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vinners in a competitive system, but at least the EDA is utilizing a set of economic criteria to ensure that the taxpayer dollars it administers are scrutinized, and flow to the projects which represent truly compelling needs.

Mr. President, we have before us a mammoth new appropriations bill which presents an inviting target for Members to evade this competitive system, and bypass its reasonable guidelines for the expenditure of taxpayer dollars. The earmark added to this bill effectively sweeps aside higher priority requests, and arbitrarily puts one unauthorized project at the head of the line. Instead of a community receiving flood control assistance because it's needs are urgent and meritorious, this one project will prevail over hundreds of others because it secured political support. Well intentioned support, I'm sure, but unfair nonetheless.

As I have said many times on this floor, Mr. President, during one of my many unsuccessful attempts to curb the Congress's seemingly unquenchable thirst for more spending, my criticisms about this specific project is about process. I in no way contend that the Devils Lake Basin flood control program is unnecessary. I fully recognize that the Senators from North Dakota are affirmatively responding to requests for assistance from some of their constituents.

What I do contend is that the Senate should not respond to such requests—requests that all 100 Members of this body receive on a daily basis—in a manner that circumvents a thorough, merit-based process, and substitutes quick-and-easy earmarks in yet another emergency spending bill.

While I am opposed to the Senate again condoning what I feel is an indefensible process, let me state that I have not offered this amendment out of any respect for endless bureaucratic analysis; I offer it because there are dire problems facing our communities and the taxpayers who support them, and it is wrong to subvert their efforts to play by the rules when they are in need of Federal disaster aid.

Again, I don't question the possible benefits of the Devil's Lake Basin project. I do question the wisdom in the Senate boosting it to the head of the line for funding from the Economic Development Administration, when there are 84 other project's among North Dakota's neighboring States that are also anxiously awaiting funding. Unlike Devil's Lake Basin, however, these communities are properly competing for funding from the EDA for their disaster needs.

I have been advised by the EDA, Mr. President, that they did not request funding for the Devil's Lake Basin project, nor have the project's sponsors officially filed a request for funds with the EDA's Denver Regional Office, which allocates funding to North Dakota and nine other Western and Midwestern States. Therefore, dozens of communities in States such as Colorado, Kansas, Missouri, South Dakota, Iowa, Wyoming, and Utah will continue to have their needs go unaddressed by EDA, while $10 million in new moneys they might have competed for will instead be diverted to a single project.

I am not talking about mere pennies, either. The total earmark for the Devils Lake Basin project in this bill is larger than the entire expected budget of the EDA's Denver Regional Office for fiscal year 1996. This one project will receive almost $13 million in Federal aid, while 84 communities in the above 9 States will have to compete with each other for the $11 million that the Denver office is anticipating for this year. Without a doubt, a number of these requests are emergency projects.

Regrettably, many communities who have developed meritorious proposals, and are willing to play by the rules by competing for scarce taxpayer dollars, will never get a dime from the EDA.

Obviously, Mr. President, every Senator in this body is interested in receiving Federal funds for infrastructure and disaster aid for their State. I'm certainly no exception. Arizona has over $6 million in requests pending with the EDA, some of which have been pending for several years. For Arizona to even have a chance at having one project funded, communities in my State must compete with 115 requests from seven other States in Region 7, which includes California, Idaho, Alaska, and Hawaii. These States currently have over $100 million in requests pending at the EDA. Most of these will be rejected due to the intense competition, yet Devils Lake Basin is guaranteed $10 million without having to face any competition.

The $3.8 million earmark for the Devils Lake Basin project in this bill from the Fish and Wildlife Service is similar in the respect that it was not officially requested by the agency, in its submission to the Appropriations Committee for inclusion in this bill. There are other earmarks in the bill, as well.

The amendment I am offering is very simple, and entirely fair to every Member of this body, and every State in our Nation. It simply says that funding provided in this bill to the EDA, the Fish and Wildlife Service, HUD, and other agencies will be awarded according to the established prioritization process of those agencies.

Mr. KENNEDY. Mr. President, I rise to express my deep concern about the title VIII of the pending appropriations bill, the so-called Prison Litigation Reform Act [PLRA].

Its proponents say that the PLRA is merely an attempt to reduce frivolous prisoner litigation over trivial matters. In reality, the PLRA is a far-reaching effort to strip Federal courts of the authority to remedy unconstitutional prison conditions. The PLRA is itself patently unconstitutional, and a dangerous legislative incursion into the work of the judicial branch.

In my view, the effort to enact this proposal as part of an omnibus appropriations bill is inappropriate. Although a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves.

At the hearing, Associate Attorney General John Schmidt expressed serious concerns about the feasibility and consequences of the PLRA. While Mr. Schmidt did not take issue with provisions in the PLRA that merely seek to curb frivolous prison litigation, he noted that other aspects of the proposal would radically and unwisely curtail the power of the Federal courts to remedy constitutional and statutory violations in prisons, jails, and juvenile detention facilities.

I understand that my colleague from Illinois intends to include relevant excerpts of Mr. Schmidt's testimony in the RECORD, but I will just highlight several of the objections that he raised, all of which I share. Mr. Schmidt observed that:

The effort to terminate all existing consent decrees "raise[s] serious constitutional problems" under doctrines reaffirmed by the Supreme Court as recently as this year;

Provisions limiting the power of federal courts to issue relief in prison conditions cases would "create a very substantial impediment to the settlement of prison conditions suits—even if all interested parties are fully satisfied with the proposed resolution." "This would result in litigation that no one wants . . . and could require judicial resolution of matters that would otherwise be more promptly resolved by the parties in a mutually agreeable manner";

The proposal to terminate relief two years after issuance is misguided because, in those cases where the problems have not been remedied, 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 disruption of ongoing remedial efforts."

All of these problems remain in the legislative language before us today.

In addition, I call to the attention of my colleagues an assessment prepared by the Administrative Office of the United States Courts dated June 21, 1995. The Office found that the "potential annual resource costs of [the bill] could be more than $239 million and 2,096 positions, of which at least 280 would be judicial officers—Article III judges and/or magistrate judges." The bill appropriates no funds to the Federal judiciary to offset this enormous fiscal impact.

Finally, I note with great concern that the bill would set a dangerous precedent for stripping the Federal courts of the ability to safeguard the

civil rights of powerless and disadvantaged groups.

I do not intend to offer an amendment to this bill, because it is clear that a majority of the Senate would not vote to strike the provision, and I do not believe the Senate is positioned to consider detailed improvements to the PLRA during debate on this omnibus appropriations bill. But the abbreviated nature of the legislative process should not suggest that the proposal is noncontroversial in Congress.

It is my hope that after the President vetoes this bill, as I expect he will, that the administration seek to negotiate changes in the PLRA that remedy the profound constitutional, fiscal, and practical problems outlined by Mr. Schmidt and other experts.

I ask unanimous consent that a copy of a letter sent by myself and four other Senators to the Attorney General on this subject be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, February 2, 1996.

Hon. JANET RENO,
Attorney General of the United States, Department of Justice, Washington, DC.

DEAR MADAM ATTORNEY GENERAL: We write to express our concern about aspects of the Prison Litigation Reform Act (PLRA), which has passed Congress as title VIII of the Commerce, State, and Justice Departments Appropriations bill. President Clinton vetoed this appropriations bill on December 18, but it is our understanding that issues such as the PLRA may be the subject of negotiations between the Administration and members of the Appropriations Committees in the coming weeks.

We do not take issue with provisions in the PLRA that merely seek to curb frivolous prison litigation. But in other respects, the PLRA is far reaching legislation that would unwisely reduce the power of the federal courts to remedy constitutional and statutory violations in prisons, jails, and juvenile detention facilities.

PLRA was considered as one of many issues on the appropriations bill. For this reason, PLRA passed on a voice vote following relatively brief debate. But the manner in which the bill passed the Senate should not suggest to you that the Senate considers the proposal to be entirely noncontroversial.

In particular, we share some of the concerns that Associate Attorney General John R. Schmidt raised in his testimony before the Senate Judiciary Committee on July 27, 1995. Mr. Schmidt noted that provisions limiting the power of federal courts to issue relief in prison conditions cases would "create a very substantial impediment to the settlement of prison conditions suits—even if all interested parties are fully satisifed with the proposed resolution." "This would result in litigation that no one wants . . . and could require judicial resolution of matters that would otherwise be more promptly resolved by the parties in a mutually agreeable manner."

Mr. Schmidt also pointed out that the proposal to terminate relief two years after issuance is troublesome because, in those cases where the problems have not been remedied, 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 disruption of ongoing remedial efforts."

These problems have not been remedied by the changes made to the proposal since Mr. Schmidt's testimony.

We also call to your attention an assessment prepared by the Administrative Office of the United States Courts dated June 21, 1995. The Office found that the "potential annual resource costs of [the bill] could be more than $239 million and 2,096 positions, of which at least 280 would be judicial officers (Article III judges and/or magistrate judges)." The bill appropriates no funds to the federal judiciary to offset this enormous fiscal impact.

We suggest that the Administration negotiate changes in the PLRA that remedy the serious fiscal and practical problems outlined by Mr. Schmidt and other experts.

Thank you for your attention to this important matter.

Sincerely,

FRED THOMPSON.
JIM JEFFORDS.
TED KENNEDY.
JOE BIDEN.
JEFF BINGAMAN.

Mr. SIMON. Mr. President, I join Senator KENNEDY in raising my strong concerns about the Prison Litigation Reform Act, a section of S. 1594. In attempting to curtail frivolous prisoner lawsuits, this legislation goes much too far, and instead may make it impossible for the Federal courts to remedy constitutional and statutory violations in prisons, jails, and juvenile detention facilities. No doubt there are prisoners who bring baseless suits that deserve to be thrown out of court. But unfortunately, in many instances there are legitimate claims that deserve to be addressed. History is replete with examples of egregious violations of prisoners' rights. These cases reveal abuses and inhumane treatment which cannot be justified no matter what the crime. In seeking to curtail frivolous lawsuits, we cannot deprive individuals of their basic civil rights. We must find the proper balance.

My colleague from Illinois, Associate U.S. Attorney General John Schmidt, testified before the Senate Judiciary Committee on July 27, 1995, and raised numerous concerns about this legislation. I have included a copy of his comments for my colleagues to review. I should also note that at the same hearing, former Attorney General Barr of the Bush administration, agreed with the assertion that there are constitutional problems with the bill as drafted which have not yet been addressed.

As outlined in Mr. Schmidt's testimony, the bill has so many problems that I cannot list them all here. So let me describe just a few. First, the bill severely limits the options available to States and courts in remedying legitimate complaints. For example, the bill makes it virtually impossible for States to enter into consent decrees even when the consent decree may well be in the State's best interest for both fiscal and policy reasons. Similarly, this legislation, by creating new and burdensome standards of review, would effectively prohibit courts from placing population caps on prisons. Prison overcrowding obviously creates a serious threat to the general public, as well as to prison staffs and the inmates themselves. We must not exacerbate this problem. Furthermore, the bill places undue burdens on States and courts by requiring that relief be terminated 2 years after issuance even in cases where the problems have not been remedied

I am very discouraged that this legislation was considered as one of many issues on an appropriations bill. Legislation with such far reaching implications certainly deserves to be thoroughly examined by the committee of jurisdiction and not passed as a rider to an appropriations bill. I urge the White House to carefully review these provisions and work with Congress to make the necessary changes to remedy the myriad of constitutional and practical problems found in this far-reaching legislation.

I ask unanimous consent that the relevant portions of Mr. Schmidt's testimony be printed in the RECORD.

There being no objection, the testimony was ordered to be printed in the RECORD, as follows:

TESTIMONY OF JOHN SCHMIDT

REFORMS RELATING TO PRISONER LITIGATION

The Department also supports improvements 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 required 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

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

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 Person 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 rules in this context—and brings it more into line with administrative exhaustion rules that apply in other contexts—by generally prohibiting prisoner §1983 suits until administrative remedies are exhausted.

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

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

Section 103(d) of S. 3 deletes from the minimum standards for prison grievance systems in 42 U.S.C. 1997e(b)(2) the requirement of an advisory role for employees and inmates (at the most decentralized level as is reasonably possible) in the formulation, implementation, and operation of the system. This removes the condition that has been the greatest impediment in the past to the willingness of state and local jurisdictions to seek certification for their grievance systems.

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

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

B. S. 866

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

In essence, the point of these amendments is to ensure 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 nonmeritorious 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 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).

[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."

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 small 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 derivation, 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, of 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. Dob, 486 U.S. 592, 603 (1988); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Bartlett v. Bowman, 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 substitute 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 proceedings 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 alternative could carry heavy costs in relation to this proposal's evident objective 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 because it 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), More importantly, 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 Plauty, 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 that 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 of 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.

Mr. HATFIELD. Mr. President, for the better part of an hour we have notified Members through the communication system that we are ready to go to third reading and finalize, first of all, the managers' package—for the better part of an hour. And I think it has now reached a reasonable period of time to bring this to a halt.

So I want to say that at 5:05—in 15 minutes—I will ask for the lifting of the quorum and the Chair will put the question. So that will mean we have waited for an hour and 10 minutes for anyone to exercise their parliamentary right. I think that is a fairly good test of knowing if anyone is interested in doing so. Then we will move to the third reading following the adoption of the managers' package.

Mr. FAIRCLOTH addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. FAIRCLOTH. Mr. President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator is recognized.

COMMON SENSE PRODUCT LIABILITY REFORM ACT

Mr. FAIRCLOTH. Mr. President, I rise in strong support of the conference report on H.R. 956, the Common Sense Product Liability Reform Act.

The legislation is modest in its reach, but it includes long-overdue changes, and it pulls together commonsense reforms that command broad support in this Congress.

Nonetheless, President Clinton announced that he will veto the bill and if, indeed, he does veto this legislation, he will line up with the special interests—the trial lawyers—rather than the American people.

The President refused to buck the trial lawyers last year, also, and he vetoed securities litigation reform. His veto was overridden by a bipartisan vote. The senior Senator from Connecticut, Senator DODD, brought strong support from the other side of the aisle, and we overrode the veto. It was not a radical bill. It was a balanced bill, modest reform. But the trial lawyers handed him the veto pen, and, political considerations at the forefront, he signed on the dotted line to veto securities reform.

Likewise, the Product Liability Reform Act is not radical legislation, as Presidential campaign aides insist. It addresses some of the principal abuses—our efforts to pass an expansive bill failed—and it, too, has a broad base of support. Just look at the bipartisan leadership on this bill. But despite the consensus for the bill, President Clinton again will do the trial lawyers' bidding, and he insists that he will veto yet another reform measure.

The argument that this legislation goes too far just does not hold up. The conference report was hammered out with the 60 votes for cloture in mind. It is, by definition, a consensus bill. So, let the facts be clear, this veto is not about consumer protection—the trial lawyers are worried about changes to a legal racket that took them years to build—it is about political considerations in an election year.

So, despite all the White House rhetoric about wages and growth, the President will take a stand for growth, but it will not be for growth in jobs. No, it will be for continued growth in the frivolous lawsuits that swell court dockets and cost American jobs.

The American tort system is far and away the most expensive of any industrialized country. It cost $152 billion in 1994. This is equivalent to 2.2 percent of the gross domestic product. This has serious economic implications, and, in fact, it is estimated that the legal system keeps the growth of our gross domestic product approximately 10 percent below its potential.

We have heard a lot of discussion about economic growth, but I believe that a good legal reform bill is, in effect, a growth bill.

The costs of these baseless lawsuits are profound—lost jobs, good products withdrawn from the market, medical research discontinued, and limited economic growth—all because our tort system is far too expensive.

We do not have the votes for general legal reform in this Chamber. I wish we did. However, we do have the votes for limited product liability reform, and we now have a bill that addresses the principal abuses.

President Clinton will be forced to choose sides on this bill. I hope he will reconsider his announcement and line up with the American workers rather than the trial lawyers. This bill will reduce the costs of frivolous lawsuits—the cases that compel companies to settle rather than risk ruin in the hands of juries run amok—and it will boost capital investment in our factories. Consequently, this legislation will generate jobs—manufacturing jobs—and strengthen our industrial base. This is good economics, and, Mr. President, it is good for the working people of this country.

Mr. President, I yield the floor.

Mr. HATFIELD. Mr. President, for the better part of an hour we have notified Members through the communication system that we are ready to go to third reading and finalize, first of all, the managers' package—for the better part of an hour. And I think it has now reached a reasonable period of time to bring this to a halt.

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Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, may I proceed for 5 minutes?

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HOLLINGS. Mr. President, in response to my distinguished friend from North Carolina—and I know North Carolina very well—I would challenge the distinguished Senator to name the industry that refused to come to North Carolina, or to Tennessee, on account of product liability. Specifically, the State of North Carolina, as well as my State of South Carolina, has foreign industry galore. They talk about the international competition, and within that international competition we just located, with respect to investment Hoffman LaRoche from Switzerland, the finest medical-pharmaceutical facility that you could possibly imagine; with respect to the matter of photographic papers, Fuji has a beautiful new plant there; and we have Hitachi, a coil roller bearings, and we have over 40 industries from Japan and 100 from Germany. The distinguished Presiding