaching them discipline, responsibility and pride. Military-style boot camps of the type being tried in Texas are a good example. We believe that it would be appropriate for Congress to provide funds for similar facilities in the federal correctional system, if the Bureau of Prisons determines that it has the demand and need for such facilities. Funds should not be appropriate, however, for juvenile programs that do not teach offenders discipline and responsibility. We are not familiar with the bill you have sponsored, and are not in the position to take a position on it.

Answer 2. Yes, we share your concern about the costs and problems associated with separating juveniles from adults in jails, and would support a reasonable compromise that protects accused juveniles from hardened adult criminal while properly conserving scarce law enforcement resources.

RESPONSES TO QUESTIONS FROM SENATOR BIDEN TO WILLIAM P. BARR AND PAUL T. CAPPUCCIO

Question 1. The 1994 Crime Law enacted a new 18 U.S.C. 3626, which required that consent decrees be "reopened at the behest of a defendant for recommended modification" at-least every two years. Does this provision address your concern that, currently, consent decrees sometimes continue in force long after they can be justified? If not, can this provision be modified to address your concern?

Answer 1. We do not believe 18 U.S.C. 3626 is itself sufficient to address our concerns—that consent decrees often require more than the constitutional minimum and that consent decrees often continue to burden States and localities long after genuine constitutional violations have been corrected. The main problem with section 3626 is that it is too vague, and it does not require a court to do anything. On its face, it only requires that the consent decree be "reopened" for recommended modification.

It is, however, possible that section 3626 can be modified and expanded to help alleviate the problems we have identified. For instance, our concerns would be substantially alleviated if section 3626 were modified to provide that, as soon as the defendant showed both that: (i) the constitutional violations alleged in the underlying complaint had been remedied, and (ii) there was no imminent likelihood that the prison or jail would immediately lapse back into constitutional violation, the Court *must* vacate the consent decree, *even if the consent decree required more than constitutional minimum.*

Question 2. S. 400 allows broad standing to challenge an order which limits prison populations. Specifically, it allows prosecutors, elected officials, and any other governmental official who "is or may be affected by" the order to intervene. Please comment on the impact of this section of the bill.

Answer 2. I have considered whether S. 400's standing provisions are consistent with Article III of the Constitution, which requires an injury in fact that is particularized to the person who claims to have standing that is different from a generalized grievance suffered by the public as a whole. My tentative view is the standing provisions in S. 400 may be constitutional because certain correctional officials suffer a particularized injury from prison population cap orders, but I have not looked into the issue in any detail.

RESPONSES TO QUESTIONS FROM SENATOR ABRAHAM TO WILLIAM P. BARR AND PAUL T. CAPPUCCIO

Question 1. Do you believe that *Plaut* v. *Spendthrift Farm, Inc.* limits Congress' ability to relieve State and local correctional authorities from unreasonable ongoing judicial supervision, and if so how? *See especially* the Court's discussion of *Wheeling & Belmont Bridge Co.*, slip op. at 22, and *Counsel* v. *Dow*, slip op at 25.

Answer 1. No, *Plaut* v. *Spendthrift Farm, Inc.*, No. 93–1121 (U.S. Apr. 18, 1995), does not prevent Congress from relieving State and local correctional authorities from unreasonable ongoing judicial supervision of prisons and jails. Under long-standing Supreme Court authority, Congress may directly supersede *on a prospective basis* a continuing injunction like a consent decree without thereby contravening judicial authority in violation of the Constitution's separation of powers. Indeed, *Plaut* reaffirms Congress' authority to supersede a continuing injunction on a prospective basis. Thus, Congress is entirely free to provide that existing (or future) consent decrees shall not, going forward, apply to restrict unreasonably the conduct of State or local officials.

As *Plaut* points out, at least since *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), the Supreme Court has consistently approved Congress' power to "alter [] the *prospective effect* of injunctions entered by Article III courts." *Plaut* v. *Spendthrift Farm, Inc. supra* at 22 (emphasis added). This follows from the fundamental distinction between the judicial power and the legislative power: It is the "province and duty" of the judicial department "'to say what the law is' in particular cases and controversies," in other words, "to *decide*" cases in under existing law, *Id.* At 7 (emphasis in original) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); but it is the province of the Congress to say what the law *will be* for future application by the courts.

In *Plaut*, the Court was careful to hold only that separation-of-powders principles are violated when Congress attempts to "set aside the final judgment of an Article III court by *retroactive legislation*." Slip op, at 19 (emphasis added). The Court defined "retroactive legislation" to mean "legislation that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred." *Id.* at 14 (emphasis in original) The statute at issue in *Plaut* sought to revive lawsuits that had been dismissed as untimely under preexisting law and whose dismissals had become final by virtue of the waiver or exhaustion of appellate review. "When *retroactive legislation* requires its own application in a case already finally adjudicated," the Court explained, "it does not more and no less that 'reverse a determination once made, in a particular case.' The Federalist No. 81, p. 545 (J. Cooke ed. 1961) . Our decisions [including *Wheeling Bridge*] have uniformly provided fair warning that such [a retroactive] act exceeds the powers of Congress." *Plaut* slip op. at 15 (emphasis added). The Courts, however, was clear to state that in contrast to the retroactive legislation involved in *Plaut*, the "prospective effect" of the statute at issue in *Wheeling Bridge* was sufficient in and of itself to "distinguish" *Wheeling Bridge*, and "nothing in our holding today calls [*Wheeling Bridge*] into question." *Id.* at 22.

Accordingly, it is quite clear that the separation of powers principles discussed in *Plaut* do not prevent the Congress from either: (i) altering the prospective effect of any existing consent decree—by providing that it shall not govern the conduct of the correction officials or the States and localities going forward, or (ii) limiting the circumstances and/or scope of any consent decrees entered in the future by the federal courts regarding prison conditions.

Question 2. Can parties settle litigation through private settlements? Would H.R. 667's limitations on prospective relief, which state that "[p]rospective relief shall extend no further than necessary to remove the conditions that are causing the deprivation of the Federal rights of individual plaintiffs in that civil action," interfere in any way with private settlements? Please list the costs and benefits of consent decrees versus contractual settlements.

Answer 2. Parties can, of course, settle litigation through private settlement. There is nothing on the face of the provision in H.R. 667—providing "[p]rospective relief shall extend no further than necessary to remove the conditions that are causing the deprivation of the Federal rights of individual plaintiffs in that civil action"—that would prevent the parties from entering into a private settlement. We do not understand the plain meaning of the term "[p]rospective relief" to encompass private settlement agreements.

In some ways, a settlement agreement if preferable to a consent decree. Most notably, a settlement will not involve intrusive continuing federal court supervision of the day-to-day operations of prison and jails. Moreover, a settlement agreement could be enforced only by the plaintiff bringing action for breach of the settlement agreement and carrying his/her burden to show such a breach. In these important respects, settlement agreements are less intrusive than consent decrees.

We are, however, constrained to point out that encouraging facilities defendants to resolve prison condition litigation by private settlement agreements does not address the problem of agreements (be they consent decrees or settlement agreements) in which the defendant agrees to do substantially more than the constitution requires. As we pointed out in our oral testimony, there is some pressure on correctional facilities defendants to agree to expensive obligations that the Constitution does not require as a means of circumventing tight budgetary controls. By limiting the approval and enforcement of consent decrees to the agreement that goes to far. It is not clear to us how Congress could limit private settlement agreements in the same way—at least to the extent that they are enforced in State court. Accordingly, it may well make more sense to tolerate and encourage consent decrees, but strictly limit their scope and duration.

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Question 3. Are you aware of any ongoing violation of federal statutory or constitutional law that requires continued judicial supervision of Michigan's correctional facilities?

Answer 3. Mr. Cappuccio visited several Michigan correctional facilities in 1992. At that time, he came back to the Department with the impression that there were no obvious constitutional violations in the facilities that he saw, and that both the Michigan correctional department officials and the Michigan Governor's office were very serious and professional about maintaining the conditions in Michigan facilities above the constitutional minimum. Nor, at that time, could anyone at the Department of Justice point to a genuine constitutional violation in the Michigan system that justified federal involvement (except, perhaps, with regard to some narrow aspect of mental health care treatment which, if memory serves us correctly, was the subject of a proposed narrow settlement agreement with the Department of Justice). Accordingly, at that time, we concluded that it was time for the Department of Justice to return control of the Michigan correctional facilities to the people of Michigan without ongoing federal court supervision.

Question 4. What is your view of the following proposals for reform of CRIPA:

- Requiring the prisoner to exhaust his administrative remedies before filing a lawsuit;
- removing the inmate advisory role to a prison's grievance procedure as a minimum requirement for certification of a grievance procedure;
- including a provision allowing federal judges to issue sua sponte dismissals of frivolous prisoner lawsuits;
- replacing the "reasonable cause to believe" standard for DOJ lawsuits under CRIPA with a "clear and convincing" standard, with particular mention of federalism concerns.
- statutory restrictions on judicially-created remedies?

Answer 4. Neither of us are, at this time, familiar enough with CRIPA procedures to take a formal position on any of the proposals you have presented, although we would be happy to take a closer look at the matter. Generally speaking, however, our tentative view is that it would be sensible to require prisoners to exhaust meaningful administrative remedies before filing a lawsuit and to allow federal judges to issue sua sponte dismissals of frivolous prisoner lawsuits. It also seems quite sensible to restrict DOJ involvement under CRIPA to cases of clear violations of federal rights and to limit judicial remedies to correcting the violation of federal rights without further burdening the State or local officials.

Question 5. What steps do you believe are necessary to correct the current deficiencies in consent decree procedures?

Answer 5. In our written testimony to the Committee, we outlined ways in which the Current deficiencies in consent decree procedures could be substantially alleviated.

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO JOHN J. DIIULIO, JR.

Question 1. My question to the panel is, do you believe that we should dedicate a portion of prison funds for juvenile facilities?

If so, would you support a bill that Senator Specter and I introduced (along with Senators Cochran and Kassebaum) entitled the Juvenile Corrections Act of 1995, which would dedicate 10 percent of adult prison money to juvenile facilities?

Answer 1. I do not know the details of the bill in question, but I would urge the Senate to consider increasing funding for programs that incarcerate dangerous juvenile offenders. Given the demographics, the need for secure juvenile facilities will grow rapidly over the next five years. We are not prepared.

Question 2. Do you share my concern about the current law, and do you think we can come up with a reasonable compromise between the need to protect accused juveniles from a hardened adult criminal class and the need to properly conserve scarce law enforcement resources?

Answer 2. I am confident that such a compromise could be reached. I would urge the Senate to address as well the even *bigger* problem of keeping violent juveniles away from non-violent ones.

RESPONSE TO QUESTION FROM SENATOR BIDEN TO JOHN J. DIIULIO, JR.

Question 1. S. 400 would automatically terminate all remedial orders—whether entered by consent decree or after a trail—after two years. Doesn't this create a danger that a continuing constitutional violation would exist without a judicial remedy? Would courts be required to hold a complete new trail in order to continue the order?

Answer 1. I fail to see how requiring the courts to terminate orders after two years would pose such a risk. If actual violations are still occurring (if indeed, they ever occurred in the first instance), the courts would have every opportunity to reopen the matter and proceed accordingly.

The bigger danger is the one we have already suffered, namely, that courts will enforce and expand decrees well beyond the point of judicial authority. The two-year limit is a necessary brake on court intervention. Without it, I worry that the essential problems that STOP addresses would not be remedied. Any costs of the two-year limit must be balanced against the costs of decade-old interventions that threaten public safety, inflate budgets, and have a mixed affect on prison conditions.

RESPONSES TO QUESTIONS FROM SENATOR ABRAHAM TO JOHN J. DIIULIO, JR.

Question 1. Are you aware of any correctional facilities where genuinely uncivilized conditions persist? Do we need judicial oversight to prevent this from occurring?

Answer 1. Senator, before answering this question, please allow me to highlight those aspects of my work in the field that may be deemed most relevant to it.

Since 1980, I have studied or toured scores of prisons and jails—public and private, federal, state, and local—in dozens of jurisdictions all around the country. In the mid-1980's, I served for a time as the chief consultant to the New York City Board of Corrections, the agency that serves as a "watch dog" over the City's Department of Corrections. I have conducted leadership and management training for a wide variety of corrections practitioners, including a majority of the wardens who serve in the Federal Bureau of Prisons. I edited the first major book examining the impact of court intervention on prisons and jails. And just a few years ago, I directed a U.S. Justice Department project which devised and disseminated to thousands of federal, state, and local justice-system professionals a new and demanding set of eight specific objective performance standards for criminal-justice agencies, including institutional corrections facilities (please see Appendix attached).

There is, to be sure, inter-jurisdictional, intra-jurisdictional, and historical variance in the performance of institutional corrections facilities (or what in my first book I termed the "quality of prison life.") Simply stated, some facilities are safer, cleaner, more program-oriented, and more cost-effective than others. Even facilities in the same jurisdiction with virtually identical inmate populations and which share other objective characteristics (funding levels, crowding levels, staffing patterns, institutional architecture) often differ in terms of how orderly and livable they are.

But the simple truth is that most incarcerated persons live without undue suffering, and are afforded a wide range of life amenities and services while in confinement. Generally speaking, prison conditions are better than jail conditions, but in neither prisons nor jails do genuinely uncivilized conditions persist. While most prisons and jails are not "country clubs" or out and out "resorts," even fewer are anything even vaguely resembling "hell holes." Indeed, I have seen any number of federal and state facilities which, though operating well above their rated capacities ("overcrowded"), and though home to thousands of double-celled or open-bay dormitoried hardened criminals, consistently produced safe and humane conditions behind bars.

It is true that prisons and jails in many parts of this country were once hotbeds of physical abuse and official corruption. Even today, given facilities in given places at given times may give rise to disorders or deprivations that most Americans would consider uncivilized. But what STOP opponents fail to admit is that such facilities are now clearly exceptions to the rule.

Still, I continue to believe that federal judges must intervene when particular inmates in particular facilities suffer specific serious violations of constitutional protections or federal laws that prohibit inhumane treatment (total lack of medical care, rotten food, physical abuse, total lack of access to law books). Indeed, the

whole point of my own scholarship on the matter has been to identify the conditions under which judges can do more good than harm when they intervene. There is most definitely a role for the courts in overseeing prison and jail conditions, and I for one would not support any changes in federal law that would eliminate this role. The federal judiciary is to be credited for bringing about many improvements in institutional corrections. The "hands-off" doctrine did contribute to the demise of well-governed, civilized prisons and jails. The early, limited, incremental, and targeted reversals of that doctrine made good constitutional, legal, and moral sense.

But where STOP is concerned, we are not talking about a return to the "hands-off" doctrine. We are not talking about prohibiting the federal courts from any legitimate role in overseeing prison and jail conditions or acting to right specific constitutional or legal wrongs in particular cases. Nor are we talking about a flat ban on consent decrees.

Rather, we are talking about the desperate need for *a reversal of the "hands-on" doctrine* as followed by federal judges such as Judge Shapiro in the Philadelphia case, Judge Justice in the Texas case, Judge Muecke in Arizona, and many other irresponsible federal judges who have given new meaning to the term "imperial judiciary." We are talking about limiting government by consent decree in the interests of *restoring government by consent of the governed.*

Judge Shapiro and her ultra-activist brethren have, in effect, substituted the ACLU's prisoners' rights wish list for the Bill of Rights. Time and again, they have intervened in sweeping ways that manifest only the most casual concern for the constitutional limits of their own authority, the bloody impact of prison caps and revolving-door justice on public safety, the necessities of institutional order, and the stresses on the public purse. They have arbitrarily read into public law and correctional practice an expansive definition of prisoners' rights, and they have behaved as if the protection of prisoners' rights thus defined was the sole value at stake in public decisions governing the sentencing process. Not only have they behaved as legislators rather than as judges, but they have behaved as *bad legislators* who elevate one set of desirable public ends (in this case, prisoners' rights) above all else. These judge-legislators neither weigh competing values nor make necessary compromises and trade-offs.

In sum, while there is a proper role for the federal courts in overseeing prison and jail conditions, Congress must act to check and balance Judge Shapiro and other practitioners of the hands-*on* doctrine for whom maintaining public safety, respecting victims rights, preserving institutional order, and restraining public spending are peripheral concerns.

As I noted in my testimony on the 27th, a huge fraction of the financial costs of institutional corrections is now the direct result of federal court orders and decisions. There would appear to be no end to it. For example, to comply with Judge Muecke's latest ideas about how to stock prison libraries would cost Arizona taxpayers in excess of $2.5 million, plus another $1.6 million a year for 14 new librarians and 60 new corrections officers to monitor inmates as they move back and forth to the library at least 10 hours each week. Likewise, there would appear to be no end to the institutional disorders caused by irresponsible interventions on the Texas model, where scores of inmates were murdered as Judge Justice's sweeping orders were rammed into effect.

But the biggest issue for me, and undoubtedly for most Americans, is public safety. As I tried to suggest in my testimony on the 27th, the statistical data are overwhelming. But the bare statistics do not tell the whole story. Let every Member of Congress look into the eyes of Philadelphia Detective Patrick Boyle, whose son, a rookie cop, was murdered in cold-blood by a criminal out because of Judge Shapiro's orders. It's painfully clear that Congress can and should act to stop this judicial madness.

Question 2. Are there any circumstances in which a release order is the appropriate response to prison conditions? What about inmate caps? What alternative remedies are available for overcrowding?

Answer 2. As I attempted to explain in my testimony on the 27th, there is absolutely no empirical basis to the claims about prison "overcrowding" made by anti-incarceration activists and many federal judges. As prison population densities increase, life behind bars grows less comfortable, and greater stresses are placed on corrections administrators, especially at the line level. But there is no constitutional right to comfortable prisons or jails, and there are countless cases of prisons in which populations have soared without producing any significant ill effects on inmates and staff. Naturally, many corrections commissioners and bureaucrats prefer smaller populations and bigger per inmate budgets (which, for all practical purposes, is what court-imposed caps and related orders produce) to bigger populations and smaller per inmate budgets. And, of course, for the ACLU and other anti-incar-

ceration organizations that seek to realize via the courts the lax sentencing policies that they could not obtain via the legislative process, court-ordered caps and supporting myths about "overcrowding" are absolutely essential. But I find it hard to justify any release of violent and repeat criminals.

There are many alternatives remedies for genuine overcrowding. One is to build more prisons. I know that opponents of STOP like to say that "Prison is not the answer." But if prison is not the answer, then what is the question? If the question is how to solve America's crime problem and the demographics that help drive it, then prison is not the answer. But if the question is how to relieve genuine overcrowding behind bars and stop revolving-door justice, then building more prisons is most definitely an answer.

Another answer is to manage prisons and jails more effectively. Often, overcrowding is blamed for conditions created by poor institutional administration. It is easier for officials to blame overcrowding than to blame themselves. But that should not stop us from acknowledging the significant variance in the performance of prisons and jails with virtually identical population densities and objective inmate characteristics. I am put in mind here of California's Warden Wayne Estelle, who in the 1980's ran the California Men's Colony (CMC) at a time when that facility's population more than doubled to over 7,000 inmates. Despite the overcrowding at CMC, the prison remained one of the safest, cleanest, most program-oriented, and most cost-effective in the country. Likewise, I would encourage Congress to consider the Federal Bureau of Prisons (BOP). The BOP has done a very good job of managing its growing population despite having many facilities operate over their rated capacities.

In essence, my answer is build more facilities and run them well—by far a better bargain for all Americans than releasing dangerous criminals in deference to judicially-enforced myths about "overcrowding."

In closing, I thank you for inviting me to participate in the Senate's deliberations, and I applaud you, Senator Hatch, Senator Biden, and others in Congress for giving this issue the attention it deserves.

Appendix

Criminal Justice Performance Measures for Prisons

Italicized items are based on official records. Others are based on surveys of staff or inmates (or both, in which case the staff and inmate means are counted as separate indicators). "Rate per capita-6" means "divided by total number of inmates resident at some time during a 6-month reference period." Scale values are omitted for all scale items ("rating of ...," "perception of ...," etc.).

Survey and *official record* measures of prison performance

Dimension 1: Security ("keep them in")

A. General
   1. Rating of how the building design affects surveillance of inmates

B. Security procedures (6-month period)
   1. Perceived frequency of shakedowns in the living area
   2. Perceived frequency of body searches
   3. Proportion of staff who have observed:
      a. Any consequential problems within the institution
      b. Lax security
      c. Poor assignment of staff
      d. Inmate security violations
      e. Staff ignoring inmate misconduct
      f. Staff ignoring disturbances
      g. Other problems
   4. *Number of cell or bunk area shakedowns conducted in a 1-month period*
      a. *Rate per inmate*
      b. *Proportion finding contraband*
   5. *Number of urinalysis tests based on suspicion in a 1-month period*
      a. *Rate per inmate*
      b. *Proportion testing positive for opiates*

C. Drug use (6-month period)
   1. *Drug-related incidents, number and rate per capita-6*
   2. *Discipline reports related to drugs or contraband, number and rate per capita-6*

D. Significant incidents (6-month period)
   1. *Significant incidents, total and rate per capita-6*
      a. *Proportion of 6-month population involved in any incidents*
   2. *Escapes, number and rate per capita-6*

E. Community exposure (6-month period)
   1. *Furloughs, number and rate per capita-6*

F. Freedom of movement
   1. Perceived freedom of movement for inmates: Day / Evening / Night

G. Staffing
   1. *Ratio of resident population to security staff*

Dimension 2: Safety ("keep them safe")

A. Inmate safety (6-month period)
   1. Perceived likelihood of an inmate being assaulted in his living area
   2. Estimated rate (per 100 population) of armed assaults involving inmates
   3. Estimated rate (per 100 population) of assaults against inmates without a weapon

Appendix

Criminal Justice Performance Measures for Prisons

Italicized items are based on official records. Others are based on surveys of staff or inmates (or both, in which case the staff and inmate means are counted as separate indicators). "Rate per capita-6" means "divided by total number of inmates resident at some time during a 6-month reference period." Scale values are omitted for all scale items ("rating of ...," "perception of ...," etc.).

Survey and *official record* measures of prison performance

Dimension 1: Security ("keep them in")

A. General
   1. Rating of how the building design affects surveillance of inmates

B. Security procedures (6-month period)
   1. Perceived frequency of shakedowns in the living area
   2. Perceived frequency of body searches
   3. Proportion of staff who have observed:
      a. Any consequential problems within the institution
      b. Lax security
      c. Poor assignment of staff
      d. Inmate security violations
      e. Staff ignoring inmate misconduct
      f. Staff ignoring disturbances
      g. Other problems
   4. *Number of cell or bunk area shakedowns conducted in a 1-month period*
      a. *Rate per inmate*
      b. *Proportion finding contraband*
   5. *Number of urinalysis tests based on suspicion in a 1-month period*
      a. *Rate per inmate*
      b. *Proportion testing positive for opiates*

C. Drug use (6-month period)
   1. *Drug-related incidents, number and rate per capita-6*
   2. *Discipline reports related to drugs or contraband, number and rate per capita-6*

D. Significant incidents (6-month period)
   1. *Significant incidents, total and rate per capita-6*
      a. *Proportion of 6-month population involved in any incidents*
   2. *Escapes, number and rate per capita-6*

E. Community exposure (6-month period)
   1. *Furloughs, number and rate per capita-6*

F. Freedom of movement
   1. Perceived freedom of movement for inmates: Day / Evening / Night

G. Staffing
   1. *Ratio of resident population to security staff*

Dimension 2: Safety ("keep them safe")

A. Inmate safety (6-month period)
   1. Perceived likelihood of an inmate being assaulted in his living area
   2. Estimated rate (per 100 population) of armed assaults involving inmates
   3. Estimated rate (per 100 population) of assaults against inmates without a weapon

4. Estimated rate (per 100 population) of sexual assaults upon inmates
5. Estimated rate (per 100 population) of instances inmate has been pressured for sex
6. Inmates' perceived danger of being:
   a. killed or injured
   b. punched or assaulted
7. Proportion of inmates who say they have been physically assaulted by another inmate in a 6-month period
8. Proportion of inmates who say they have been physically assaulted by staff in a 6-month period
9. *Discipline reports that involved fighting or assault, number and rate per capita-6*
10. *Significant incidents involving inmate injury, number and rate per capita-6*

B. Staff safety (6-month period)
1. Rating of how the building design affects staff safety
2. Perceived danger to male staff
3. Perceived danger to female staff
4. Rating of how often inmates use physical force against staff
5. Perceived likelihood that a staff member would be assaulted
6. Proportion of staff who say they have been assaulted by an inmate in a 6-month period
7. *Significant incidents involving staff injury, number and rate per capita-6*

C. Dangerousness of inmates
1. Proportion of inmates perceived to be extremely dangerous
2. Proportion of inmates perceived to be somewhat dangerous
3. Perceived frequency of inmate possession of weapons in living quarters

D. Safety of environment (6-month period)
1. Perceived frequency of accidents:
   Housing Units / Dining Hall / Work Environment
2. Perceived occurrence in housing units of clutter that could feed a fire

E. Staffing adequacy
1. Proportion of staff and inmates who feel there are enough staff to provide for safety of inmates:
   Day / Evening / Night
2. Proportion of staff who feel there are enough staff to provide for their own safety:
   Day / Evening / Night

Dimension 3: Order ("keep them in line")

A. Inmate misconduct (6-month period)
1. Perceived frequency of physical force by inmates against staff
2. Perceived security of inmate personal property
3. Proportion of inmates who report being punished in the last 6 months:
   a. with a major sanction
   b. with a lesser sanction
4. *Number of inmates written up, as proportion of 6-month population*
5. *Discipline reports, total and rate per capita-6*
   a. Reports per inmate among those written up
6. *Significant incidents of disturbance or incitement to riot, number and rate per capita-6*

B. Staff use of force (6-month period)
1. Perceived frequency that staff have used force against inmates over a 6-month period
2. *Significant incidents in which force was used, number and rate per capita-6*
3. *Significant incidents in which restraint was used, number and rate per capita-6*

C. Perceived control
1. Agreement that staff know what goes on among inmates
2. Agreement that staff have caught and punished the "real troublemakers"
3. Perceptions of how much control inmates have over other inmates: Day / Evening / Night
4. Perceptions of how much control staff have over inmates: Day / Evening / Night

D. Strictness of enforcement (6-month period)
1. *Proportion of discipline reports that were:*
   a. *Dismissed*
   b. *Guilty of a minor report*
   c. *Guilty of a major report*
2. *Proportion of minor report convictions that received a sanction of:*
   a. *Warning/reprimand*
   b. *5-10 extra hours of duty*
   c. *15-20 extra hours of duty*
   d. *25-30 extra hours of duty*
3. *Proportion of major report convictions that received a sanction of:*
   a. *Segregation only*
   b. *Loss of goodtime only*
   c. *Segregation and loss of goodtime*
4. *Average number of goodtime days taken away*
5. *Average number of days to be spent in segregation*
6. *Proportion of major report sanctions*
   a. *Suspended at committee level*
   b. *Modified by warden*

Dimension 4: Care ("keep them healthy")

A. Stress and illness (6-month period)
1. Inmate stress scale: average of 9 items reporting feelings of mental, physical, and emotional strain
2. Average number of days an inmate was ill or injured
3. Average number of days an inmate was seriously ill enough that medical help was needed but did not go to sick call
4. *Significant incidents involving suicide attempts or self-injury, number and rate per capita-6*
5. *Significant incidents requiring first aid or infirmary visit, number and rate per capita-6*

B. Health care delivered (6-month period)
1. Proportion of inmates who used medical facilities other than for emergency problems
   a. Proportion of those who used the facilities who felt the problem was properly taken care of
2. Proportion of inmates who reported having had emergency medical treatment
   a. Proportion of those who received emergency medical treatment who felt that it was adequately handled
3. *Clinical contacts, total and rate per capita-6*
4. *Sick calls, number and rate per capita-6*
5. *Medical appointments, number and rate per capita-6*
6. *Physicals and TB tests, number and rate per capita-6*
7. *Lab appointments, number and rate per capita-6*
8. *Miscellaneous clinic visits, number and rate per capita-6*

C. Dental care (6-month period)
1. Proportion of inmates who received dental treatment
   a. Proportion of those receiving dental treatment who felt it was adequately handled
2. *Dental visits, number and rate per capita-6*

D. Counseling (6-month period)
1. The alcohol and drug counseling services have been satisfactory (agree/disagree)
2. Other counseling services have been satisfactory (agree/disagree)

3. Proportion of inmates who report having participated in some kind of counseling:
   a. Drug/alcohol counseling
   b. Therapy
4. *Psychologist contact cases per capita for 1 month*
5. *Number of contact hours per contact case for 1 month*
6. *Proportion of inmates who were involved in the following programs:*
   a. *Psychology/psychiatric; includes substance abuse*
   b. *Employment and pre-release counseling*
7. *Psychiatric visits (over a 6-month period), number and rate per capita-6*

B. Staffing for programs and services
1. *Number of program or services delivery staff (FTE):*
   a. *Medical clinicians*
   b. *Education/work*
   c. *Psychology/counseling*
   d. *TOTAL*
2. *Number of inmates (average daily resident population) per FTE staff position in programs or services:*
   a. *Per medical clinician*
   b. *Per education/work staff*
   c. *Per psychologist/counselor*
   d. *Per total program/service staff*
3. *Program or services delivery staff as a proportion of total staff*

Dimension 5: Activity ("keep them busy")

A. General
1. Inmates usually have things to do to keep them busy

B. Work and industry involvement (6-month period)
1. *Involvement in prison industry, work release, or institutional jobs:*
   a. *Proportion of population eligible*
   b. *Proportion working*
2. *Among eligible inmates, proportion involved in:*
   a. *Prison industry*
   b. *Work release*
   c. *Institutional jobs*
3. *Average work hours per week among employed inmates*

C. Work and industry evaluation (6-month period)
1. The work training program has been satisfactory (agree/disagree)
2. Have the vocational training courses provided skills that are useful?
   a. Perceived importance of learning the information presented in class
   b. Perceived understanding of the information presented in class
3. *Grievances that involved problems with work, number and rate per capita-6*

D. Education and training involvement (6-month period)
1. Proportion of inmates who report having participated in some educational program
   a. Educational
   b. Social education/pre-release skills
2. *Enrollment in education or vocational training classes:*
   a. *Proportion of population eligible*
   b. *Proportion enrolled*
3. *Among eligible inmates, proportion involved in the following programs:*
   a. *Adult basic education*
   b. *Secondary education*

   c. *College education courses*
   d. *Vocational training*
4. *Average class hours per week among those in education or vocational training programs*

E. Education and training evaluation (6-month period)
1. The general education program has been satisfactory (agree/disagree)
2. Have the academic courses provided useful skills?
   a. Perceived understanding of the information presented in class
   b. Perceived importance of the information presented in class

F. Recreation (6-month period)
1. Recreational activities are satisfactory (agree/disagree)
2. Rating of how often prison recreational facilities are used
3. Rating of how often inmates are unable to use the recreational facilities

G. Religious services (6-month period)
1. Religious services have been satisfactory (agree/disagree)
2. Rating of how often inmates attend religious services

Dimension 6: Justice ("do it fairly")

A. Staff fairness
1. Questions on aspects of staff fairness (agree/disagree)
   a. Staff let inmates know what is expected of them
   b. Staff are fair and honest
   c. Inmates are written up without cause
2. Staff are too involved in their own interests to care about inmate needs (agree/disagree)

B. Limited use of force (6-month period)
1. Staff use force only when necessary (agree/disagree)
2. Perceived frequency with which staff have used force against inmates
3. *Significant incidents in which force was used, number and rate per capita-6*
4. *Significant incidents in which restraints were used, number and rate per capita-6*

C. Grievance volume (6-month period)
1. Proportion of staff reporting having a grievance filed against them in last 6 months
2. Proportion of inmates who reported filing a grievance against staff or management
3. *Inmates filing grievances, number and proportion of 6-month population*
4. *Grievances filed, total and rate per capita-6*
5. *Number of grievances directed at individual staff*
   a. *Proportion of all grievances*
   b. *Rate per capita-6*

D. The grievance process (6-month period)
1. Perceived effectiveness of the grievance procedure
2. Perceived benefits of the grievance procedure
3. Perceived effect of grievance procedure on the quality of life
4. Proportion of inmate grievants who report their grievance was taken care of:
   a. Completely
   b. Partially
   c. Not at all
5. Proportion of inmates who did not file a grievance, who cite the following reasons:
   a. They never had any major complaint
   b. The problem was solved informally
   c. They thought it would be useless
   d. They were afraid of negative consequences
   e. Other reasons

6. *Proportion of all grievances that were appealed*

E. The discipline process (6-month period)
1. Proportion of inmates receiving a major sanction who felt it was a fair punishment
2. Proportion of inmates receiving a lesser sanction who felt it was a fair punishment
3. Perception of how many maximum security inmates really belong there
4. *Proportion of discipline guilty verdicts that were appealed*
   a. *Minor reports*
   b. *Major reports*
5. *Proportion of major report sanctions*
   a. *Suspended at committee level*
   b. *Modified by warden*

F. Legal resources and legal access (6-month period)
1. Proportion of inmates who have used the law library
2. Proportion of inmates who feel the law library has supplied adequate information
3. Proportion of inmates who feel the law library has not supplied adequate information.
4. *Grievances that involved legal resources or access, number and rate per capita-6*

G. Justice delayed (6-month period)
1. *Average number of days from the date of the discipline report until the hearing*
2. *Proportion of minor reports with hearings beyond 7-day limit*
3. *From date of grievance report until resolved by grievance officer:*
   a. *Average number of days*
   b. *Proportion beyond 20 days*
4. *From date of grievance report until resolution approved by warden:*
   a. *Average number of days*
   b. *Proportion beyond 27 days*

Dimension 7: Conditions ("without undue suffering")

A. General
1. The administration is doing its best to provide good living conditions (agree/disagree)

B. Crowding (6-month period)
1. *Average resident population as percentage of capacity*
2. *Proportion of 6-month period in which capacity was exceeded*
3. *Average number of sq. ft. per inmate in housing units*
4. Perceived occurrence of crowding in the housing units
5. Perceived occurrence of crowding outside the housing units

C. Social density and privacy
1. *Proportion of inmates who were confined in:*
   a. *Single-occupancy units of 60 sq. ft. or more*
   b. *Multiple-occupancy units with 60 sq. ft. or more per inmate*
   c. *Multiple-occupancy units with less than 60 sq. ft. per inmate*
2. Perceived amount of privacy thin the sleeping area
3. Perceived amount of privacy in the shower and toilet area

D. Internal freedom of movement
1. Perceived freedom of movement for inmates: Day / Evening / Night
2. *Proportion of inmates who were confined to housing units for over 10 hours per day*

E. Facilities and maintenance (6-month period)
1. *Residents vs. conveniences in living areas*
   a. *Inmates per shower*
   b. *Inmates per sink*
   c. *Inmates per toilet*

   d. *Inmates per telephone*
   e. *Inmates per television*
2. *Grievances about maintenance, number and rate per capita-6*

F. Sanitation (6-month period)
1. Perceived occurence of insects, rodents, or dirt in the housing units
2. Perceived occurence of insects, rodents, or dirt in the dining hall
3. Perceived occurence of a bad odor or poor air circulation in the housing units

G. Noise (6-month period)
1. Perceived noise level in the evening hours
2. Perceived noise level in the sleeping hours

H. Food (6-month period)
1. Quality of food at the institution
2. Variety of the food at the institution
3. Proportion of inmates who feel enough food is served for the main course
4. Proportion of inmates who feel the appearance of the food is appealing
5. *Grievances involving food complaints, number and rate per capita-6*

I. Commissary (6-month period)
1. There is an adequate commissary selection (agree/disagree)
2. Proportion of inmates who reported:
   a. No errors in their commissary account
   b. Errors that were corrected
   c. Errors that were not corrected

J. Visitation (6-month period)
1. Proportion of inmates who find it hard to arrange visits with family and friends

2. Proportion of inmates reporting family and friends who find it hard to arrange visits
3. Average number of visitors reported by inmates
4. Rating of the quality of visits
5. Perceived occurence of too many people in the visiting area
6. Rating of how often it is hard to talk to a visitor because of noise in the visiting area
7. Proportion of inmates who feel the visiting room has enough furniture
8. Proportion of inmates who feel the visiting room has enough vending machines
9. *Grievances involving visitation and mail problems, number and rate per capita-6*

K. Community access (6-month period)
1. *Furloughs, number and rate per capita-6*

Dimension 8: Management ("as efficiently as possible")

A. Job satisfaction (6-month period)
1. Institution satisfaction index: average across 3 items expressing positive feelings toward the institution
2. Proportion of staff who reported filing a grievance against management
3. Proportion of staff who have not filed a grievance, who cite the following reason:
   a. Never had a major complaint
   b. Problem was taken care of informally
   c. Thought it would be useless
   d. Afraid of negative consequences
   e. Other reason

B. Stress and burn-out
1. Job stress index: average across 5 items regarding how often staff experience stress on the job
2. Hardening-toward-inmates index: average across 3 items regarding how often staff feel indifferent or harsh toward inmates

3. Relating-to-inmates index: average across 7 items regarding how often staff feel positive about the way they work with inmates

C. Staff turnover
   1. *Staff on reference date divided into:*
      a. *Vacancies on reference date*
      b. *Terminations during previous 6 months*
   2. *Termination rate divided by relevant BOP tenure-specific rate*

D. Staff and management relations
   1. Management and communication index: average across 10 items expressing positive appraisals of the organization and authority of management
   2. Relationship-with-supervisor index: average across 6 items regarding how positive staff feel toward their supervisor
   3. Rating of how the building design affects communication among line staff
   4. Rating of how the building design affects communication between line staff and supervisors

E. Staff experience
   1. Average number of years worked at this institution
   2. Average number of other facilities worked in prior to this facility
   3. *Average years in corrections*
      a. *Total staff, minus services staff*
      b. *Custody staff*
      c. *Top administrators*

F. Education
   1. *Average years of education (excluding services staff)*

G. Training
   1. Training index: average across 5 items regarding the effectiveness and quality of the training program

H. Salary and overtime (6-month period)
   1. *Average salary (in $1,000's)*
      a. *Total, minus services staff*
      b. *Custody staff*
      c. *Top administrators*
   2. Average number of overtime hours worked in a week
   3. Average proportion of overtime compensated by:
      a. Extra pay
      b. Compensatory time
      c. No compensation

I. Staffing efficiency
   1. *Number of resident inmates per FTE staff member*

ADDITIONAL SUBMISSIONS FOR THE RECORD

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Huntsville, TX, July 31, 1995.

HON. ORRIN HATCH,
U.S. Senate,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR HATCH: I would like to take this opportunity to thank you for inviting me to testify before the Senate Judiciary Committee on behalf of the American Correctional Association. The hearing, I believe, addressed a number of critical issues that the nation's state prisons face in their efforts to incarcerate violent offenders and provide for truth-in-sentencing.

As you know, the Texas Department of Criminal Justice (TDCJ) has been working diligently with the Texas Legislature over the past few years to provide tougher penalties for those who commit violent crimes, and Texas continues to be in the forefront of states imposing the longest sentences and requiring the longest time served for violent criminals. We have also led the nation in creating the prison capacity necessary to enforce our laws.

We in Texas appreciate the work of the Senate Judiciary Committee under your leadership in addressing the critical areas of violent crime, truth-in-sentencing, victims right, and relief from civil actions in cases of prison overcrowding.

Thank you, again, for the opportunity to share my views with the Committee. If I can ever be of any assistance to you or your staff in these important areas, please do not hesitate to call.

Sincerely,

JAMES A. COLLINS,
Executive Director.

PAUL S. KENYON, M.D., P.C.,
BOARD CERTIFIED ORTHOPEDIC SURGERY,
Jackson, MI, July 17, 1995.

Senator SPENCER ABRAHAM,
U.S. Senate,
Washington, DC.

DEAR SPENCE, First I would like to thank you for serving Michigan as our first Republican Senator in many years. I appreciate your hard work and stand behind you as you try to reform Washington.

Spence, as a member of the Senate Judiciary Committee I want to discuss a problem that I believe is going to destroy this country. This has to do with the abuses of power occurring on the Federal bench. I believe that within 20 or 30 years this country is going to litigate itself out of existence. I believe that this is of the utmost importance and something needs to be done about somehow curbing the power of the demagogues that currently pass as Federal judges. I believe that the Federal court system in this country, again, is going to lead to our ruin. We need to change it, and we need to change it *now!*

One way that I directly see these abuses has to do with litigation of the inmates in the State of Michigan. Local, state and federal resources are being wasted to comply with Federal injunctions and numerous frivolous lawsuits that are filed in Federal court by inmates. I am currently involved in four of them. I will describe them to you as follows:

The first has to do with a convicted child molester who was trying to escape and was shot and had retained pellets in his ankle. I offered to remove them. He refused to sign the surgical consent and is now suing me in Federal court because of an Eighth Amendment violation for cruel and unusual punishment because I failed to treat him. This is ridiculous! U.S. Marshals have had to come to my office to serve subpoenas. Numerous precious resources have been wasted, and the Federal judges have allowed this to continue. I anticipate this case going to trial, again, wasting my time, the state's time and Federal resources before this is finally thrown out. This needs to be changed, and changed now.

I have another inmate who is suing me for a similar situation. This inmate was going to see me in my clinic for a new problem but was so unruly

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F. Education
1. *Average years of education (excluding services staff)*
G. Training
1. Training index: average across 5 items regarding effectiveness and quality of the training program

in the waiting room that he had to be removed by guards. Again, he is suing me for failure to treat.

Another inmate is suing me because I would not do an elective operation such as a knee replacement because I did not feel that this man wanted to get any better. Again, I am being sued because I did not perform elective surgery on a inmate.

Another inmate is suing me for a problem that I never even evaluated him for. He had a A–C separation in his shoulder which is normally treated by doing nothing. He was seen elsewhere and the thought was entertained of possibly doing an elective surgical procedure which I would totally disagree with. Again, I am being sued for failure to treat.

None of these inmates currently have lawyers. They are all doing these lawsuits on their own and going through the Federal courts. The judges in the Federal courts are allowing these to pass through and, again, are causing great expense to the local and state governments and the federal taxpayers. These are clogging the Federal courts and this needs to be changed. The least that I think that we should be able to do is to disallow inmates to file these ridiculous, frivolous lawsuits. If they do, we should at least require them to put up $500–$1,000 to cover the ridiculous courts costs. If we do not, we are going to litigate ourselves out of existence.

I am also very much dismayed by the activist positions that the federal judges take. Currently the citizens of Michigan do not even run the prison system. It is being run by Judge Ensling out of Kalamazoo who has direct authority to pull money out of the State of Michigan coffers to fund his pet projects for prisoners. This is absolutely ridiculous and needs to stop.

Again, I have a young child and you have two young daughters. If we do not make changes in the federal court systems to patrol these abuses of power by federal judges, I don't believe that we are going to have much of a country left for our children. You are on the Senate Judiciary Committee and I would appreciate your moving the Judiciary in this direction so that necessary changes could be made. I think from a political standpoint for Republicans that this is a win-win situation. I would be more than willing to testify before any Senate committee regarding these abuses of power and of the court system especially by inmates.

I anxiously await your reply. I think that this is one of the core issues for Republicans and citizens of this country because if the changes aren't made, I don't see much of a future for us.

Sincerely,

PAUL S. KENYON, M.D.

PREPARED STATEMENT OF THE AMERICAN BAR ASSOCIATION

On February 10, the House of Representatives approved the "Stop Turning Out Prisoners Act" ("S.T.O.P.") (H.R. 667, Title III), an Act whose apparent purpose is, and clear effect would be, to curb adult and juvenile inmates' ability to obtain redress for the violation of their constitutional rights. This Act was rushed through the House of Representatives, with virtually no discussion of its unconstitutionality, the burdens it would place on the federal courts, and the adverse, and potentially disastrous, effects the Act would have on the already difficult job correctional officials face in managing this nation's adult and juvenile correctional facilities.

The "Stop Turning Out Prisoners Act" has now been introduced in the Senate (S. 400). Set forth below is an analysis prepared by the American Bar Association of the provisions of the Act and just some of the many problems with the Act. Because of these many problems, the American Bar Association urges the members of the Senate to vote against S.T.O.P. At the same time, the ABA recommends that Congress provide for the appointment of a broad-based task force to study the subject of inmate litigation and provide recommendations to Congress about steps that can be taken to minimize the burdens on courts and correctional officials of inmate litigation while ensuring that conditions of confinement in correctional facilities are constitutional and that the constitutional right of adult and juvenile inmates to have meaningful access to the courts is preserved.

1. *Section 3626(a):* This section of S.T.O.P. places a number of limitations on the prospective relief that may be granted in a civil-rights suit challenging the conditions of confinement in an adult or juvenile correctional facility. Subsection (a)(1) provides that the relief is to be strictly limited to what is "necessary" to remedy the illegal conditions of confinement. Subsection (a)(2) furthermore prohibits federal courts from reducing or limiting the inmate population in a correctional facility unless crowding is the "primary cause" of the unconstitutional conditions of confinement and no other relief can remedy those unconstitutional conditions.

One of the chief problems with § 3626(a) is that it ignores the reality that most major class-action suits contesting the conditions of confinement in adult and juvenile correctional facilities are resolved through a settlement. When government officials recognize that a court will most likely find conditions of confinement in the correctional facility to be unconstitutional, they generally decide that it is in the best interests of the people of the state or locality to enter into an agreement to remedy the unconstitutional conditions of confinement.

The ironic result of § 3626(a) is that the federal government, by legislative fiat, will be preventing states from resolving litigation in a way which the states have concluded is in their best interests. Often, when attempting to remedy unconstitutional conditions of confinement, states will agree to take steps which are a reasonable and effective means of remedying the problem and yet technically not "necessary" within the meaning of § 3626(a).

For example, assume that inmates bring a civil-rights suit because large numbers of prison inmates in a maximum-security prison are being beaten, raped, and even killed by their cellmates. The Supreme Court has made it quite clear that the Constitution does not generally mandate single celling. *See, e.g., Rhodes* v. *Chapman,* 452 U.S. 337 (1981). State officials responding to the unconstitutional conditions of confinement might, however, decide that the best way to remedy the problem of inmate violence is by single celling inmates. Such single celling might not be "necessary," as required by § 3626(a), to cure the constitutional violation, since prison officials could take other steps to curb inmate violence, such as increasing the number of staff members monitoring inmates in their cells. Yet the single celling of inmates would certainly be a reasonable way of remedying the unconstitutional conditions of confinement prevailing at the prison. *See* American Correctional Association, *Standards for Adult Correctional Institutions,* Standard 3–4128 (3d ed. 1990) (single cells required in maximum-security prisons).

Section 3626(a)(2) similarly ties the hands of state and local officials as well as judges. This subsection prevents a court from placing a population cap on a prison or prison system unless no other relief will redress the constitutional violations caused by overcrowding. This requirement will, however, rarely, if ever, be met since the construction of new prisons can, at least for a limited period of time, alleviate crowding and its adverse effects. The practical effect of § 3626(a)(2) would therefore often be to require states to build new prisons to alleviate unconstitutional crowding, even when officials would prefer to ease crowding by placing a cap on the prison population and developing cost-effective community-based sanctions for the punishment of the many nonviolent offenders whose incarceration is not necessary to protect the public's safety.

Section 3626(a) not only represents an unprecedented encroachment on the prerogative of state and local governments to enter into agreements to remedy constitutional violations, but it will also impose added burdens on already overburdened federal courts. Because of § 3626(a), courts will no longer be able to simply enforce a settlement agreement that the parties have decided is in everyone's best interests to enter into. Instead, courts will have to hold lengthy hearings to determine whether the agreed-upon relief is indeed "necessary," "narrowly drawn," and the "least intrusive means" of remedying the constitutional violation. And since the necessity of the relief ordered depends on the nature and scope of the constitutional violations in question, courts will have to hold what are in effect full-scale trials to ensure that the relief conforms to the requirements of § 3626(a). The incentive to settle conditions-of-confinement cases and the advantages of doing so will then be lost.

2. *Section 3626(b):* Section 3626(b) provides for the automatic termination of the prospective relief granted in conditions-of-confinement cases. Subsection (b)(1) provides that such relief will automatically end two years after the date a court found conditions in a correctional facility to be unconstitutional or two years after the enactment of S.T.O.P., whichever is the latest date. The critical flaw in this subsection is that Congress is directing that court orders be set aside even if the constitutional violations which gave rise to the courts' orders persist. This subsection not only raises grave separation-of-powers concerns, but disregards the constitutional right of inmates to have "meaningful access" to the courts (*Bounds* v. *Smith,* 430 U.S. 817, 823 (1977)) and their eighth amendment right not to be subjected to cruel and unusual punishments.

Subsection (b)(2) provides for the immediate termination of prospective relief in conditions-of-confinement cases when the relief was ordered or approved by a court without a finding that the conditions of confinement in an adult or juvenile correctional facility were unconstitutional. Once again, court orders will be voided whether or not the conditions of confinement to which adult and juvenile inmates are presently subjected are unconstitutional.

This subsection raises the same constitutional concerns that subsection (a) does. In addition, the effect of this subsection will be to place a potentially enormous burden on the federal courts.

As of January 1, 1994, thirty-nine states and the District of Columbia, Puerto Rico, and the Virgin Islands had one or more prisons operating under a consent decree or other court order. *Status Report: State Prisons and the Courts—January 1, 1994,* The Nat'l Prison Project J. 3–12 (Winter, 1993/94). More than a quarter of the country's 503 largest jails are also operating under court order. Bur. of Just. Stat., U.S. Dep't of Just., *Jail Inmates 1992* 5 (Aug. 1993). When these court orders are added to the court orders governing some smaller jails and juvenile correctional facilities, the number of correctional facilities operating under court order because of conditions of confinement rises to well over two hundred.

As mentioned earlier, a large number of these court orders stem from a settlement agreement between the parties. And as part of these agreements, the parties typically include in the consent decree a statement to the effect that the defendants, by agreeing to settle the case, are not admitting that the conditions of confinement in the correctional facility are unconstitutional. This statement is included in the consent decree so that the decree is not later used against correctional officials in other lawsuits contesting the conditions of confinement.

Congress, through §3626(b)(2), will be setting aside the court orders in these cases which the parties had agreed to settle. And if conditions in the correctional facilities in question are still unconstitutional, the juvenile or adult inmates in those facilities will most likely bring another lawsuit, thereby placing on the courts the burden of adjudicating these lawsuits and resolving issues already resolved by the parties themselves.

3. *Sections 3626 (c) and (d):* Section 3626(c)(2) provides for an automatic stay of prospective relief after a prescribed period of time upon the filing of a motion to modify or end prospective relief in a conditions-of-confinement case. Under §3626(d), this motion can be brought not only by the defendants in the lawsuit, but by any government official "affected by" a population cap on a correctional facility, including prosecutors.

What §3626(c)(2) does in effect is to permit defendants in these lawsuits and other government officials to trump a court order simply by filing a motion. For example, thirty days after defendants or other government officials who have standing under S.T.O.P. file a motion to end prospective relief in a conditions-of-confinement case, a stay will go into effect, whether or not conditions in the correctional facility are flagrantly unconstitutional and even life-threatening. Section 3626(c)(2) therefore not only permits correctional and other government officials to usurp judicial authority, but will force adult and juvenile inmates, at the whim of those officials, to continue to endure and suffer harm from unconstitutional conditions of confinement.

4. *Section 3626(e):* In many conditions-of-confinement cases, courts appoint special masters or monitors to assist them in ensuring that the court's orders are enforced. When questions are raised about whether correctional officials are complying with a court order, for example, a court monitor will submit a report to the court containing his or her objective findings concerning the matter in dispute. The monitor will also often assist the parties in resolving disputes about the requirements of a consent decree or other court order, thereby avoiding the necessity for court intervention.

Section 3626(e) would permit only United States magistrates to serve as court monitors and would limit their role in conditions-of-confinement cases to resolving complex factual issues submitted to them by the court. This section would have the perverse effect of necessitating greater intrusions by courts into the administration of correctional facilities since magistrate judges would be responsible for monitoring implementation of court orders rather than the wardens, correctional superintendents, and other correctional experts who generally serve as court monitors at the present time. In addition, court monitors could no longer help to avoid court involvement in many disputes between the parties by assisting them to informally resolve those disputes.

5. *Section 3626(f):* This subsection substantially curtails the attorney's fees which may be awarded under 42 U.S.C. §1988 in lawsuits in which adult or juvenile inmates have prevailed. This subsection will have the effect of eviscerating the constitutional rights of adult and juvenile inmates and, like so many other parts of S.T.O.P., will abnegate the effect of court orders in conditions-of-confinement cases.

The Supreme Court has repeatedly observed that the purpose of §1988 is to encourage attorneys to assist others in the vindication of their constitutional rights by providing for the award of attorney's fees to plaintiffs who prevail in civil-rights

suits. *See, e.g., City of Riverside* v. *Rivera,* 477 U.S. 561, 576–578 (1986). Section 1988 is designed not only to protect individuals whose constitutional rights have been violated, but to further the public's interest in the enforcement of the Constitution and civil-rights laws. *Id.* at 574.

These purposes will, however, be substantially undermined by §3626(f) since the limitations which it places on attorney's fees will discourage attorneys from representing inmates in conditions-of-confinement cases. Subsection 3626(f)(2), for example, requires that the attorney's fees awarded be "proportionally related" to the court-ordered relief obtained by adult or juvenile inmates. In *Riverside* v. *Rivera,* 477 U.S. 561 (1986), the Supreme Court refused to adopt such a proportionality requirement. The Court recognized that a strict proportionality requirement failed to take into account the nonpecuniary benefits to individuals and the public of vindicating constitutional rights and ignored the deterrence of future constitutional violations which occurs when plaintiffs prevail in civil-rights suits. The Court also recognized that many meritorious civil-rights claims would simply never be brought if a proportionality requirement were adopted.

The Supreme Court has, however, held that the plaintiff's degree of success in a §1983 suit is one factor which should be considered by a court when determining the size of the fee award to be granted a prevailing plaintiff. *Hensley* v. *Eckerhart,* 461 U.S. 424 (1983). In addition, it must be remembered that the defendants in conditions-of-confinement cases, as well as other civil-rights cases, have a great deal of control over the size of attorney's fee awards. Those awards can be limited by promptly settling, rather than contesting lawsuits involving meritorious claims and by promptly complying with, rather than resisting court orders. If the plaintiffs should refuse to settle, the defendants can still limit their liability for attorney's fees by tendering a reasonable settlement offer to the plaintiffs. If the judgment obtained by the plaintiffs is not as favorable as the relief offered by the defendants, the defendants will not be liable for the plaintiff's attorney's fees incurred after the date of the offer. *Marek* v. *Chesny,* 473 U.S. 1 (1985). Section 3626(f) is therefore not only unsound since it will undermine the enforcement of the Constitution, but unneeded to avoid the award of excessive attorney's fees in conditions-of-confinement cases.

The proportionality requirement of §3626(f) is not the only part of that section which will have nefarious effects on the enforcement of constitutional rights. Section 3626(f)(1) limits the award of attorney's fees in conditions-of-confinement cases to those "directly and reasonably incurred in proving an actual violation" of a federal right. One of the adverse consequences stemming from the language of this subsection is that it would seem to foreclose the recovery of attorney's fees incurred when enforcing court orders in conditions-of-confinement cases.

When inmates prevail in conditions-of-confinement cases, their attorneys generally recognize that only half of the battle has been won because typically, and unfortunately, many defendants drag their heels in bringing their facilities into compliance with the requirements of a consent decree or court order. The plaintiffs must continually nudge the defendants to meet their legal obligations, and the plaintiffs are entitled to attorney's fees incurred in enforcing the courts' orders. *Duran* v. *Carruthers,* 885 F.2d 1492 (10th Cir. 1989). If the right to these attorney's fees is withdrawn by Congress, many court orders and consent decrees in conditions-of-confinement cases will become nothing more than an empty, and unenforceable, set of words.

For all of the reasons set forth above, the American Bar Association strongly urges members of the Senate to vote against the "Stop Turning Out Prisoners Act." S.T.O.P. reflects an insensitivity to the constitutional rights of adult and juvenile inmates, encroaches on the authority of state and local governments to settle conditions-of-confinement cases, and places enormous burdens on the federal judiciary. By making it difficult, and sometimes impossible, for inmates to obtain redress for the violation of their constitutional rights through nonviolent means, S.T.O.P. will also exacerbate tensions in correctional facilities and make the already difficult job correctional officials face in maintaining control in those facilities even more difficult.

If Congress is truly concerned about freeing correctional facilities from court supervision, there are several meaningful steps that Congress can take to accomplish this objective—steps which do not undermine the Constitution, states' rights, and judicial authority. One of the principal reasons for the unconstitutional conditions in so many of this nation's correctional facilities is the overcrowding that plagues those facilities. The federal government can greatly assist the states and local governments in easing this crowding and bringing their correctional facilities into compliance with the Constitution by providing technical assistance in the development of meaningful community-based sanctions for the punishment of nonviolent offenders whose incarceration is not necessary to protect the public safety. In addition, the

federal government could condition certain monetary assistance to state and localities on their compliance, within a defined period of time, with court orders governing conditions of confinement.

The American Bar Association stands ready to assist Congress in devising means to minimize the need for litigation to bring adult and juvenile correctional facilities into compliance with the Constitution. And we welcome, and would again request, the opportunity to discuss our concerns about S.T.O.P. in a hearing before the Senate Judiciary Committee.

AMERICAN BAR ASSOCIATION,
SECTION OF CRIMINAL JUSTICE,
Washington, DC, February 17, 1995.

DEAR SENATOR: I am writing on behalf of the American Bar Association to urge you to oppose including in S. 3 the provisions of the "Stop Turning Out Prisoners Act" ("STOP") as approved on February 10 by the House of Representatives in H.R. 667. This legislation lacks constitutional sufficiency, violating the principles of the Tenth Amendment, which reserves certain powers to the states.

THe "Stop Turning Out Prisoners Act" impedes the ability of adult and juvenile inmates to obtain redress for the violation of their constitutional and other legal rights in a number of different ways. The Act for example, limits the prospective relief that courts can order in lawsuits challenging conditions of confinement, automatically terminates prospective relief after a two-year period, and places substantial limits on the attorneys' fees which can be awarded inmates' attorneys—an action which could have a serious "chilling effect" on inmates' efforts to secure the vindication of their rights.

STOP will lead to a number of different problems, just a few of which are briefly capsulized below.

1. *Much of the "Stop Turning Out Prisoners Act" is Unconstitutional.* The United States Supreme Court has held that inmates have the constitutional right to have "meaningful access" to the courts. *Bounds* v. *Smith,* 430 U.S. 817 (1977). Much of the "Stop Turning Out Prisoners Act," however, flies in the face of this constitutional command. To give an example of nut one of the constitutional defects in the Act, a section provides that prospective relief ordered by courts in lawsuits contesting the conditions of confinement in prisons, jails, and other adult and juvenile correctional facilities must automatically terminate after two years. Even if the conditions of confinement to which inmates and juveniles are subject are still flagrantly unconstitutional two years later, the inmates and juveniles are, by legislative fiat, denied relief. Exercise of the right of inmates and juveniles to have access to the courts can be rendered an empty ritual if the resources are simply not available to rectify the violations within two years. The right not to be subjected to cruel and unusual punishment can be stripped of all meaning if recalcitrant or dilatory compliance delays implementation beyond twenty-four months.

2. *The "Stop Turning Out Prisoners Act" will Place Undue Burdens on Federal Courts.* Although STOP's intent may be to relieve the burdens of state corrections and other officials, it will have the side effect of placing additional burdens on an already overburdened federal judiciary. Much of STOP is designed to strictly limit what courts can do to remedy unconstitutional or other illegal conditions of confinement. But in order to ensure that those limits have not been exceeded—that, for example, the relief provided goes "no further than necessary to remove the conditions that are causing the deprivation" of federal rights, courts will have to hold extensive and time-consuming hearings.

A very large percentage of the major lawsuits challenging conditions of confinement in adult and juvenile correctional facilities are ultimately resolved through a settlement, sparing the parties and the courts the time and expense of a trial. These benefits of settlement will, however, be lost if a federal court must then in effect hold a trial to determine whether the strict, and as is discussed below, unrealistic limits placed by STOP on the authority of courts to grant remedial relief are met.

3. *The "Stop Turning Out Prisoners Act" Betrays a Lack of Understanding of Court Procedures and Legal Remedies and Encroaches on States' Rights.* STOP ignores the limitations which already exist on the power of federal courts to grant equitable relief. For example, as the Supreme Court has recognized, when a court has found, after a trial, that the conditions of confinement at a juvenile or adult correctional facility are unconstitutional, the court's remedial order must be tailored to cure the constitutional violation. *Rufo* v. *Inmates of the Suffolk County Jail,* 112 S. Ct. 748 (1992). When the state and aggrieved parties agree, however,

that remedial steps should be taken, they have the prerogative, and should have the prerogative, to devise a remedial package which most effectively redresses the illegal conditions of confinement, even if the agreed-upon relief goes somewhat beyond the specific requirements of the Constitution.

To give but one example of the flexibility which courts and parties need to effectively remedy illegal conditions of confinement, assume that juveniles in a juvenile detention facility bring a class-action § 1983 suit because juveniles are being severely beaten by correctional officers. The parties agree that the juveniles' constitutional rights are being violated and enter into a consent decree. Part of that decree provides for more training of correctional officers in the handling of juveniles to avert the unconstitutionally excessive use of force.

The Constitution itself, however, does not mandate such training, and such court-ordered training might technically exceed the limitations placed by STOP on court-ordered relief. Yet such training, whether or not "necessary" to cure the constitutional violation, is a reasonable means of doing so. States should not be deprived by Congress of the leeway they need to settle these and other lawsuits in a way which best serves the interests of the people of the states.

4. *The "Stop Turning Out Prisoners Act" will Fuel the Already High Tensions in This Nation's Correctional Facilities.* One of the values of prisoners' civil-rights suits is that they provide an outlet through which juvenile and adult inmates whose legal rights have been violated can express their grievances through non-violent means and obtain redress for the violation of their rights. STOP places a number of unreasonable and insurmountable obstacles in the path of inmates seeking the vindication of their constitutional and other legal rights. The practical effect of STOP and some of the related provisions concerning inmate litigation in H.R. 667 is to eliminate litigation as an effective means of redressing violations of inmates' rights. Some inmates, unfortunately but undoubtedly, will then, at some point, turn to violent means to protest the sordid conditions of their confinement. In short, the end results of this legislation will, in the long run, prove to be not only short-sighted, but tragic.

The foregoing problems arise because STOP violates fundamental principles. These principles are incorporated into Standards of the American Bar Association. The *ABA Standards for Criminal Justice: Legal Status of Prisoners* provide that inmates are to have "free and meaningful access to the judicial process" and to have the same rights that members of the general public have to obtain redress for the violation of their rights. *See* Standards 23-2.1 and 23-8.5. The *IJA/ABA Juvenile Justice Standards* also reflect a concern about juveniles' right of access to the courts. The curbs on attorneys' fees in STOP would, for example, undermine juveniles' ability to contest the conditions of their confinement, in contravention of Standard 7.2(N).

For all of the reasons outlined above, the American Bar Association urges you to vote against STOP. Should this legislation proceed any further in Congress, we would request that hearings be held on STOP and that the American Bar Association be afforded the opportunity to further explain the grave problems in this Act and related provisions in H.R. 667.

At the same time, however, we would like to offer our assistance to Congress, or perhaps a Commission established by Congress, in studying civil-rights litigation involving prisoners and juveniles and the steps that could be taken both to ensure that legitimate grievances are effectively and expeditiously redressed and that frivolous claims do not burden the court system. The Corrections and Sentencing Committee of the ABA's Criminal Justice Section is already studying these matters and will be reporting its recommendations to the American Bar Association.

If the American Bar Association can provide you with further information about H.R. 667, please contact me or Tom Smith, the Director of the Criminal Justice Section.

Sincerely,

E. MICHAEL MCCANN,
Chairperson of the ABA Criminal Justice Section.

PREPARED STATEMENT OF KENNETH KUIPERS, PHD, ON BEHALF OF THE NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am Kenneth Kuipers, PhD, of Grand Rapids, Michigan where I am a County Commissioner of Kent County. I am also the National Association of Counties' (NACO's) representative to the Board of Directors of the National Commission on Correctional Health Care (NCCHC).

Currently, I am the Chair-elect of the NCCHC Board and will assume the office of Chairman in November at the Board's annual meeting here in D.C.

We very much appreciate the opportunity you have provided us to present the concerns that NCCHC has with respect to legislation pending before you, S. 400.

At the outset, let me say that my personal concerns in regard to the S.T.O.P. legislation are the same as those of the National Commission. While most discussion surrounds the effect of the bill's provisions on prisons and prison systems, passage of S. 400 will have an equal or even greater effect on county governments in their responsibility to provide for the detention and incarceration of pre-trial and convicted prisoners. On any given day, there are nearly 500,000 prisoners in the nation's county jails. In any recent year, more than 11 million men and women are released from prisons and jails. Legal actions brought by jail inmates who allege Constitutional deficiencies in their incarceration, and the litigation and court decrees that follow, are as much concern to the counties and their commissioners as are the actions brought by state and federal prisoners and the subsequent court orders and decrees to Congress and to state legislators and their departments of corrections.

If I may, allow me a few moments to describe a unique organization—the National Commission on Correctional Health Care—so that our credentials are understood.

The National Commission on Correctional Health Care, a not-for-profit 501(c)(3) organization, is supported by 36 national professional organizations representing the fields of health, law, and corrections, including the National Sheriffs' Association; the National District Attorneys' Association; the American Medical Association; and my own organization, the National Association of Counties. (Please note that while we enjoy the privilege of wide-spread professional support, the opinions we express here are those solely of the National Commission on Correctional Health Care and not necessarily those of any supporting organization).

NCCHC is the only organization devoted solely to establishing standards for health care in corrections, providing technical assistance to correctional systems and institutions, and conducting and publishing research in the correctional health care field. The NCCHC's published *Standards for Health Services* (separate volumes for prisons, jails, and juvenile confinement facilities) are in use throughout our country, and help jails, prisons, and juvenile confinement facilities increase their organizational effectiveness, improve the overall health status of their inmates and staff, and reduce risk of adverse court judgement.

Further, NCCHC's voluntary accreditation program has been hailed as a major factor in the substantial progress made in the last twenty years toward improving the availability, accessibility, and quality of medical, mental health, and dental care provided to prisoners, detainees, and juveniles in confinement. Some four-hundred prisons and jails are in our *voluntary* accreditation program. Each has been site-visited by a team of medical and health services administration experts and provided a written report with findings. These evaluation visits are repeated at least every three years (more often if needed) and, in the interim, the accredited facilities file verified annual reports with NCCHC detailing any changes since the last on-site survey. There are also many more hundreds of prisons, jails, and juvenile confinement facilities that use the National Commission's health services standards to guide them in developing and managing their health care system.

It is this "hands-on" experience that qualifies NCCHC to come before you today to comment on S. 400, which we believe would alter the progress made in the last 20 years to upgrade the medical care in correctional institutions to an acceptable Constitutional level.

In our twenty years experience, we have evaluated the health services of a good many correctional institutions and systems that were under court order or consent decree. At the beginning, in the early and mid-70's, we were likely to find that health services were bartered for by inmates; that much of health care was provided by non-licensed personnel, including other inmates; that mental health care was seriously below any acceptable minimal standard; and that dental care, when available at all, consisted solely of pulling teeth. Very often, little attention was paid to the overall cost burden that shifted to the taxpayer as the inmate or detainee was released to the community with disease acquired from other inmates or that festered from the lack of treatment while incarcerated. Please note again that over 11 million inmates are released from prisons and jails each year.

Today, the situation is considerably improved, though no one would claim that the problems relating to the provision of adequate and constitutional health care to the incarcerated have disappeared. While there are a good number of correctional institutions that have not yet subscribed to meeting national standards for health serv-

ices, their numbers continue to decrease as correctional administrators wisely decide to meet health standards set by a maturing society.

We recognize that in some—or even most—instances, prisoner instituted litigation is burdensome, costly, and unwarranted. Further, we understand that in some situations court orders or decrees seem to have gone beyond a judicial sphere, or a court's supervision of its decrees may seemingly have gone beyond the pale of good judicial judgement. But these, in our experience, are not the norm. Instead, what has come to pass since the 1970's is the complete turnabout of conditions in county jails and prisons. Turnabouts that often are the result of court actions or the threat of such actions being visited on the state's department of corrections or the county's jail system.

To, in effect, call a halt to the involvement of the courts would start us back on a path leading to where we were twenty and more years ago.

(As an aside, let me note that we often quietly hear from corrections administrators that they are grateful for the court orders, since only as a result of such actions are they able to correct serious health services deficiencies; and, that without the court's involvement they can't draw the attention of the budget people).

Now to comment on sections that are particularly within the purview of our experience and knowledge.

Section 3626(a) Requirements for Relief—subparagraph (1) limits prospective relief in a prison conditions case to a narrowly drawn order. On its face, it appears as a reasonable requirement—one that courts would observe in any case. However, on closer thought, it needs to be recognized that gains for both plaintiffs and defendants often come about when other factors are thrown into the remedial pot. For example, in the process of remedying one fault, another more substantial one may be created. Requiring double-celling (two inmates per cell) may be fine in a department of correction (DOC) multi-prison system, but inappropriate in one of its facilities, or in a part of a facility, say, where mental health conditions are pervasive. Or, on the other side of the coin, requiring single-celling may run in the face of sound medical judgement that calls for multiple-celling where inmates (or one inmate) may be contemplating suicide (the leading cause of death in jails).

Limiting prospective relief seems to us to be an unnecessary restriction on the courts—one that may curtail an occasional abuse in discretionary power while, at the same time, creating a whole new set of problems the solution for which is likely to be costly, time consuming, and burdensome on the resources of courts and correctional institutions.

Section 3626(b) Termination of Relief—This provision would automatically terminate prospective relief with respect to prison conditions within two years after the finding of a violation of a federal right or the enactment of this legislation.

In our experience, two years does not even begin to provide sufficient time for the correction of a deficiency in health services that is present and clear to all parties. In most prison condition suits, the flaws in the correctional system's health services program require substantial changes: the development of new procedures and policies; hiring of professional personnel currently not on staff (this, alone, may take the two years to accomplish); sometimes, the provision of adequate space to provide—say—infirmary space, or special rooms to handle communicable diseases, or space for a dentist, or for the evaluation and treatment of mental health patients; and time for a "track record" to confirm that the situation has been corrected.

An automatic termination of the court's involvement in the follow-up to its decree, without regard to whether serious faults have been remedied is, in our opinion, simply wrong.

Section 3626(e) Special Masters—This provision would require the special master or monitor to be a United States magistrate and to limit his or her findings to complicated factual issues submitted to that master by the court.

It is our experience that the health services issues assigned to the special masters and monitor are almost always of complicated factual situations. While the federal magistrates are most likely to be competent in many matters, they are not likely to be knowledgeable in medical related issues. Nor are they likely to acquire that knowledge during the course of their work. We find that the people currently being assigned by the courts as masters or/and monitors are well qualified by experience and education to enter into the morass of complicated medical and administrative issues and effect a successful conclusion for all the involved parties.

Further, the restriction against extending the function of a special master is not, in our opinion, well founded. In the process of righting a situation, the correctional facility, its medical staff, and the DOC may agree with the complaining party and their attorneys that the needed result may best be acquired in a way not specifically designated by the Court. It does not seem to be good common sense to hold to restrictive language when all parties agree that a small detour would be beneficial to the government, DOC, and plaintiffs in resolving the issue.

We believe, and so recommend, that court supervision through a master or/and monitor not be limited as provided in this paragraph (e).

Mr. Chairman and Members of the Judiciary Committee, in the main, it is our opinion that consent decrees, enforceable by the issuing courts, have been a major factor in the needed improvement of medical, dental, and mental health conditions in the nation's prisons, jails, and juvenile confinement facilities. The courts have helped a maturing society to its understanding of the purpose of incarceration—effective punishment through the deprivation of liberty. We should not be moving back to the way it was. Not for the counties' and states' sake; not for the correctional institutions' sake; not for the sake of the inmate who needs medical or mental health treatment; not for the sake of the community to which the inmate or prisoner returns; not for our country's sake.

No, not for the sake of any of us.

SUPPORTING ORGANIZATIONS

American Academy of Child & Adolescent Psychiatry
American Academy of Family Physicians
American Academy of Pediatrics
American Academy of Physicians Assistants
American Academy of Psychiatry & the Law
American Association of Physician Specialists
American Association of Public Health Physicians
American Bar Association
American College of Emergency Physicians
American College of Healthcare Executives
American College of Neuropsychiatrists
American College of Physicians
American Correctional Health Services Association
American Counseling Association
American Dental Association
American Diabetes Association
American Dietetic Association
American Health Information Management Association
American Jail Association
American Medical Association
American Nurses Association
American Osteopathic Association
American Pharmaceutical Association
American Psychiatric Association
American Psychological Association
American Public Health Association
American Society for Addiction Medicine
John Howard Association
National Association of Counties
National Association of County Health Officials
National Council of Juvenile & Family Court Judges
National District Attorneys Association
National Juvenile Detention Association
National Medical Association
National Sheriffs' Association
The Society for Adolescent Medicine

PREPARED STATEMENT OF DAVID RICHMAN, ATTORNEY FOR PLAINTIFF INMATES IN HARRIS V. CITY OF PHILADELPHIA

INTRODUCTION

My name is David Richman. I am lead counsel for the plaintiff class of inmates in the federal prison conditions lawsuit entitled *Harris* v. *City Of Philadelphia*. I would like to thank you for taking the time to consider my views regarding the Stop Turning Out Prisoners Act, otherwise known as 'STOP.'

The STOP bill was drafted with the assistance OF Philadelphia District Attorney Lynne Abraham, the bill's most vocal proponent. Ms. Abraham testified in favor of the bill on January 19, 1995 before the Subcommittee on Crime of the House of Rep-

resentatives and is scheduled to present testimony in defense of the bill to this Committee on July 27, 1995.

Based on her testimony before the House of Representatives, I anticipate that Ms. Abraham will portray the *Harris* litigation as an example of the supposed evils warranting passage of the STOP legislation. As counsel for the plaintiffs, I feel a responsibility to correct the District Attorney's inaccurate portrayal of the lawsuit. Because I will not be able to present my views in person, I am presenting my testimony in written form for inclusion in the record.

First, a word about my background. A lawyer for 26 years, I am a partner in the Philadelphia office of the law firm Pepper, Hamilton & Scheetz. My practice primarily involves the representation of industrial clients in hazardous waste and toxic tort litigation. I joined the law firm in 1974, following five years as an Assistant District Attorney for the City of Philadelphia, mostly under the leadership of Arlen Specter, who was then District Attorney.

HISTORY OF HARRIS V. CITY OF PHILADELPHIA

As a law clerk and then Assistant District Attorney under District Attorney Arlen Specter, I came to know well the conditions of Philadelphia's jails through participation in two investigations in the late 1960's and early 1970's into rampant homosexual assaults and a violent prison riot. Those events were part of the backdrop to a state court civil rights action trial in 1971 (in which I was not involved) that produced a 264-page opinion detailing the conditions in Philadelphia's jails that were found to be subjecting inmates to cruel and unusual punishment in violation of the Eighth Amendment of the federal Constitution. Affirmed by the Pennsylvania Supreme Court, the ruling spawned a series of remedial decrees that, because they were neither honored by the City nor enforced by the state judiciary, left essentially intact the conditions that the ruling condemned.

In 1982, a group of inmates filed the *Harris* case in federal District Court in Philadelphia, and I was subsequently appointed by the Court to represent them. The thrust of the lawsuit was that despite the state court finding ten years earlier that the conditions in Philadelphia jails subjected inmates to cruel and unusual punishment, the promise of relief from those conditions had been unfulfilled.

District Court Judge Norma Shapiro, who is reviled here by the District Attorney for her supposed activism, initially dismissed the *Harris* lawsuit. She did so on a motion by the City that argued that the federal suit duplicated the still-pending state court proceedings. On an appeal by the plaintiff class, the Court of Appeals for the Third Circuit reinstated the lawsuit, and the Supreme Court declined to review the ruling.

When the lawsuit returned to the District Court in 1985, the inmates and the City administration separately weighed the potential benefits and risks of a trial on the constitutionality of current conditions in light of the current state of Eighth Amendment law. The City was faced with the harsh reality that for much of the 1980's, it had been housing three inmates in cells designed for one; using recreational areas and day rooms as dormitories; and finding itself unable to provide safe or sanitary conditions in jails that were too deteriorated to physically maintain.

The City administration also realized that without the cooperation of the trial courts and other elements of the criminal justice system, overcrowding would persist and worsen as a result of long delays in bringing defendants to trial and sentencing. That perception was borne out in a series of independent studies in ensuing years by independent investigators who uniformly found that overcrowding in Philadelphia's jails was largely the product of an inefficient and maladministered system of criminal justice.

With these circumstances in mind, Philadelphia's then-Mayor decided that further resistance to the litigation was not in the public interest and that, by settling the lawsuit, he could improve not only the City's jails, but also its criminal justice system whose notorious inefficiencies were a source of the severe prison overcrowding. The two consent decrees entered into by the City in 1986 and 1991 marked a commitment to upgrading Philadelphia's jails and improving the criminal justice system in preference to defending a system that needed fixing, not defending. Eight years later, the wisdom of that course is not rationally assailable.

Directly as a result of its agreement to the consent decrees criticized by District Attorney Lynne Abraham, Philadelphia is days or weeks away from opening for occupancy a 2,016-bed jail and a modern criminal courthouse and, by year's end, will shut down an unmaintainable, horrific 19th century jail. Philadelphia has fashioned physical and operational standards for its new and existing jails to achieve compliance with correctional industry standards. The jails have an earned-time, good-time

program and a program for teaching literacy. New medical services have replaced services that were lethal to inmates.

In addition, the City is on the verge of installing an computerized information system that will connect the police, courts, prosecutor, defender, prisons and parole functions for the first time. Cases are being tried more speedily though pretrial delays are still excessive as is the jail population itself. Philadelphia has launched a model program of community-based treatment for in-patients and out-patients as a probation or parole option for drug and alcohol addicts. The City government and the state courts deserve credit for all of these improvements, but none would have come about without judicial enforcement of a remedial order, crafted and agreed to by the parties in a federal civil rights action.

REBUTTAL OF THE DISTRICT ATTORNEY'S CRITICISM OF HARRIS

The District Attorney's testimony virtually ignores these accomplishments and damns them as having been purchased at the cost of public safety. The District Attorney's indictment of the *Harris* litigation is a mixture of half-truths and untruths, as I will proceed to show, point-by-point. The true teaching of *Harris* is that federal prison conditions litigation can be a powerful tool for criminal justice as well as for social justice.

Allegation: The District Court imposed a prison cap and decided the appropriate level of Philadelphia's prison population.

Fact: The City administration in 1986 proposed a jail capacity of 3,750 inmates and, with the inmates' consent, the figure was incorporated into a consent decree that the Court approved after a hearing. The population level is not a "cap"; it is a threshold which, when crossed, triggers a moratorium on the admission of persons *charged* with non-violent crimes and lesser drug offenses. It has never applied to persons convicted of crime; nor has it ever applied to persons charged with a violent crime.

Because the agreed-upon population level is not a cap, the actual population of Philadelphia's jails has typically exceeded by more than a thousand inmates the "allowable population." For the most part, the population has hovered between 4600 and 5000 inmates, or anywhere from 20 to 40 percent over the agreed-upon capacity.

Importantly, the agreed-upon population level applies only to the jails currently in operation in Philadelphia. Accordingly, the City has always been free to build additional jail space to house any persons who are released pretrial as a result of the agreed-upon capacity of the existing jails.

The 1991 consent decree required the City to submit proposals for alternative methods or criteria for managing the size of the prison population. Until recently, none had been forthcoming from the City or the District Attorney. The City has now filed with the Court a plan for the City and the state courts to assume responsibility for controlling the population of Philadelphia's prisons. On the strength of that undertaking, the District Court is likely to dissolve the population control mechanisms embodied in the consent decrees.

Allegation: The two consent decrees in the case were entered "under pressure from the federal judge."

Fact: Both decrees were arrived at through arms-length negotiations between the parties without any involvement by the Judge, although the second decree benefited from consultation with a prison expert retained to advise the Court. Indeed, the second agreement of the parties sat on the Judge's desk for over a year before she was convinced of its soundness and gave her approval after hearing the objections of the District Attorney and of some individual inmates who complained, respectively, that the agreement afforded too much or too little relief.

Allegation: The District Court Judge created a charge-based system for determining who may enter Philadelphia's jails, thereby preventing state courts from dispensing justice through individualized bail determinations.

Fact: The criteria for diverting inmates from pretrial incarceration came from the City and the plaintiffs, not the Judge. Indeed, the Judge's only involvement has been to liberalize the criteria for admission, over the inmates' objections, at the District Attorney's urging.

The District Attorney's assertion that the consent decree deprives the City of any discretion regarding releases is untrue. Under *Harris*, the District Attorney of Philadelphia is allowed to prevent the release of any inmate by substituting another in the interest of public safety.

Allegation: A criminal defendant charged with a non-violent offense cannot be detained pretrial no matter how many times he fails to appear in court.

Fact: The District Attorney's statement is false. A defendant who fails to appear for court in two open cases without a legitimate excuse can be detained pretrial. The District Attorney has abandoned a unit to enforce bench warrants and seize fugitives who could then be detained and tried. The failure to pursue and arrest defendants who persistently fail to appear for court does not result from the dictates of the consent decrees and begs some other explanation.

Allegation: More than 100 murders have been committed by criminals set free by the prison cap.

Fact: This inflammatory assertion has never been documented. If persons released under *Harris* have been charged with murder allegedly committed during pretrial release, two questions must be asked: Were they acquitted or found guilty of the charge? Would they have been "set free" on bail or on their own recognizance if *Harris* were not in effect? In fact, the consent decrees have not resulted in the diversion of any more defendants from pretrial custody than were diverted before the lawsuit.

Allegation: Philadelphia can manage without population control mechanisms like those established in *Harris.*

Fact: The District Attorney represented in her testimony before the House of Representatives that Philadelphia has almost 50,000 outstanding fugitive bench warrants. There are roughly 5,000 people currently confined in Philadelphia's jails, and the City's own 1993 study placed the appropriate capacity at 3,549. Where then does the District Attorney propose to house the other 25,000, 35,000 or 45,000 persons she evidently believes would be incarcerated but for *Harris*? If Congress mandates the abrogation of the *Harris* decrees, should it not also provide the funding that will be necessary to house the deluge of new inmates bound to descend on the jails?

The District Attorney responsibly conceded in her testimony before the House of Representatives that we are "morally required to treat humanely all members of our society, even those who break the law" (as well as, she might have added, those merely charged with breaking the law, which describes two-thirds of Philadelphia's jail population), but she offers no legislative prescription for housing, let alone humanely treating, 10,000 or 40,000 inmates in jails designed for fewer than 4,000. Some form of population limitation is indispensable under these circumstances as is greater utilization of intermediate punishments including treatment for drug and alcohol abuse.

Allegation: The most pernicious of the District Attorney's distortions is that the *Harris* decrees have turned Philadelphia into a crime-ridden hell with a demoralized citizenry and a "judicial system * * * broken beyond repair by the prison cap."

Fact: Philadelphia is the safest of the nation's ten largest cities according to FBI crime statistics. Arrests for crimes of violence have steadily declined in Philadelphia since 1988 when the population limits took effect. Since 1990, arrests for crimes of violence have decreased in Philadelphia by nearly 20 percent. The incidence of drug crime in Philadelphia mirrors the national picture; it is no worse. The number of criminal case dispositions in state court is much higher since the inception of *Harris* then it was before.

Although it is true that the failure-to-appear for trial rate is unacceptably high among persons diverted from jail under *Harris,* that phenomenon is due largely to the City's withdrawal of pretrial services to monitor defendants awaiting trial and to take measures to promote their appearances. More significantly, the rate of rearrest for new crimes among those released pretrial under *Harris* is comparable to the rearrest rate of those who were released on bail or on their own recognizance before the inception of *Harris.* Hence, the District Attorney's statistics as to the number of new crimes for which persons were arrested after being released under *Harris* are misleading in the extreme as are the anecdotes that accompany the data; those figures and similar anecdotes apply equally to the system in place before the City agreed to the current system of maintaining a limited prison population.

In the City's own plan for the system to displace *Harris* (which will probably take effect in October 1995 as a result of the City's representation that it is prepared to assume responsibility for managing the size of the City's prison population), the City projects that defendants will be diverted from pretrial custody at the same rate as they are diverted today in Philadelphia. There is little reason to believe that the rearrest rate among that population will materially differ from the existing rate.

Allegation: The District Court has intruded unnecessarily into the affairs of the local criminal justice system against the wishes of the current City administration.

Fact: District Attorney Abraham lists among the evils of the federal Court's actions in Philadelphia its oversight of jail construction and of a long-range prison planning process which the City agreed to carry out in the 1991 consent decree. The planning process requires the City to project the size of the prison population into the future; to formulate standards, policies and procedures for building and operating the City's jails to correctional industry standards; to develop a criminal justice system information system; and to budget for these projects. After he was elected and just before taking office, Mayor-elect Rendell extolled the planning process and committed his administration to its full-hearted implementation on an expedited basis.

In order to raise the funds to build a new jail and criminal courthouse, the debt-ridden City offered the investment bankers the security of federal judicial oversight of contracts. The City's financing instruments—not its consent decrees—require the Court's approval of contracts and contract changes as a condition of financing new construction. As a direct result of the Court's oversight, Philadelphia is about to open a new criminal courthouse and a 2,016-bed jail, both of which will be completed within budget, an uncommon event in large municipal construction projects. The Court did approve a change order at the request of the Philadelphia court system to expand a room in the new courthouse for court interpreters; the District Attorney's information to the contrary is bad. (The Court's letter of October 26, 1994 approving the $5720 change order is available to confirm the invalidity of the District Attorney's charge.) The other examples cited by the District Attorney of the District Court's "intrusiveness" into the construction are fanciful. There have been no "debates" on such subjects, no orders, no approvals asked or needed.

Allegation: The City has no power to extricate itself from a burdensome decree made by a prior administration.

Fact: A contract made by a state or municipality binds the state or municipality, not just the political administration in office when the contract was made. Consent decrees entered into by a state or municipality are likewise binding beyond the term of the officeholder who authorized the agreement.

Although they bind successor administrations, consent decrees can be terminated or modified under existing federal law upon a showing of changed circumstances which obviate the plaintiffs' need for, or entitlement to, continued relief. Such a motion is currently pending. An earlier motion by Mayor Rendell seeking similar relief was dismissed as a sanction for the City's contumacious refusal to comply with court orders to produce a long-completed audit of prison conditions and capacity.

Based on the aforementioned commitment by the City and the state courts to implement new bail guidelines and other means for regulating the size of Philadelphia's jail population, federal court involvement in jail population control is in the process of being transferred to local authorities.

The longevity of the *Harris* litigation is by no means due to the District Court Judge's resistance to returning the management of the jail population to local authorities. Rather, it is due to the City's failure to fashion a plan for managing the size of the jail population in the thirteen years that have elapsed since the filing of the *Harris* lawsuit, and the seven years that have elapsed since the implementation of the population control mechanisms adopted in the consent decrees. Indeed, I had written personally to the City's attorneys on multiple occasions offering to dismantle the *Harris* population control mechanisms in return for the City's agreement to manage the population within whatever level might be found to be appropriate in light of existing conditions. Until recently, the City had declined all such offers. It is notable that, almost immediately upon the filing by the City of a plan for regulating the size of the jail population, the federal Court began the process of returning jail population control to local authorities.

Allegation: The perception of many Philadelphia residents is that Philadelphia law enforcement is ineffective.

Fact: The allegation is true, but the cause lies elsewhere than *Harris* releases. For starters, Philadelphia's police force has declined in strength by 25 percent over the past 16 years or so, while jail capacity has nearly doubled. No city in this country has found an effective means of combating drug and drug-related crime, and reliance on more jails and longer, mandatory sentences will bankrupt us long before it cures the drug problem. But this is beside the point, because it remains the case that Philadelphia does not currently have the jail space to avoid the pretrial release

on bail or otherwise of numerous persons charged with crime. If Philadelphia elects to remedy this problem by building enough jail space to detain every single person who is charged with a crime, the *Harris* consent decrees would not stand in the way.

STOP IS A DANGEROUS COURT-STRIPPING MEASURE

In addition to correcting the misimpressions fostered by the District Attorney, I write also to urge Congress not to reverse the modest tide of prison conditions reform that has been accomplished under the federal civil rights laws. Those laws were enacted after the Civil War to afford federal judicial remedies when the organs of state government proved hostile or indifferent to the guarantees of the Bill of Rights. Those rights include the right of indigent persons merely accused of crime to be free from punishment without a trial and conviction. They include the right of convicted persons to be shielded against punishments that are cruel and unusual.

Those who benefit directly from the enforcement of these rights are typically those at the lowest rung of the socio-economic ladder and include many who have alienated our sympathy by their lawless behavior. As a consequence, there has been little political incentive historically to imprison people under conditions that honor these rights. With few exceptions, the federal courts, enforcing the federal civil rights laws, have been the only agency of government to which inmates have been able to turn for relief from conditions which are "disgusting and degrading" and "severely overcrowded"—to use the words of the Pennsylvania Supreme Court describing, in 1971, a Philadelphia prison that is still in service today—and to which the description still applies.

If federal courts are themselves to be shackled—as the STOP bill evidently intends—to prevent them from safeguarding the civil rights of prisoners, it is a safe guess that prisoners will be merely the first to lose their rights through a curtailment of judicial power. It will not be long before other protections in the Bill of Rights will be similarly trimmed—not by amending the Constitution, but through the far simpler process of stripping judges of their powers to forge and enforce remedies for violations of the constitutional rights of the powerless and unpopular.

CONCLUSION

Passage of the Stop Turning Out Prisoners Act cannot be justified on the experience of Philadelphia's prison conditions litigation. If the bill were to be enacted into law, its effect on Philadelphia, assuming it survived constitutional attack, would be to stop dead in its tracks the remarkable movement now underway to revitalize the City's criminal justice system, to assure minimally decent jails, and to provide a range of alternatives to incarceration for criminal behavior. Theoretically, all of these goals could be accomplished in the absence of the *Harris* decrees, but history teaches the naivete of any such expectation.

If the City of Philadelphia made a bargain that is no longer sensible, fair, or just, the existing law of consent decree modification and termination gives the City the means to change or bring an end to the arrangement. STOP's erosion of the power of federal courts and its reversal of the existing judgments of federal courts would do far greater mischief to our system of separation of powers than would any federal court order, however intrusive, aimed at protecting prisoners from oppressive conditions of confinement.

PREPARED STATEMENT OF CHASE RIVELAND, SECRETARY OF THE WASHINGTON DEPARTMENT OF CORRECTIONS

Good Morning. I would like to thank all of you for giving me the opportunity to testify before this distinguished Committee.

My name is Chase Riveland. I am the Secretary of the Department of Corrections of the State of Washington and have been for nine years. I have worked in the management and operation of correctional facilities for over 30 years. Before assuming my present position, I was the Director of Corrections of Colorado for four years. Before that, I was in the Wisconsin correctional system for 19 years serving as Deputy Director, Superintendent of a maximum security prison, and a variety of other positions. I have also visited many prisons around the country as a consultant at the request of the National Institute of Corrections, the American Correctional Association, and various other organizations.

I would like to focus my testimony on the Stop Turning Out Prisoners Act, otherwise known as STOP. I understand that this panel has also been assembled to address the Stopping Abusive Prisoners Lawsuits Act; however, the most disconcerting

and worrisome legislation under consideration is that known as STOP. As a preliminary matter, I would like to dispel any confusion between these two bills. The "abusive" or "frivolous lawsuits" bill is concerned, among other things, with limiting frivolous prisoner lawsuits. STOP, on the other hand, is targeted an institutional reform litigation raising meritorious constitutional and statutory claims. If enacted, STOP will apply to all litigation concerning conditions in adult prisons, adult jails, and juvenile incarceration and detention centers.

My concerns fall into three areas:

1. The defining principles of this country that would be compromised by this legislation;
2. The usurping of what have heretofore been the prerogatives of state or local jurisdictions; and
3. The enormous fiscal impact such legislation could have on state and local governments.

First, the defining principles: I believe strongly in the Constitution and the Bill of Rights. But many countries have constitutions; it is how they are applied that determines the strength of the country or nation. This country has historically extended constitutional rights to all—wealthy or poor, black or white, male or female. Indeed, extension of constitutional rights and protections to our least privileged and least empowered is what sets us apart from other nations. Extending those rights even to prisoners who may have committed heinous crimes exemplifies the dignity, humanity, and moral character of the majority of our citizens. I am concerned that we are considering a shift or limitation in that defining principle.

Many individuals entering prisons feel that the justice or legal system has never been anything but oppressive to them, that it doesn't work for them. We do know that humans that feel aggrieved or mistreated will seek redress or solutions no matter what setting they are in. This is also true of inmates.

I would rather have inmates using grievance systems and lawsuits than physical confrontation and destruction to resolve their problems. In fact, I see it as productive to teach them to use those socially acceptable means of challenge in hopes that those will be the same means of challenge they will use when released. A few will abuse the privilege, but the courts already have the means to deal with the abuse. It is my opinion that this bill will overly restrict individual constitutional protections and overly limit a socially acceptable outlet for frustrated people.

I would like to deal with my second two concerns—usurping of prerogatives of states and counties and the potential enormous fiscal impact on state and local governments—concurrently. Our memories are short. The riot of Attica in 1971 and New Mexico in 1980 were but visible examples of the destruction of property and life that can occur when prisons are operated with inadequate medical and psychiatric services; a lack of trained, professional correctional staff; and inadequate work and education programs. Such conditions, accompanied by overcrowding, were not uncommon in the late 1970s and the early 1980s.

At the Washington State Penitentiary in Walla Walla, Washington in the late 1970s, conditions were arguably as bad as any in the nation. It housed nearly three times the number of inmates that it was designed for; staff were poorly trained; medical services were grossly inadequate; and educational and work opportunities were nonexistent to the bulk of the inmate population. Inmates, for all practical purposes, ran the institution. Inmate assaults and murders were commonplace; assaults on staff and staff murders were frequent. It became so bad that full institution lockdown became the sole manner in which officials could prevent riots, murders, and assaults. Inmates, two or three to a small cell, were locked in their cells 24 hours a day.

In 1979, a class action suit was filed and the prison was later found to be unconstitutional on most grounds. The state has subsequently spent many millions of dollars to bring the physical and operational activities up to at least constitutional minima. Today, the prison, still holding over 2,000 inmates, has an assault and incident rate lower than probably any prison of comparable size and custody level. Without federal court intervention, it is unlikely that such changes would have been made.

Because the state chose to go to trial in 1979, and subsequently appeal the district court's decision, millions of dollars were spent on legal costs. In hindsight, the state would have saved millions of dollars by negotiating a consent decree. If the State of Washington were to find itself in a similar circumstance today, the STOP bill's provisions would have *required* the State to expend the millions of dollars on legal costs; it would not even have had the option of resolving the litigation by negotiating an agreement.

My experience with consent decrees and post-trial orders has convinced me of their utility, as well as the utility of the federal courts in enforcing those orders and decrees. Each time I assumed the position as the director of a correctional system, I inherited consent decrees and post-trial orders. My experience has been that each one of those decrees and orders was essential, at that point-in-time. For example, I recently signed a decree that governs the medical care provided to women prisoners in Washington. There were clear problems at the facility that prevented us from giving the inmates minimally decent medical care. Although I would have liked to resolve the problems that existed at the facility without litigation, I had been unable to do so. This decree will result in the allocation of resources that are necessary to remedy those problems.

You may wonder why a corrections administrator would reject a statute that appears to relieve people like myself from litigation; in reality, this bill would significantly *increase*, rather than decrease, the expenditures that my department will be required to incur. By way of illustration, if STOP had been law, I would not have been able to sign the consent decree regarding the medical care provided to women prisoners in Washington. Instead, I would have been required to go to trial in a case that I know I would have lost. I would have ultimately been required by the Court to pay an attorney fee award that far exceeds the one that I have currently agreed to pay because I would have been required to pay for the time and expenses incurred by the plaintiffs in going to trial.

The only way that I could have avoided a trial under the provisions of STOP would have been to agree to a finding of liability. Such an agreement of liability would have exposed me and the State of Washington to countless individual lawsuits by prisoners for damages, and the admission of liability would have prevented us from mounting a defense. It is for this reason that consent decrees do not include admissions of liability and, instead, typically include a provision to the contrary.

The decision to settle a case by a consent decree must be left to correctional officials and State Attorney Generals who are familiar with the conditions in the system or facility at issue. They should not be put to the choice of admitting liability or going to trial in every case. Requiring them to go to trial, and requiring them to risk exposure to an increased attorney fee award, in a case that they know they will lose, is unconscionable. Their only other alternative, admitting liability, would expose them to unknown, and potentially astronomical, money damages.

To make matters worse, after the state conducts the trial, and pays out a substantially unnecessary attorney fee award, under this bill, the state will be required to undergo a trial, and another attorney fee award, every two years. The terms of a consent decree or a post-trial order can take several years to implement. This is particularly true when conditions are extremely egregious or systemic. Courts have been remarkably flexible and understanding about the difficulty of implementation of remedial orders and decrees in prison conditions cases. Since STOP requires the termination of post-trial orders two years after issuance, there is little reason to believe that courts will maintain this flexibility. Instead, prison systems will be forced to implement the provisions of an order within two years, which is often an entirely unrealistic time frame. Indeed, achieving the required resources from the Legislature typically consumes at least one half of that time. If a state has been unable to implement the provisions within two years, it will be required to relitigate the issues, even when the state knows that it will lose the litigation. And the state will be required to do so every two years thereafter, until they achieve compliance. Our dollars would be much better spent training staff and making conditions humane, rather than relitigating issues with such frequency.

A provision that is related to the one that prevents consent decrees in the future is the one that calls for the immediate termination of all existing consent decrees. This provision will wreak havoc, and require the expenditure of an untold number of dollars, in my system alone. Consent decrees are the product of endless hours of negotiations between the parties. Lawyers for my department have expended countless hours in arriving at the numerous consent decrees that are in existence in Washington. Terminating these decrees by legislative fiat will undo all of that work, and immediately require my department to prepare for trial in those cases.

I have heard that one of the driving forces behind the STOP legislation is the perception that prison conditions lawsuits have resulted in the imposition of population caps that have led to the release of offenders who should have remained behind bars. Notably, no court order or consent decree in the States of Washington, Colorado, or Wisconsin, that has capped populations in one or more institutions, has resulted in inmates being released earlier than the normal release at the conclusion of their sentence. Instead, the Legislatures in all three states responsibly provided additional capacity. This is true in most jurisdictions across the country. Those few jurisdictions suffering court-imposed early release conditions are generally those in

which the funding bodies have refused to step up to the plate by providing sufficient resources to meet constitutional minima. Indeed, it is my experience that Governors and Legislatures in states that have experienced prison disturbances or been subject to major prison litigation are more likely to be responsive to providing adequate resources.

Moving to another of the bill's provisions, the way I read section (a)(1) of this bill before a court will be allowed to enter any relief in a class action, the court will have to hear from every single class member. Even if my department has made a determination that the challenged conditions are unconstitutional, we will be forced to listen to testimony, presented by plaintiffs' attorneys, from every single prisoner in the facility or every single prisoner in the state, depending on how the class is defined. The truth remains: there are unconstitutional facilities. When such a facility is sued, what purposes will be served by requiring the defendants, and a federal court, to hear testimony from every single inmate?

I would also like to comment on the impact the bill would have on preliminary relief. The bill would prevent a court from issuing any relief until after it finds a violation of law. This would prevent a court from entering any form of emergency relief, such as a temporary restraining order or a preliminary injunction. I see no good reason to prevent a Court from addressing a proven emergency. For example, a trial court judge in Pennsylvania entered a preliminary injunction requiring that the system impose a program of TB testing of all incoming inmates. The court issued this order after finding that the system was on the verge of a TB epidemic caused by the lack of such testing. STOP would have prevented the Judge from entering this order. After the order was entered, over 400 cases of TB infection were discovered at just one of the fourteen prisons affected by the order. Although a corrections official would prefer to implement a TB control system without being ordered by a court to do so, a court order is still preferable to a TB epidemic.

In summary, it is my opinion that the limitation this bill puts on an unempowered, disenfranchised segment of our population sets a dangerous precedent; that "federalizing" decisions that are currently the prerogative of state and local jurisdictions is not only unnecessary, but presumptuous; and that this Act will create a major fiscal burden for state and local governments. Indeed, it is a clear example of an unfunded mandate.

Thank you for giving me the opportunity to share my opinions with you.

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