PRISON REFORM: ENHANCING THE EFFECTIVENESS OF INCARCERATION

HEARING
BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED FOURTH CONGRESS
FIRST SESSION
ON
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TO CONTROL CRIME, AND FOR OTHER PURPOSES
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TO AMEND THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, AND FOR OTHER PURPOSES
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TO PROVIDE FOR APPROPRIATE REMEDIES FOR PRISON CONDITIONS, AND FOR OTHER PURPOSES
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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 and your representatives. In particular, we are pleased to be assisted by our colleagues, Senators Hutchinson 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, 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 these 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 Hutchinson and Senator Gramm, as well as by Associate Attorney General John Schmidt and former Attorney General William Barr.

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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 free again.

Our prison system today is plagued today by several interrelated problems—the inappropriate utilization by federal courts of population caps and intrusive micro-management. Our own state and local prisons, the costly effects of frivolous inmate lawsuits filed in federal court, and a lack of sufficient capacity. The federal government has an obligation to help address these issues. As of January 31, 1994, 544 institutions in 34 jurisdictions reported being under conditions of confinement court orders, and 244 reported having court ordered population caps. (The Corrections Yearbook 1994, Criminal Justice Institute, Inc.)

No one, of course, is suggesting that prison conditions which actually violate the Constitution should be allowed to persist. Nevertheless, I believe that the federal courts have far gone too far in exercising their equitable powers to micromanage our Nation's prisons, at the expense of the proper roles 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. 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 doors of 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 a few 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 his7 pipe stolen. (Lone v. Ayw.) 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 clothes. (O'Keefe 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 tailor the sentences of those who commit crimes—what the penalty is for breaking the law.

Our witnesses will be commenting on each of these matters, and pending legislation which helps 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 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 disillusioned with 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 to make it easier for the victims of crime to stop paying an even greater portion of the price of crime. At that point, the burden should shift as much as possible to the criminals themselves.

This is not because most of our citizens are heartless or cruel. 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 unthinkably tortured and ultimately killed. The third case involves the kidnaping, robbing, and ultimately murdering a 2-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 TVs, 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 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 been 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 selected 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—indeed, 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 murder, rape, or kidnaping, robbing, and torturing and killing a 12-year-old girl are more likely to commit that awful act if they know that they will face many years of confinement, hard work, and 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.

What has happened? To some extent, no doubt, it was a reaction to genuine and serious abuses that were taking place in prisons 25, or perhaps 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 propensities fatally undercuts the fundamental purpose of incarceration.
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 9 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.

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 the latest manifestation of the criminal rights philosophy, which has reeked havoc on our criminal justice system. This view holds that criminals are victims of society, should not be blamed 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 Biddinotto 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, volleyballs, 15 sets of barbells, weightlifting machines, electronic bicycles, and stainmasters facing a TV.

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

Biddinotto 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, amplifier, 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 conditions that offer dangers to null around 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 prison system the recipient of state prison conditions, medical disabilities, or disciplinary action.

The critics of this legislation are likely to denounce it as too costly or too unworkable. However, as prison reform expert and noted author John Dilulio has pointed out, one-half of every tax dollar spent on prisons goes to the families of convicted criminals, but to amenities and services for prisoners. However, these expenses 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 increases increased Texas’s prison operating expenses ten-fold, from $41 million in 1980 to $1.84 billion in 1994—even though the prison population only doubled. This legislation is just a small step in a cost-efficient manner, and will give them the needed protection from the overreaching federal courts.

Moreover, this is only one step in the process of allowing 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 thank Mr. Chairman for his statements and the floor which 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.

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 strangulated 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 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 I 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 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 reducing 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 disincentives 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 taking of Federal district court's control over important aspects of Texas' correctional system. To quote from the court's final decision, it was not appealed. Although random, others have repeated the court's control is in perpetuity in key areas such as population limits, restrictions on new facilities of all kinds, including all ball fields. It is estimated that the provision 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 ball 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 is, if the rights of victims are more important, is Texas free to set prison population caps such that victims' rights are more important than those criminals' 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 it has been repeatedly called for an appeal to be undertaken, the State officials have 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 those cases when Federal judges have gone too far.
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 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 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 inducements 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, 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 here, but I understand about it. My understanding is 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.

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

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 the 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.

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 recent legislative issues before us.

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 said 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, 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.

Mr. SCHMIDT. Well, I am not trying to be evasive. I guess what I am trying to say is that, apart from the mental health area, there is no need for continuing jurisdiction by the district court.

Mr. SCHMIDT. The Justice Department has changed its position in its earlier conclusion? I mean, there is some debate as to what 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.

Mr. SCHMIDT. But the rest was to be stipulated to be dismissed.

Mr. SCHMIDT. My understanding is the district court, when it rejected the stipulation, set up an alternative procedure under which it said the case 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.
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 our 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-Summers 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 $32,000 per Federal prisoner, and that doesn't count the cost of building prisons. We should include in our next crime bill the 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 minindustrial 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 this.

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 believe significant that with your help, we can assure that the Federal assistance gets to the states that need it to help end revolving door Justice...
Soon after the Crime Act's enactment, the Department began meeting with representatives from national criminal justice organizations, state and local justice agencies, and others to determine how best to implement the new law so that programs were responsive to the needs of states 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 address the needs of violent offenders and career criminals who are incarcerated in our state penal systems. 

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. Some federal, 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 provisions 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 offenders. 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 these not familiar with the boot camp concept, a boot camp is a residential reformation 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 are provided to help offenders prepare for a productive life in the community.

The Department has found 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 camp programs 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 must submit plans that incorporate a number of new requirements that were found to be successful in existing boot camps.

We're currently reviewing a total of 82 applications received from 42 states/territories and the District of Columbia. Thirty-five applications are for boot camp construction; 30 are for planning grants; and 19 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; and boot camps for juvenile offenders 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 defines funding equally between the Truth in Sentencing Initiative program and the Violent Offender Incarceration program. Fifty percent of those allocations are to be allocated for Truth in Sentencing Formula Grants for states that adopt truth in sentencing laws, while the other 50 percent of their sentences. States must allocate truth in sentencing laws that provide for sentences that are at least three-quarters of the statutes.

The Violent Offender Incarceration Grantees for states that adopt truth in sentencing laws, ensuring that second time violent offenders do not serve sentences that are too long. The other 50 percent are to be allocated for Violent Offender Incarceration Grants to all states. To be eligible for funding, states must implement truth in sentencing laws. Both programs require truth in sentencing, but the Violent Offender Incarceration Program is somewhat 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 will serve a substantial portion of their sentences; provide sufficiently severe punishment for violent offenders; and incarcerate violent offenders for a period necessary to protect the public. States must agree to work with local governments. The Department must also demonstrate that the rights of crime victims are protected. Much like the Byrne Memorial Grants recorded state and local planning, states are also to create in comprehensive community-based 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. Certainty, this is one lesson—the need for planning—that we learned from the LEEA.

For 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 or subsequent criminal offense and who are imprisoned for 10 or more years serve at least 10 years. The states must show that their laws are effective in reducing crime, and the Justice Department will issue regulations to set the rules for the program.

These requirements were outlined in the Interim Final Rule published in the Federal Register in December 1995, which also received comment. We note the comments received and have incorporated a number of new program requirements into the final rule. We are currently reviewing a total of 82 applications received from 42 states/territories and the District of Columbia. Thirty-five applications are for boot camp construction; 30 are for planning grants, and 19 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; and boot camps for juvenile offenders will be awarded for construction of new boot camp facilities.

The Civil Rights of Institutionalized Persons Act (CRIPA) for state prisoner suits, and adopt other safeguards to implement the new law so that 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 PRINCIPAL JURISDICTION

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 provide greater incorporation into their programs that were found to be successful in existing boot camps.

The Department of Justice has received letters from governors' offices, departments of corrections, sheriffs' departments, local jail, prosecutors and criminal justice organizations, and a number of organizations. We have also met with representatives from offices of prosecutors, state attorney 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.
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 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 determines that the action fails to state a claim upon which relief may be granted or is frivolous or malicious. A rule of this type is desirable to minimize the burden on state and federal courts 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 28 U.S.C. § 1997e(b) 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 108(f)(1) of S. 3 amends this 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 attachment 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 institutional 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.

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 the prison account balance in the prisoner's account would be required, and thereafter the prisoner would be required to make monthly payments of the remainder 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 liable for fees and costs, that these must be accompanied by certified prison account information, and that funds from, their accounts are to be forwarded periodically when the account reaches 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 even if partial filing fees have been imposed by the court.

Section 3 of S. 866 essentially directs courts to review as promptly as possible suits brought by prisoners who seek representation, and may dismiss the case if the complaint fails to state a claim. 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 material information to the court, or
(2) the Attorney General determines that one of these circumstances has occurred and recommends revocation of good time credits 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. 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. § 6362. Singling out one form of misconduct for denial of judicial decisions concerning good time credits—where all other decisions of this type are made by the Justice Department—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 as to whether a circumstance specified in the section has occurred (i.e., a malicious or harassing claim or knowingly presenting false evidence or material information to the court), or
(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. C. The STOP provisions

As noted above, we support the basic objective of the STOP proposal, including particularly the principle that population changes 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 standards and minimal 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 disturbances and hardships of incarceration are the proven type of effective safeguards against inhuman conditions in prisons and other facilities. The constitutional provision ensures that the most frequent in prison cases is the Eighth Amendment's prohibition of cruel and unusual punishment. Among the conditions

1 However, there is a typographic error in line 22 of pages 5 and 8 of the bill. The words "are 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; cruel and unusual punishment; abuse of correctional authority; and 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 control, and the result is increased 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 suffer unconstitutional conditions of confinement, and ultimately must retain access to meaningful judicial relief so that such violations occur. While Congress may validly enact legislation that provides directions and guidance concerning the nature and extent of prison conditions remedial approaches which 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 § 400 and title III of H.R. 661—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 federal rights, this aspect of the proposal appears to be constitutionally objectionable, 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 constitutional violation. 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 cost to public safety. Measures that result in 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). However, by 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 violation. We would prefer to codify such a provision, or permit 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 constitutional violation. 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 cost to public safety. Measures that result in 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.

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 would depend on the 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. Since the relief available in habeas proceedings in this context could be limited to release from custody, reliance on such proceedings as an of limitation of the release of prisoners sentenced for unconstitutional conditions is inappropriate.

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 when other means would work.

Proposed 18 U.S.C. 3626(b)—which automatically terminates prospective relief after two years and provides a test for deeming the statute as not precluding relief procedurally for unconstitutional conditions of confinement. It is possible that prison conditions held unconstitutional by a court might 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 as contrary 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 heart 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 court remedies would remain available to provide any necessary constitutional remedies. The Supremacy Clause, 28 U.S.C. 1346, 1348 (1970), does not constitute a barrier to federal court jurisdiction over state court actions when federal rights are involved. The concern may be that any lower federal court overstate proceedings would result in the same constitutional violation. However, we believe that this provision is constitutionally sustainable against such a challenge. Important cases of habeas relief do not provide any forms of judicial relief, even if it applies both to state court and federal court suits. The possibility of constituting the statute the precluding relief in habeas 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 person 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 restriction proscribed in 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. 1441 (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 proposed legislation if 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 retrospective 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 potential interveners 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 to situations where the new litigation will revisit matters that have already been adjudicated and resolved in an earlier judgment.

Existing law, as enunciated in the holding of 3626(b), already requires that any order or consent decree seeking to remedy an Eighth Amendment violation be reopened at the behest of a defendant for reconsideration at a minimum of two years intervals. The statute could be strengthened to give eligible interveners under the STOP proposal, including prosecutors, the same right to periodic reconsideration of prison conditions as litigants 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. Dilullo, District Attorney Abraham, Mr. Gadola, Mr. Watson, and Mr. Martin.

Thank you all for coming here today, with the same caveat that we raised in the 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 want to get 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 Dilullo, 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. B. B. 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 I will start with Attorney General Barr. Thank you for being here today.

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 provide the necessary opportunity for greater 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 today, was speaking about 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 it cast a chilling effect on 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 both in remediating eighth amendment violations, or alleged violations, many of the courts went far beyond what the Constitution required. They started specifying details 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 1970s and 1980s of consent decrees in prison litigation, and I thought the Department had misused consent decrees in two ways; one, in pursuing these consent decrees 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 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. Corder's testimony. 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 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 remediating 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, one concern is the fact 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 a decree 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—revise 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 to an ongoing constitutional violation. I think that that would be those decrees and terminate those decrees unless it can point then to an ongoing constitutional violation.

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 incapacitating 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 have enough beds? But, there is one thing that is beyond dispute: imprisoning chronic violent criminals. For every year on habitual offender site in his prison cell, there are scores, perhaps hundreds, of fewer violent crimes committed.

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 hampered by the involvement of the Justice Department and the Federal courts in the day-to-day operation of State facilities. After hearing these concerns expressed many 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 et developed are important goals that we must work towards.

Congressional reforms that provide appropriate starting point for this committee's consideration of legislative reform in this area.

I believe that an appropriate way to reform 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 prison conditions as violating the eight amendment's protection against "cruel and unusual punishment." In some instances, Federal court intervention was appropriate because the prison's conditions 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 improperly equated the eighth amendment's minimalist protection against "cruel and unusual punishment." This is a requirement that States follow what was thought to be current 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 limits, or caps, on the populations of state prisons and local jails.

As a result of these extraneous 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, 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 for nearly 500,000 additional inmates, which translates into a savings of approximately $10 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.

Third, and perhaps most disturbing, problem that we found was the Justice Department's overly aggressive and, in some cases, improper use of its authority to impose continuing supervision of the State systems beyond the time when the Court found the violation to have ended. I will let Mr. Cappuccio speak to this problem in further detail. 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 the States were in some lower court decrees that the eight amendment required ambitious improvements by the States than the Supreme Court has subsequently held as amendment requirements. But the fact remains that some 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 potential violation of the eight amendment to impose continuing supervision of the States in violation of the eight amendment itself. I could cite case after case after case where the Department has used its authority to impose continuing supervision of the States on the basis of alleged eight amendment violations after the underlying constitutional violation has been remedied. This, of course, goes far beyond what the Constitution requires. In the States in near perpetuity burdensome and expensive requirements that the Federal Government had no authority to impose on the States to begin with. 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 Constitution mandates, and then, attempting to enforce those unconstitutional provisions after the underlying constitutional violation has been remedied, the Department has put the courts and the States in a no-win situation. I believe that both the following general principles and specific guidelines to govern the Justice Department's involvement in prison litigation. I believe that the following general principles and specific guidelines to govern the Justice Department's involvement in prison litigation.
First, as the Supreme Court has recently made clear in cases such as Wilson v. Seiter and Hudson v. Mcclain, the 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 substandard where no specific deprivation of a human need is demonstrated.

I directed that the Department should not initiate prison 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 remediating constitutional violations, the courts are not free to order general improvement 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 practices that may be sound correctional practices.

Accordingly, I directed that the Justice Department 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.

I directed that the department 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 unconstitutional 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 limits 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 HUDSON v. McCLAIN, courts must stand ready to reopen, modify 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 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 is without 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 the 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 this offer. Over the next several months, after staff reviewed these cases, we began to make significant progress in freeing these States and localities from unwanted 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 plain error in the Michigan action and a long-standing intervenor in the action—the Federal Justice Department resisted our efforts 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, department turnover occurred and we left the Department.

It seems to me that the difficulty we faced in implementing these common sense guidelines in 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, and second, it would provide guidance to States and localities to ensure that the Court does not intervene in ongoing 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.

Senator ABRAHAM. Thank you very much. Mr. Cappuccio?

STATEMENT OF PAUL T. CAPPUCCHIO

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.

Mr. CAPPUCCHIO. 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 litigation as a common sense approach to address those problems briefly and then talk about some commonsense solutions.

Mr. Chairman, I start from the proposition that, at least in the current consent decrees are good things. They avoid the enormous expense of litigation which could last for years and they allow the parties to agree to relief and to avoid potentially much more intrusive court orders. So, I begin with that bias that we should continue to encourage the use of consent decrees, the use of litigation to 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 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 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 eight 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 living quarters, 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 is that the Justice Department has 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 fix 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 tinkering 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 became 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 advantage of 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 believe was right. On the other hand, I came away convinced that in several instances over the last 23 years, the Department of Justice has overreached in pursuing, or continuing to pursue, prison conditions litigation, and improperly intruded into areas that are 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 on the committee's attention on one of the problems with the use of consent decrees in prison conditions litigation. That problem is 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 could be, and 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. Let me first be specific about 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 (or 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 have been cases in which the Court could not have established this difficult standard.

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 conditions 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 trial." Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 523 (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 common problem 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 particular of what these decrees require has seemed quite pliantly 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 is quite out of proportion to 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, in its request to modify the decree to remove constitutional violations, has sought to impose on the States or localities additional burdens not required by the Constitution or other applicable Federal law. When 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.

(c) If 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.

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 enacted 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. The Justice Department in the future should announce new guidelines to govern the Justice Department's participation in prison conditions litigation. These five simple guidelines were:

(a) The Department should avoid entering into a consent decree unless it is 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 need 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 prisoners or prisons, once the correctional facilities have cured the constitutional violation. If the correctional facility has cured the constitutional violation, then the Department should notify the court and thus complete its duty to encourage continuing court supervision.

(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
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 641,000 of these violent criminals were brought to trial, with another 850,000 coming to trial and getting off on a technicality. Of the remainder, 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 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 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 murder or murders for which they were convicted. For example, between 1990 and 1993, Virginia convicted some 1,411 persons of violent crime over the last many years were in custody on parole, probation, 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. 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 crimes 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 3,118 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 95 percent of all parole violator admissions, had been convicted of thousands upon thousands of new crimes, including 285 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 mere empty legalisms on this subject, especially with regard to such issues as parole 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 these 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 Congress are deeply concerned 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. Diulio follows:]

PREPARED STATEMENT OF JOHN J. DIULIO, 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 exercised 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 this 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.

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 many of them 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 160,000 to convictions (over 90 percent of them the result of plea bargains), and only 100,000 or so to prison sentences, which on average lasted before the convict had served even half his time. The National Crime Victimization Survey 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 had not been convicted of a violent felony prior to their arrest. Even those not sentenced to prison are waiting to go off in just a few years.

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And of the 4.9 million persons under correctional supervision in America in 1993, about 72 percent were not incarcerated. Between 1990 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 8 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 researcher 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 500,000 were on probation or parole.

Revolving-door justice in corrections begins with revolving-door justice at the time of sentencing. For example, about 68 percent of the 51,000 felony defendants in the nation's 3110 state prisons at the end of 1993 were 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 with parole violations who were in prison for a property crime, are rearrested within three years for a violent crime. Between 1977 and 1983 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 sentences reversed as a result of judicial, court decisions, or other reasons.

According to the BJS, in 1984, some 2,716 persons were on death row. Available criminal history records reveal that 68 percent of their 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, 68 percent were "in custody" at the time they murdered. About half of them were on parole at the time of murder, 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 three years were "in custody" at the time they murdered. 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 murdered. In custody at the time of murder, 45 percent were considered to be "in custody" at the time they murdered. Nearly a quarter of violent prisoners had victimized other parole 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 3.1 percent of them—7 percent of total prison admissions—were technical parole violators. The other 42,834 of them—61 percent of total admissions, 96 percent of all parole violators who were in prison for a violent crime—were considered to be "in custody" at the time they murdered and had been convicted of thousands upon thousands of new crimes, including 255 newly convicted 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 1979 and 1980 many states passed laws upon which 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 residents 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 3.1 percent of them—7 percent of total prison admissions—were technical parole violators. The other 42,834 of them—61 percent of total admissions, 96 percent of all parole violators who were in prison for a violent crime—were considered to be "in custody" at the time they murdered and had been convicted of thousands upon thousands of new crimes, including 255 newly convicted murder.

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. Since 1964, when President Johnson declared a "war on crime," judges have handed down over 900 federal court decisions in more than 350 cases. Many states have passed laws aimed at reducing the number of violent crime offenses, including reduction of bail and excessive sentences for major crimes. Over 320 of these have been brought in at least 47 states, and 1600 of them have been in effect for at least one year. And yet, despite all the data I've just summarized, despite the mountains more academic, media, judicial, and legislative attention that they continue against all reason and morality to receive, they continue to do so.

Based on a scientific survey representing 711,000 state prisoners in 1991, BJS found that fully 84 percent of state prisoners were violent or repeat offenders. About 66 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 offenders had an active legal status at the time they murdered more than one person, and 20 percent had victimized a minor.

In a recent article by Dr. Steven Levitt of the National Bureau of Economic Research that incarcerating each prisoner reduces the number of crimes by exactly 10 percent. 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 "more" 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 residents who have done a mix of property and other crimes.

And yet, despite all the data I've just summarized, despite the mountains more that do not accept the same revolving-door reality, and despite the public's justifiable outrage, one continues to hear and see reported as "fact" the falsely false notion that most prisoners are "mere" drug offenders, "technical" parole violators, and other unfortunates who did little criminal harm to society when they were free, and who do no harm to society if they were released if they were released the next 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.

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In sum, the Pope is Catholic, frogs do not have wings, and America has a world-class problem of revolving-door justice.
...are both constitutionally required and morally imperative. Most federal judges act responsively in respect to public safety, prisoners' rights, and other important public values.

In 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 1994, the National District Attorneys Association (NDAA) passed a resolution that treat criminals to do murder and mayhem on the streets. The NDAA resolved that federal court orders in prison litigation offend the public.

In 1993 and 1994, only one public official had an interest in the criminal-justice system. By passing sweeping orders, federal judges have been able to release dangerous criminals without ruling on constitutional claims or holding a trial on the allegations.

The anti-STOP coalition would like nothing better than to have this Congress enact a STOP amendment like the anti-STOP coalition would like this Congress to believe that the public prison population densities and levels of violence and other problems behind bars is negligible. But it is not. The empirical evidence on the relationship between prison population densities and levels of violence and other problems is overwhelming.

1. A 1995 BJS study of over 160,000 housing units in 694 state prisons found that the most crowded prisons had a rate of homicide lower than that of less crowded prisons directly related to the incidence of homicide, assault, or major disorders. (C. Innes.
2. A 1993 survey of the empirical literature on prison crime concluded that, in prison violence, illness, and hostility, modern research has failed to establish positive prison social and spatial densities and these problems.

In 1993 and 1994, only one public institution received lower ratings from the public than did Congress itself, namely, the criminal-justice system. By passing sweeping orders, federal judges have been able to release dangerous criminals without ruling on constitutional claims or holding a trial on the allegations.

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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 LYNN ABRAHAM

Ms. ABRAHAM. Thank you, Mr. Chairman and Senator Biden. My name is Lynn 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,

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 residents of our communities. The work you are embarking upon, in combating the Violent Crime Control and Law Enforcement Act of 1994, can only reinforce 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 and unceasing interference by federal courts in prison litigation has had an adverse effect on our ability to protect our communities. Court orders and decrees that would otherwise be unconstitutional, or at least intrusive and burdensome to local government, can only be enforceable if the federal government has agreed to the consent decrees. The executive branch of government, however, has been unable to provide the political support necessary to establish uniform provisions limiting federal court orders and consent decrees that affect local prisons and jail facilities. We believe, and our constituents agree, that the federal government should provide the necessary support to ensure that our communities' safety is protected.

Our Association strenuously urges the Congress to adopt legislation that would establish uniform, enforceable provisions limiting federal court orders and consent decrees that affect local prisons and jail facilities. Such legislation should include provisions that would allow the courts to recognize those that are least intrusive and burdensome to local government and with the least likelihood of disrupting 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 vacating of court orders where unconstitutional conditions have been corrected; and that would 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 than to see a wrongly 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.

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 be dealing 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 we didn't exclude 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 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 the whole city, of the kinds or prison caps that we have been suffering. In 1970 in this country, there were essentially no more than 20,000 State prisoners in 1,200 State prisons subject to court orders or consent decrees, many of which contain prison population caps.

In some, in particular, the Federal judge sitting on our prison cap case 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 almost all 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 offenders are on the street because of pressure from the federal courts. The federal courts, often with the intention of improving prison conditions, have intruded unnecessarily into the state criminal justice systems and conditions, a federal judge, who made no finding of them were rearrested for another felony, and 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, and drug-dealing, vehicular homicide, manslaughter, terrorism threats, and gun-dealing. A person cannot be detained pretrial, no matter how many times 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 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, shot his son and killed him right on the street and right through the stolen car 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 a convicted taxpayer. 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, does it seem 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 understate the shear 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 ask 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. The Chair wishes to ask me, and I appreciate the opportunity to be here.

The prepared statement of Ms. Abraham follows:

PREPARED STATEMENT OF LYNN 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 position of what federal government can do to help states run their own criminal justice systems in order to ensure justice for both, the victims of crime and those who commit crimes.

Over the last 25 years, we in law enforcement have seen a dramatic change in prison 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 cap mandates. Unfortunately, the federal courts, often with the intention of improving prison conditions, have intruded unnecessarily into the state criminal justice systems and completely undermined their ability to dispense justice and protect the public.

A Justice Department study of 5,000 felony probationers found that 49 percent of them were rearrested for another felony within their state while on probation. Half of those arrests were for violent crimes or drug crimes. In addition, 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 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 was appointed to oversee what has now become an eight-year-old program of wholesale re-

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From the day I took office as District Attorney 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 was appointed to oversee what has now become an eight-year-old program of wholesale re-
leaves 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 has recently found that the conditions in even Philadelphia's most crowded and most decrepit facility—Holmesburg Prison—were still constitutionally insufficient. Unfortunately, the prior mayoral administration did not even put up a defense to this lawsuit, thereby allowing the former prison to be held in contempt for violation of a federal court order and to be found in default. Yet, even Philadelphia has defendants who are willing 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 prior to 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 "charge-based" system for determining who may enter the prison. 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, terrorist 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 Colt is deemed "non-violent." The defendant's prior convictions, his history of failing to appear for court hearings, 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 on the streets looking for these fugitives. Why bother—arrested, they will all be released again to the grace of the cap.

- In the six-month period, thousands of defendants who were on the street because of the prison cap have been arrested for new crimes, including 79 murder, 699 robbery, 2,216 drug dealing charges, 101 burglaries, 2,728 thefts, 90 rapes, and 1,133 assaults.

- In 1993 and 1994, over 57,000 new bench warrants for misdemeanor and felony charges have been issued for defendants released under the prison cap. This represents 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 the court system is higher for prison cap defendants than for defendants released under our traditional state court bail process. A study established the following failure to appear rates:
  - Drug dealing 78 percent;
  - Counterfeiting 72 percent;
  - Aggravated assault 78 percent; a crime for which defendants cannot be released under the prison cap in the first instance just 9 percent.

The fiscally responsible rate nationally for defendants charged with drug dealing is 28 percent. In Philadelphia, however, our FTA rate of 76 percent is three times the national rate.

But these statistics do not reflect the insurmountable losses to our community caused by criminals in their belief that the criminal justice system is powerless to hold them. The murder of even one citizen is too high a price for these ill-conceived and counter-productive policies. Every 100 people killed in Philadelphia killed by those released on parole or probation; many states will not seek to return violators to prison because of the impact on 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 the same state 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 deductible, uninsured, and unsecured security and surveillance costs, and increased insurance premiums. How can we expect to attract retail businesses to urban areas when they "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.

It is my observation that the drug trade is, by most accounts, an extremely attractive investment for drug cartels. The Philadelphia International Airport is now a favored location to send out the illegal drugs. Under the prison cap defendants who hold a drug smuggler in prison unless he is caught with more than 50 pounds of marijuana or more than 90 grams of cocaine. So the drug cartels and their minions need not even have to suffer the inconvenience of putting up the money to get back the drug dealer out on bail. They 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 modifications. Every single construction change order has required federal court approval. Recently, for example, the Philadelphia court system wanted to expand one room in the court building for court interpretation. 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 $90,000.

The federal court has micro-managed the Philadelphia criminal justice agencies to an almost insane level—there have been debates over the placement of flag poles on our courthouses. When the federal cap was announced, the federal court forced us to demolish our large new state courthouse under the prison cap because it 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 $90,000.

We, the current mayor, other law enforcement officials and I are attempting to resist this cap. We know that the prison cap can only be maintained, even though I have standards 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. The federal prison cap is an insurmountable barrier to returning crime control to the ability of court-ordered punishment.

In Philadelphia, we are committed to devoting adequate resources to ensure appropriate prison conditions for inmates and safety for our correctional officers. Human conditions are essential not only because they prevent a federal takeover of our correctional system, but, more important, they respect the rights of all members of our society, even those who break the law. But we must also assure that law enforcement 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 and the Loring 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 ability of the state to provide for the compelling need of additional beds.

For these reasons, the National District Attorneys Association, a bi-partisan organization, 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 federal injunctive relief 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 204 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, relying 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 cells, which 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 prison crowding 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 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 read 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 or 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 CIRPA 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 CIRPA. 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 overload 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.
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. 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 position 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 many 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 prosecuted and convicted of one of the newly created crimes that have been created 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 consent decree institutions, concluded that Michigan had attained the objectives of the decree in the areas of medical
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 January of 1991 when the court was imposing $16,000-per-day fines upon the State. If the ways of compliance are the same as those one would presume for continued unreadiness—namely, Justice Department flip-flops, court orders hearing 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 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 State of Michigan’s perspective on the issue of overhauling the nation’s prisons. For better or worse, prisons are a necessary and large 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 1982, capital spending represented only 3 percent of the general revenue fund. What is the tremendous increase in resources committed to corrections? The reason is simple: in the 15 year period the inmate population has skyrocketed over the past 15 years—from 15,700 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 innovative, reasonable and cost-effective alternatives to traditional incarceration which have been independently implemented by the State. Michigan is justly proud of its efforts to run a high quality, humane and constitutional prison system. It is an absurdity to require Michigan to first re-model 10 years of our corrections expenditures, and then to permit the Federal Bureau of Prisons 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 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 only one avenue for, the Attorney General to pursue a course of litigation (with the admirable purpose of) to end the litigation, 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 which the Attorney General, acting under the authority of this Act, is being deprived of by officials as a vehicle to insure that State statutes are in a manner in which those officials believe they should be operated, disregarding the Congressional directive of limiting federal authority to enforcing the minimum constitutional guarantees necessary for the enjoyment of constitutional rights. CRIPA does not authorize a cause for action for employees, taxpayers and to all law-abiding citizens, the abuse of CRIPA is a crime.

In 1982, the Justice Department investigated several Michigan prisons and concluded that unconstitutional conditions existed. In July 1984, and on the same day that federal court litigation was instituted by the Attorney General, a Consent Decree was entered into by the parties to remove 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. Consent was obtained with CRIPA’s original intent as the Attorney General safeguard prisoners’ 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 Attorney General and the Consent Decree have been utilized to bring suit under the Civil Rights Division with a vehicle to pursue a course of litigation (with the admirable and full support of the Federal District Court) to require Michigan to provide medical care and other constitutional rights to prisoners in Michigan’s prisons.

In addition, the Attorney General has instituted a number of suits, such as United States v. Michigan, 680 F.Supp. 928 (WD Mich. 1987), which are pursuant to the provisions of Michigan’s Corrections Code (M.C.C. § 705.471) and are in accord with Michigan’s Corrections Code (M.C.C. § 705.471). This is a violation of the state’s sovereignty to conduct any litigation pursuant to the provisions of Michigan’s Corrections Code (M.C.C. § 705.471) and is inconsistent with the state’s sovereignty to conduct any litigation pursuant to the provisions of Michigan’s Corrections Code (M.C.C. § 705.471).

In conclusion, it is time for the Congress to bring this federal overreach into line with the Constitution. It is time for Congress to reexamine Section 504 of the Rehabilitation Act (now known as CRIPA) and Sections 508 of the American with Disabilities Act. It is time for Congress to reexamine the enforcement mechanisms of the Federal Civil Rights Division. It is time for Congress to examine the role of the Attorney General in conducting litigation.

Thank you.
is lost in all Court and Chi! Riidits 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 fifteen years of its continuing jurisdiction over the CRIPA Consent Decree, the Court has ordered the hiring of numerous independent experts to administer and enforce the Consent Decree. Unlimited access to prisons, personnel and documents are granted to these experts, each of whom are paid excessive hourly or daily rates at the expense of Michigan taxpayers. The 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. Issue is whether a prisoner's diet includes food lost, 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 of its own prisons. In fact, in Sandin v. Conner, 953 U.S. 507, 510, the U.S. Supreme Court recently cited the USA case as an example of impermissible federal micro-management of prison operations which occur under the guise of enforcing constitutional rights.

I am sorry to report that the trivialization and abuses of CRIPA continues 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 informed Michigan's grievance procedure violates Dan Prong; at the same time this allegation was made, the same Justice Department awarded full certification to its 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 all 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 procedures and provide the requisite notice of the specific concerns involving Michigan facilities prior to issuing a complaint." The Governor went on in the letter to request of Attorney General that "... the CRIPA provisions cooperate through reciprocal exchange of information." Michigan has always been willing to cooperate with federal officials regarding legitimate concerns related to its prison operations. Michigan has 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. Such 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' statute and its legislative history, has been subject to differing interpretations across the country.

Cost 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. These excessive costs and the micro-management

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

Senators ABRAHAM. Thank you. Mr. Watson, thank you also for your patience and waiting here. Senator BIDEN. Mr. Chairman, 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.

Senators ABRAHAM. It will, without objection.

Mr. WATSON. Let me comment 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 are the courts. We bring about increased attorney's fees. Our attorneys don't work for anything either, plus all the 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 into a consent decree 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 to 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 get their attention without any 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 didn't deal with it. I think it should give us 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.

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
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 J. Watson. I am the Commissioner for the Oregon Department of Corrections. I have served in that position for over eight years. I have worked in the field for over 40 years. Before beginning my career in law enforcement in 1953 as a Correctional Officer in the State’s maximum security prison. After working my way up through the ranks, I was appointed as the head of the Oregon Department of Corrections in 1976, a position that I held for ten years before moving to Delaware.

I have 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.

I would like to voice 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

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 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 to behavioral changes and 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 again.

By way of illustration, federal lawsuits often challenge prison staffing conditions, the court orders the staff to hire additional personnel, and the state has no chance of winning. By negotiating a settlement we can make over the financial burden on the State. The money that would be spent on the lawsuit could be used to improve conditions and reduce our financial burden.

Professional corrections staff do not want to run unconstitutional prisons. They want to improve conditions and reduce our financial burden. By negotiating a settlement we can make over the financial burden on the State. The money that would be spent on the lawsuit could be used to improve conditions and reduce our financial burden.

The provisions 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 a bastille anymore. At prisons all over the country, volunteers come by the hundreds. 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. They are safe with a ready access to consent decrees than if that issue was abolished, and again, good staff, a good grievance system, and the ability to access the courts, if all else fails. I think passage of STOP would complicate this process and make it more difficult to settle legitimate claims.

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will be required to conduct repeated compliance hearings. Most monitors that are appointed by the courts have significant corrections experience or expertise in the area of cases 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 question. This view is contrary to the argument that appointments of monitors and staff will be expensive and time-consuming. The attorney's fee provision of the bill would exaggerate this problem by providing for the payment of attorneys' fees. The attorney's role in the remedial phase of litigation is in no way analogous to that of a master or court monitor to oversee the implementation of a court order. 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 order is required 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 housing, 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 can only imagine the efforts of the courts to all those inside our prisons and to the communities to which they return.

It is not reasonable 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 that they have genuine problems. The courts are the first step in responding to legitimate prisoner claims; a formal grievance system is the second step. Overloaded with cases, the courts are already insisting that states implement certain correctional systems that reduce the courts' workload by processing prisoner claims out-of-court. The final step, when all else fails, is for the prisoner to sue the governor and corrections officials in court. Passage of STOP would make 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.

As with litigation, correctional systems are extremely costly and come 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 range from $419 million and 0,000 positions, of which at least $200 would be judicial positions. At least $85 million could be incurred if just 50 percent of existing cases were resolved in the context of court orders, as opposed to litigation. The costs of prisoners' claims and court orders are reflected in federal expenditures subsequent to their termination under this bill. Many more millions of dollars in resources would be incurred by the judiciary if the 28,000 prisoners in the system 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 spend in trying to address the plaintiff prisoners' claims. The vast majority of these expenditures would be far too good a purpose and could be saved by leaving enough alone.

Prisons are not ideal places to live, and they should not be. However, conditions within our correctional systems, as well as the conditions in federal prisons, are not the same. A prison is not a federal institution; it is a local correctional system. The courts' role in corrections is to ensure that the prisoners are treated fairly and with respect. The courts' role is not to run correctional systems, but to set the parameters within which they must operate.

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. And thank you for allowing me to be here today. I am a native of California, born in Gardnerville, Nevada. I was raised in the small community of Gardnerville, about 50 miles west of Reno, Nevada, and 15 miles north of Carson City. I attended the University of Nevada at Reno and I worked as a cook and counselor at the Gardnerville Youth Rehabilitation Center.

I have spent much of my career working in the corrections field. I managed the two largest state prison systems in the United States. In California, I served as Director of Corrections in California from 1987 to 1978. In Texas, I served as Director of Corrections in Texas from 1984 to 1983. In Texas, I served as Director of Corrections in Texas from 1984 to 1983. In Texas, I served as Director of Corrections in Texas from 1984 to 1983.

I have been involved in the field of corrections for over 40 years. I served as Director of Corrections in California from 1987 to 1978. In Texas, I served as Director of Corrections in Texas from 1984 to 1983. In Texas, I served as Director of Corrections in Texas from 1984 to 1983.

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I believe that good prison administrators avoid litigation by running lawful and properly designed institutional 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 been subject to 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, many lawsuits are valid. I have testified in some lawsuits on behalf of prisoners, and for the state in others. Most important, when lawsuits are filed, it is imperative that State officials, including the Director of Corrections, maintain control of the litigation. When they do not 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. PROCTOR

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. It was our understanding that inmates must be enrolled in their constitutionsal rights and that the State must be held accountable for these rights.

Though my legal practice in Austin, Texas, since 1950 had included any civil rights cases, I was assigned the task of defending the State in Ruiz v. Estelle. It was a difficult task, as the State had been found to be constitutionally liable for the manner in which it had been operating its prisons. Much of the information obtained came from my own investigation of the treatment of inmates, and I was astonished to learn that so many state officials were either unaware of the prison conditions or unwilling to recognize the obligation of Texas under the 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 IV of House Resolution 667, I am concerned that such legislation is of no more than an attempt to allow states to flout 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 in Snowbird. Best regards.

Yours very truly,

HARRY M. WHITTINGTON
• 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 already 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 trials, 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, greatly 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 Quinnin, who headed the federal Bureau of Prisons under Presidents Reagan and Bush; present and former correction commissioners of Idaho, Minnesota, Wisconsin, 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 in this critical issue.

Sincerely,
Barclain 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,
American Psychiatric Association,
National Association of Developmental Disabilities Council,
The Learning Disability Association,
National Mental Health Association,
National Head Injury Foundation,
American Psychological Association,
National Association of Social Workers,
American Psychological Association.

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 prison or jail.

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 in every case 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 exacerbate the resource crisis of federal courts.

This bill would significantly increase the burden on the federal courts, 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 Law Center,
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,
Kolodinsky, Berg, Seitz & Treiber, Daytona Beach, Florida,
Legal Aid Society of the City of New York,
Legal Services of Louisiana,
Legal Services for Prisoners, Inc.,
Legal Services for Prisoners with Children,
Lewisburg Prison Project,
Louisiana Crisis Assistance Center,
March 9, 1995.
The Right Reverend Joemoms Does, Bishop of the Episcopal Diocese of Minnesota, is in the best interests, preventing state authorities from settling agreements in prison conditions litigation. These entities 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.

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 admin ... 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, 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 then compelling 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 conditions 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.
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 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 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 prison 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 least, what you are going to do doing if you have a commitment and you are moving forward with a compliance agenda, you are going to have needless interruptions that will never telegraph 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 DiFulio out of his book recognized that in complex litigation of this type, they provide eyes and ears 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.

I would like to specifically comment on the prohibition of preliminary or emergency relief absent a showing, which would obviously require a full-blown hearing. I have been in institutions in which conditions were so severe that I believed 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 we 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 and those cases sound out of the norm to me.

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 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 and those elections. They are elected officials. They have not done so. Ill-advised and will be in the long term very counterproductive.

Texas 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 have heard some things that I find very both inhuman. 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, inhumane medical care, and overcrowding so extensive that, at one time, prisoners were housed three and four to a 48-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 reiterating 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 Fifth Circuit ruling, the plaintiffs moved for further relief, seeking to impose a single-cell requirement on the prison system, a requirement the appellate Court 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 for the majority of inmates. In return for the double ceiling, the prison board agreed on predetermined capacities at the various 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 earlier. Admittedly, in hindsight, there were a few major points at which the federal court could have stepped in to prevent the system from proceeding as it did. But even the Court, might have conducted themselves differently. Most significantly the federal court 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 the plaintiffs.

This brings me to the first of my several concerns about this legislation—that it usurps what has herebefore been the prerogatives of state and local jurisdictions to decide if and when setting litigation is in their best interests. 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, the bill—known as STOP—from the 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 after 2 years of a consent decree, and will require departments of corrections around the country to prepare a consent decree 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-
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 to have never seen two cases alike. To my knowledge, the one and a half to two and a half year rule to every case is, at best, counter productive and, at worst, pure fiction.

I recognize the concern behind this bill that some prison conditions litigation seems to drag on, and that it has that option too. I urge you to leave it that 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 jail has been in effect for over 15 years and 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 in no city in Texas, Washington, Colorado, Wisconsin, that has caged populations in one or more institutions, has required that a court order be reduced. The mechanism of the court's order is sufficiently flexible. Indeed, the Legislature in all four states reasonably 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 demands. 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 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 prejudices 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. There is no court order granting relief to the plaintiffs.

There are only two ways under this bill that a trial could be avoided, neither of which is likely. First, the state could agree to a finding of liability that this bill would incorporate 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 is likely to be the state with an open law against settling or defending a defense. For this reason, prison conditions settlement agreements do not include admissions of liability, and, typically, include a provision to that effect.

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 the non-enforceable settlement to the STOP bill that specifically exempts non-enforceable settlement from the bill's coverage. The Senate version of the bill does not include this feature. As I stated at the outset, even if one were passed, it is opaque problematic for a number of reasons. First, plaintiffs' attorneys are unlikely to agree to a non-enforceable settlement agreement because it is non-enforceable. For example, in a juvenile facility 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, the 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 a null and void option in most cases, particularly where the defendants are resistant to remediation.

In those 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 a 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 remediation 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 time. At the very least, the Committee should require
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 following procedures 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 to the court. And then the court, regarding his or her fees and expenses 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 appear in court with the findings, recommendations, fees or expenses of a court-appointed monitor. Monitor fees should be based upon the use of the monitor altogether will deprive the court 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 plaintiffs. And the plaintiffs' attorneys have 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 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 records that I have done that 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 or not a court order will be honored, whether a court order remains in effect, whether states will have to devote the majority of their Department of Corrections budget to court-mandated solutions.

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 all cases—is an extremely expensive one. And by depriving the federal courts of the tools they have used to ensure compliance with their own orders—such as the appointment of special masters with special expertise in prison operations, the enforcement of a court's order until it is complied with, the issuance of temporary restraining orders and preliminary injunctions to respond to proven emergencies and the ability to award attorneys' fees for work done by plaintiffs' attorneys in the remedial phase of litigation—we would have inadvertently set the stage for the collapse of many of our prisons to the horrific conditions of the past.

Prior to the 1960's, judges wanted to discourage communities by adhering to the idea that courts were not willing to interfere in prison affairs. This rule of law was often referred to as the "hands off doctrine." I wonder if the Committee to examine the history of America's prisons—the conditions that endured when the "hands off doctrine" was in place, and the changes that took place over the course of dismantling of that doctrine. Passage of this act will create a setting in which we will be forced to respond to the failures of the past.

Also, I would like to share some brief thoughts on the "absolute lawsuit" kid. I share the concern that appears to have engendered this frivolous lawsuits legislation. I believe that the courts are already equipped to respond to these concerns. In 1993, I wrote a law review article discussing the efforts of the Fifth Circuit Court of Appeals to respond to frivolous lawsuits. While I favor reasonable pleading standards, I believe the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. While I favor reasonable pleading standards, I believe the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits. However, there are concerns that the courts are already equipped to respond to frivolous lawsuits.
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 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.

Mr. CAPPUCCIO. I am not an expert on this. I just received the Act 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 doing wrong.

Ms. ABRAHAM. There are certain things, and some of them are politically motivated. It is more expedient to enter into a consent decree than to fight it out in court and sometimes rather than look like you are bad guys—"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.

If we 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, 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 of what goes on on the part of the parties to come in and make their statements.

The master is appointed by the court as his or her personal watch dog at public expense, without any accountability, any review, any access to the records, to actions of masters 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.

I 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 the case, 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, 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. DiFulio?

Mr. DiFulio. 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 the commission 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 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 do my best. I am trying to be thorough. 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. CAPPUCIO. 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.

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 busying 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 U.P.A. lawsuit, but I think they both demonstrate the longstanding nature of these lawsuits and the inability of the State to get out of under the negs of judicial control.

Mr. 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 a U.P.A. lawsuit, but I think they both demonstrate the longstanding nature of these lawsuits and the inability of the State to get out of under the negs of judicial control.

Mr. CAPPUCIO. That was the Monroe 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 a U.P.A. lawsuit, but I think they both demonstrate the longstanding nature of these lawsuits and the inability of the State to get out of under the negs of judicial control.

Mr. 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 that, Senate 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. 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, I 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 $8.7 billion over six years, all fully paid for by eliminating 272,000 Federal bureaucrats.

The overarching 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 prisons for at least 85 percent of their sentences would add approximately $60 billion over the next five years to their prison costs.

- It is to no one's 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 attainable
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 method of freeing 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 space.

The flexibility provided by the 1994 crime law allows States to maximize their prison dollars by moving those 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, truth 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 the list drawn up 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 if we have to go to all costs to make sure that is the case, then we must do so.

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 the need to adopt 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 proposal, in its current form, 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 Constitution would limit the courts’ traditional role in correcting unconstitutional violations. I question whether this is appropriate.

I am concerned that this legislation would appear to terminate existing remedy for prison conditions—contracts between litigants and the States—and would severely limit the courts’ ability to redress grievances.

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 belong.

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
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 cap, 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 police officer, 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 5 years arguing against the attitude 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 made it all be 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 plea bargain? Same motivation as the prison official may have. Can you make a distinction for me, professor?

Mr. DIULIO. 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, and you look at the public opinion 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. DIULIO. 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 1970s and into the early and mid-1980s was because people were saying this justice system involves an irreducible minimum of discretion. Somebody has got to exercise the discretion. And is opposed to the notion that people were saying this and is opposed to the notion that people were saying this.

Senator Biden. So the public is saying this. You are not suggesting that.

Mr. DiIulio. No, I am not suggesting that. I am suggesting that the public is making a decision about who 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, accountable 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.

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 court 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 Mr. DiIulio's area 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. 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.

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 is going 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, but 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, you know 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 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.

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. Then come down here and say, look, balance your Federal budget; by the way, send us the money 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 10 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 1980. 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 thing. In sentencing legislation you will not get any money in Michigan federally until—the good news is you are going to have 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 got 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 year or a no—do you support the經 cur to the Senate don’t trust you enough to make a judgment for 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.

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 is that something that for many States just isn’t working. 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 1980. 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.
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 council, 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 to accept 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 90 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. DiULIO. 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, 32 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 don't do that under present law anyway. That is now the law, the same breakdown. It is for violent offenders, second time, and so on.

Mr. DiULIO. Yes, well, I think we have been here before, but with provision 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.
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 is an effort 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.

Ms. ABRAHAM. 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 appoint a Justice. I think...

Senator BIDEN. That is a good point.

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 peo...
Mr. GADOLA. I certainly would. The problem that Michigan faces is that the standard we would have to meet to get out of 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 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. CAPPUCIO. 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—"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.

Mr. CAPPUCIO. Like that big, fluffy peanut butter.

Ms. ABRAHAM. Please do.

Mr. DIULIO. I think this brings us right back to Senator Biden's incisive conceptual question. I mean, this really cuts right to the heart of the matter 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 implica-
As most of you are lawyers, we can argue in the alternative. We are trained to argue in the alternative. This is not the 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 agrees 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 to reopen the act 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 constitutional 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 Mr. Chairman has 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 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 year from now and they are old 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 Senator Biddle 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 the panel 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. 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 to reopen the act and we want you to fold your tent unless you conclude, judge, that there is an existing constitutional violation.

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STATEMENT OF KATHLEEN FINNEGAN

Ms. FINNEGAN. Thank you very much, Senator. Because of Florida's revolting doo 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 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 learned enough about the realities of our system to know that I needed 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 most trusted man I have ever had the opportunity to call my friend. The early release 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 badges 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 scream for help, the shot rang out, and I saw the bel 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 moments 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 gun problems 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 was our last goodbye. But I had to try to escape, he did so into the black of night, so I ran into the woods 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 idea. 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, in 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 DeLand, 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 innocent prison serves to isolate criminals from society whose rules they choose not to follow and it protects all of us. Only when we house people 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 being the issues of inmate litigation. I 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 violent 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 costly and 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 American taken by both the Senate's proposed bill and House bill 1617, 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 best 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 they did a very effective message to Congress, offering 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.

Some of the laws 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 that 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 exceed the national average in homicide, rape, kidnapping, 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 50 percent of their sentences. 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 entire landscape 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, arguments that concern the fact that the Supreme 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." To do 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 a few of these frivolous lawsuits might be, but the 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 1983, 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, but I think there are many things that have to be changed. I certainly feel that if we have many inmates received consent decrees and permanent injunctions that tie the hands of correctional administrators, and for years.

The majority of State correctional administrators, state legislators 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. LAUR 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 the 105th Congress 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 court. 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, as well as a few others, the "early release" is based on "good time credits and other judicial release" of incarcerated violent offenders from prison sends unacceptable and dangerous messages and does a dis-service to all citizens. The victims of violent crime feel that offenders are not properly punished, perpetrators believe that crime does not pay the cost, and the average law abiding citizen feels the entire criminal justice system is broken down.

Therefore, Truth in Sentencing is an essential element of any crime bill.

After articulating the significant and vital concept of Truth In Sentencing, it is necessary to express the major concern of the approach taken in both the Senate's proposed bill and House Bill 687. Both bills contain wording that dictates to the states Congress' concept of what constitutes Truth in Sentencing and ties all federal funding for the failure of states to meet your definition or standard. State criminal justice systems, state criminal laws, and state sentencing structures all vary is uniquely different—particularly when it comes to criminal justice systems. The 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, Congress does need to provide leadership in this vital area and one great example could be setting standards, such as serving 80 percent of imposed court ordered sentences through the federal system, and suggest that states consider this as a model. A failure to do so could be viewed by the states as a matter of ignorance.

One of the flaws in the Violent Crime Control and Law Enforcement Act of 1994 was the failure of ever being to meet your definition or standard. The proposed revision in both the Senate Bill and House Bill 687 recognizes that the states do not have the same problems, incarcerated violent offenders is a greater percentage, the national average of time served for such offenses is murder, rape, robbery, and assault in order to qualify for federal funding. The draft Senate Bill, considered to be the more acceptable version for sentencing states, addresses this problem by allowing indeterminate states to qualify for federal funding if the average time served for serious violent offenders is close to the line.

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

Utah currently has 215 murderers in prison and only 30 of these have a parole date and most will spend more than 20 years in prison. Presently, 35 percent of Utah's inmates are sex offenders and 10 percent is convicted murderers. Utah has some of the highest unemployment rate and the highest percentage of families living in poverty. Utah's murder rate is 80 percent above the national average. The state has a difficult task in addressing the war on crime. It is believed that many of these same issues apply to other states.

Based upon the problems of qualifying for federal funding under your 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 standards for determining the presence of violent offenders in 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 experiencing an epidemic of crime.

Both the Senate's proposed bill and House Bill 687 rely heavily upon various "objective" statistics to fast track a state in sufficiently high on crime to merit federal grant monies. The problem is that the statistics for determining federal funding eligibility only count violent felons who are sentenced relatively new or paroled. Recently, Utah could look enoug 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 apply for federal grant monies.

The most important consideration is how to properly addressing the war on crime. Utah could look 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 apply for federal grant monies. The most important consideration is how to properly addressing the war on crime. Utah could look 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 apply for federal grant monies.
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 operations. Some significant examples of the courts position in this regard are the following decisions:

- "Lawsuit incorporation 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. 266 (1948).
- "It is not the function of the courts to superintend the treatment and discipline of the inmates and penitentiaries, but only to deliver from imprisonment those who are illegally confined." Adams v. Ellis, 187 F.2d 550 (CA9 1960).
- "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, 380 F.2d 816(CA9 1968).
- "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules of regulations." Raining v. Looney, 213 F.2d 771 (CA10 1954), cert den. 348 U.S. 829 (1954).

The inmate rights explosion began in the late 1960's and early 1970's. It was the October 1973 decision of the 3rd Circuit Court of Appeals in the case of Inmate v. Dandridge that clearly changed the previous direction of the Supreme Court to totally reverse the "hands off doctrine." An excerpt of the May 22, 1974 Congressional Record clearly defined the High Court's 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 shook the reporters by replying, "Of course—that's the whole point. Read the constitution. The government has immense power—please, read the constitution. The government has immense power—the FBI, police, Read the constitution. The government has immense power—the FBI, police, in their individual capacity without the courts. The federal courts do not have the power to stop the overwhelming power of the government. That's our purpose, to make things as tough for the prosecutor as we can."

Justice Black referred to the September 1974 decision of the Supreme Court in Dandridge v. Carson. The case involved a petition by inmates in a New Jersey prison for a declaratory judgment that the prison's hospital facilities were unconstitutional and that the use of force by prison authorities violated their constitutional rights. The court held that the inmates had a constitutional right to be free from unreasonable force and that the use of force by prison authorities violated their constitutional rights.

Inmates are not immune to the same legal process as citizens. They have the same right to due process as citizens and are entitled to the same legal protections. However, the legal process for inmates is more complex and time-consuming due to the additional layers of bureaucracy and the need to navigate the prison system. Inmates must file a writ of habeas corpus to challenge the legality of their confinement, and the court must order the prison to release them if the habeas corpus petition is granted.

The following list of actual claims provides a more complete and comprehensive view of the injustices and frivolous suits that are filed in federal court:

1. An inmate received generic form of medication instead of trade name. Anderson v. Wiggins
2. After refusing to come out of his cell to eat for two days, prisoner sued for failure to feed him. Gliek v. Stansor
3. An inmate sought release from prison because he claimed (falsely) that he had multiple Traumatic Stress Disorder (PTSD) from Vietnam service and did not in close quarters. Gliek v. Stansor
4. An inmate filed a claim for assault and battery on a guard. Brown v. Gage
5. An inmate repeatedly sued to enforce a claimed constitutional right to play more volleyball and participate in the "Tournament of Cards." Alvers v. Conner
6. An inmate repeatedly sued to obtain (and then obtain more) for himself and then was allowed to purchase a Pims 
   because they gave him "fancier cards". Lane v. Ayers
7. A class action was filed for L.A. County inmates to be released from "Pumps" instead of "Pumps" because of a medical necessity. Wicks v. Daughan
8. A prisoner claimed "invasion and non-unanimous punishment" because his cell did not have a desk. Duron v. Vigil
9. An inmate filed suit claiming that he was not allowed to call witnesses at a disciplinary hearing. The record showed that he was allowed to call all the witnesses he requested. The court ordered the inmate to cease and desist from filing such suits. R.A. v. Conner
10. Another inmate filed suit and claimed indigent status. It was later discovered that the inmate was employed, with pay, a $600,000 home and a $14,000 Dodge Caravan for a friend and still had thousands of dollars more in different bank accounts. Tuff v. Birtola
11. After a cell search, prisoner sued officers because they did not put his cell back in a "functional" manner and missed his clean and dirty clothes. Roberts v. Hopkins
12. One inmate filed suit alleging he was a Buddhist. However, after the prison let some of his demands for religious materials, he promptly refused them and sought the death of another citizen. United States v. America against John Jones. So we have built a case of rights around him to balance the situation. -- NOT IT -- Justice Black's demystifying stance.
13. The court ordered all cases to be decided on the record. The court's statement on mandating a specific date is similar.
14. The court's directive to the court's statement on mandatory a specific date is similar.
15. The court's directive to the court's statement on mandatory a specific date is similar.

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The court's directive to the court's statement on mandatory a specific date is similar.
Mr. President, Members of the House of Representatives,

I rise to support the Civil Rights Act of 1989. This legislation is a forward-looking approach to address the challenges of the contemporary criminal justice system. The Act seeks to balance the rights of individuals, particularly those in prison, with the need for public safety.

The introduction by Representative [insert representative's name] is well-timed. As we grapple with the growing population of incarcerated individuals, it is crucial that we ensure due process and respect constitutional rights. The Civil Rights Act of 1989 is designed to prevent the unnecessary punishment of prisoners and ensure that their rights are protected.

This legislation builds upon the historical foundation established by earlier civil rights acts, recognizing that prisoners, like other Americans, have the right to be free from unlawful discrimination and to seek remedies for violations of their rights.

The bill guarantees prisoners' rights to legal representation, access to educational programs, and medical care. It requires the appointment of independent monitors to oversee the implementation of the act and to ensure compliance with its provisions.

I urge my colleagues to support this legislation, recognizing its importance in maintaining the rule of law and the welfare of all Americans, regardless of their current incarceration status. The Civil Rights Act of 1989 is a critical step towards ensuring equal protection under the law for all, including those who are currently under the control of the state.
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 bid up 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.

Mr. 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 the world have found that private prison labor is more cost effective than public prison labor. In 1994, among other things, that statute authorized the expenditure of $10 billion in Federal grants to construct and improve State 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 correctional facility 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 be 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 unsustainable. I suspect this is due to the lack of a profit-based structure. In short, no one has yet devised a better pencil sharpenener 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. These include 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 the best value.

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 1984. 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. 124 and S. 38, introduced by the Majority Leader, Sen. Dale and Judiciary Committee Chairman Hatch, respectively—would improve existing law in certain respects. However, I 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 incorporate 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 prisoners. 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 urged the federal government to appropriate $150 million for the first 10 prison privatization projects.

A prison designed by its private sector operator is the best guarantee of maximum safety and security. Although many public sector agencies perform some functions efficiently, public sector efficiencies tend to get absorbed in growth—especially in staffing, 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 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.

ATTACHMENT 1

PRISON GRANT: PRIVATIZATION WILL MAXIMIZE PUBLIC BENEFITS

CURRENT LAW SUBSIDIZES INEFFECTIVENESS AND INCREASES DEPENDENCY ON FEDERAL FUNDING

- The Democratic Crime Bill (Pub. L. S103-322) 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 in clear violation of federal law prohibiting the use of federal funds for the "construction, maintenance, or operation of nonfederal prisons or correctional facilities." The new grant program is in direct violation of federal law prohibiting the use of federal funds for the "construction, maintenance, or operation of nonfederal prisons or correctional facilities." The new grant program is in direct violation of federal law prohibiting the use of federal funds for the "construction, maintenance, or operation of nonfederal prisons or correctional facilities." The new grant program is in direct violation of federal law prohibiting the use of federal funds for the "construction, maintenance, or operation of nonfederal prisons or correctional facilities.

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 that can provide in-house or outside contract;
- States should be expected to show that they have all the necessary legislative, administrative, and other facilities to do so;
- The Attorney General should give top priority to the construction of larger, "harder" facility-based programs.
- 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 outdated 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 15 years faster than under outdated 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.
contract, develop, expand, modify, operate, or improve prison correctional facilities at the
lowest possible life-cycle cost and with the best available technology.

"(d) assures the State or States have a comprehensive correctional plans 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 public 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) parole 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 have a risk reduction management plan in place as part of their application that they have an established executive body with at least the following authority and responsibilities:

(A) to prioritize 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) ensuring the complete delivery of new facilities; (iii) assuring quality service and quick accreditation by appropriate, professional organizations; 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 agreements for the design, acquisition, financing, lease, construction, and operation of correctional facilities.


"In this subdivide -
Financial Highlights
Corporate Profile

WCI is a leading designer and manager of private and public corrections facilities. It offers a broad range of design and management services to correctional agencies throughout the United States and abroad. WCI provides comprehensive design and management services to correctional agencies, including security design, facility construction, and management of operational and support services. The company offers a wide range of services to correctional agencies, including design, construction, and management of correctional facilities.

Founded in 1994 as a division of The W. M. Wood Corporation, WCI is a public company on NASDAQ. It operates facilities in several states, including Florida, New York, and Texas.

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Notice of Annual Meeting Inside Back Cover

Letter to the Shareholders

This is the first annual report to the shareholders of WCI (NASDAQ: WCI). The company's offerings of approximately 2.2 million shares of the company's stock and common stock were granted on an exchange basis from both individual and institutional investors. From the initial offering price of $10 a share, the price went to $35 a share at the end of the first quarter of trading. In December, the average daily trading volume was 170,000 shares on Wednesday's national market.

We are pleased to report to the shareholders that the company's revenues have increased significantly since our initial public offering. We continue to work with our customers to expand our offerings and improve our services. Our investment in research and development has resulted in significant improvements in our products and services, and we are committed to continuing to improve our offerings in the future.

WCI's philosophy is to provide the highest quality of care and service to our clients and their residents. We are committed to maintaining the highest standards of safety and security for all residents and staff. We are also committed to providing a positive working environment for all employees.

WCI's financial results continue to reflect our commitment to excellence. We are committed to maintaining our financial stability, and we are proud of the progress we have made in expanding our operations.

We are thankful for the support of our shareholders and our employees. We look forward to continued growth and success in the future.

Sincerely,

[Signature]

WCI Management
Facility Operations

The twenty-two Week-Leavenworth Corrections facilities under management/development include Federal, state and local facilities, 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. Prison industry is encouraged to provide on-site training and paid work to help transitioning inmates into a productive civilian life. The state operates a portion of the earnings for housing, victim restitution and support of dependents.

Devonshire, England

H.H. Prison Dorchester houses all offenders in pre-trial, convicted and sentenced categories, including category “A” prisoners, the highest security classification in the British system. Physically separated are 51 units for special health care and psychiatric needs, and a population of 1500 offenders where emphasis is on counseling and rehabilitation.

Kyle, Texas

New Vision Chemical Dependency Treatment Centre, the world’s largest in-patient intensive treatment center, has 500 inmate space. It receives inmates from the state system with alcohol and/or drug problems, and places them in group and individual therapy. The facility also provides outpatient treatment.

WCC is responsible for the operation and management of 25 facilities. These facilities are located in the United States, the United Kingdom, and Australia. The WCC facility operations are designed to meet the needs of inmates, staff and the community. The facilities provide a safe and secure environment for inmates, as well as support for reintegration into society.

In preparing for the next generation of the distribution of social services, WCC has started a model of professional management that has been successful in the United States and Australia. The model includes a comprehensive training program for managers, as well as a focus on the development of a professional management team.

In 1992, we are excited to continue our pioneering efforts to foster the privatization of corrections in the United States. We are committed to maintaining the highest standards of professional management.

Timothy P. Cole
Chairman of the Board

George C. Bailey
President and Chief Executive Officer
### Facilities

Current facilities under Black&Decker operations:

<table>
<thead>
<tr>
<th>Facility Name</th>
<th>Company</th>
<th>Design Capacity</th>
<th>Facility Type</th>
<th>Security Level</th>
<th>Date of Opening</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aguila (P.R.) Processing Center</td>
<td>Black&amp;Decker</td>
<td>600</td>
<td>DPR Ovens</td>
<td>Minimum</td>
<td>1991</td>
</tr>
<tr>
<td>New York (P.R.) Processing Center</td>
<td>Black&amp;Decker</td>
<td>605</td>
<td>DPR Ovens</td>
<td>Minimum</td>
<td>1991</td>
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<tr>
<td>State Government Contracts</td>
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<tr>
<td><em>Man Co-Operative Center</em></td>
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<td>120</td>
<td>Staff</td>
<td>Minimum</td>
<td>1991</td>
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<tr>
<td><em>Building P.R. Casino</em></td>
<td></td>
<td>520</td>
<td>DPR-Generals</td>
<td>Minimum</td>
<td>1991</td>
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<tr>
<td><em>Central Texas Facility</em></td>
<td></td>
<td>623</td>
<td>DPR-Generals</td>
<td>Minimum</td>
<td>1991</td>
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<tr>
<td><em>State &amp; County</em>*</td>
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<td><em>Coast County Vocational Center</em></td>
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<td>90</td>
<td>Staff</td>
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<tr>
<td><em>Kamp New York</em></td>
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<td>520</td>
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<td><em>Chemical Dependency Treatment Center</em></td>
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<td><em>Los Alamos Facility</em></td>
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<td><em>Metallurgical Co-Operative Center</em></td>
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<td>1991</td>
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<td><em>Texas Co-Operative Services Center</em></td>
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<td>DPR-Generals</td>
<td>Minimum</td>
<td>1991</td>
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<tr>
<td>Facility Name</td>
<td>Company Name</td>
<td>Design Phase</td>
<td>Security Level</td>
<td>Date of Opening</td>
<td>Remarks</td>
</tr>
<tr>
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<tr>
<td>San Diego City Jail</td>
<td>Correctional</td>
<td>200</td>
<td>Medium</td>
<td>1/92</td>
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<tr>
<td>San Diego Pretrial</td>
<td>Correctional</td>
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<td>Medium</td>
<td></td>
<td></td>
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<td>Wacol, Queensland</td>
<td>Management</td>
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<td>Jackson Correctional Center, Mississippi</td>
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<td>100</td>
<td>Medium</td>
<td>6/93</td>
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<td>Mississippi State Prison</td>
<td>Management</td>
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<td>Medium</td>
<td>6/93</td>
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<td>South Bay, Florida</td>
<td>Design/Construction/Financing/Management</td>
<td>1,000</td>
<td>Medium/Class</td>
<td>6/95</td>
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<tr>
<td>Stirrett Facility, Texas</td>
<td>Design/Construction/Financing/Management</td>
<td>1,000</td>
<td>Medium/Class</td>
<td>5/95</td>
<td></td>
</tr>
<tr>
<td>State Jail Facility, Texas</td>
<td>Design/Construction/Management</td>
<td>1,000</td>
<td>Medium/Class</td>
<td>5/95</td>
<td></td>
</tr>
<tr>
<td>Trans County Community Justice Center, Texas</td>
<td>Design/Construction/Management</td>
<td>1,000</td>
<td>Medium/Class</td>
<td>5/95</td>
<td></td>
</tr>
</tbody>
</table>

Facilities under contract, not yet open:

- North Carolina State Prison
- Mississippi State Prison
- South Carolina State Prison
- New Mexico State Prison
- Ohio State Prison
- Oklahoma State Prison
- Pennsylvania State Prison
- South Carolina State Prison
- Texas State Prison
- Utah State Prison
- Virginia State Prison

Board of Directors

- **Timothy R. Cole**
  - Chairman of the Board
  - Chairman of the Finance Committee
  - Former Governor of Missouri and Governor of the State of Missouri (MO)

- **John R. Tidwell**
  - Former Governor of Texas (TX)

- **William J. Draper**
  - Chairman of the Budget and Finance Committee
  - Former Governor of Colorado (CO)

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  - Former Governor of Kansas (KS)

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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 from 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, to 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 year.

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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 the 85 percent level of the minimum sentence imposed. 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 35,000 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 a 95-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 streets so they can't commit more crime.

While the total number of arrests has remained relatively stable since the mid-1970s, with a minor increase in 1996, sentences for increasing percentage of convictions have increased and, therefore, incarceration. They include enhanced law enforcement efforts, advances in forensic technologies, abolishing discretionary parole, eliminating good time, eliminating or increasing proportion of sentence 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 vesting all of the 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 150,000 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 criminologists 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 grandchild the original "baby boomers" reaching the crime-prone age group of ages 16 to 24. Both demographic 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 and the need to help citizens obtain true justice in a fair and just society. Therefore, we as corrections professionals and members of our communities have responsibilities to work hand-in-hand with you as the policymakers, to educate citizens, our constituents, to empower their communities to maintain public safety. We must be more successful in our efforts to reduce crime through a balanced approach that incorporates prevention, policing, prosecution, punishment and treatment. It is our
duty to formulate and promote policies based on informed, rational discussion, accu­rate facts, and personal experience. Today's hearing is a step in that direction.

There is compelling evidence that indicates that, when polled, four diverse seg­ments of the American people support the balanced approach involving prevention and treatment as a way of controlling and reducing crime. These findings are consistent with other national polls. The American public now is convinced that it will not be effective to tighten the law to reduce crime. It is also clear that the public supports the balanced approach to crime policy. We urge the Senate to allow truth-in-sentencing grant funds to state and local governments 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 program. The provision for states to share funds with localities has been removing the incentive for states to operate correctional facilities. In states that use state prison dollars to create housing in state facilities, an important factor is the availability of law enforcement efforts, three-strikes laws and the punishment 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 employees of all agencies find in having a setting for staff and other inmatee. 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 the Senate to do the right thing in regard to the Senate bill's emphasis on providing state grants to states to develop comprehensive correctional plans that are designed to provide an integrated approach to the management and operation of correctional systems.

ACA believes that work and education are important elements within the correc­tional system. We know that vocational training, alcohol and drug treatment, visi­tion programs and other inmatee in constructive activities.
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 tying it to "piggy-back" other reform incentives to the critical issue of truth-in-sentencing. We see in some of the current proposals attempts to tie truth-in-sentencing to other Federal reform efforts. For example, Senate Bill 930, attempts to tie the truth-in-sentencing to inmate work and education requirements and the state's ability to grant earned or good time credits to 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 personal costs, $3.3 million per year in additional inmate work supervision costs, and our annual costs of providing educational programs to inmates would increase by about 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 prisons and local detention systems. State and local correctional systems are too diverse in their composition to be forced into a mold that is not appropriate 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 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 $1.5 billion over the next 15 years. How can a state like Texas both make good on the promise of 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 funds, have already committed almost $2 billion to expand prison capacity from about 38,000 beds in 1991 to about 130,000 beds by September 1, 1995. We are not even talking about the another 75,000 beds would be required need 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 federal dollar spent matching funds under the truth-in-sentencing guidelines imposed in H.R. 667. Others have projected varying costs. According to an analysis by the Office of Justice Programs, the 144 months of prison time required to serve 85 percent of sentence to 66 months of prison time is an increase of 144 percent. Or another 144 months of prison time is an increase of 144 percent over the 66 months that they are facing. Moreover, if the federal governments are required to pay for the incarceration of violent offenders in prison for any of the four states identified by the Congression Research Service as qualifying for the 85 percent crime-in-sentencing. According to the study, Texas's average sentence imposed was 18 months, with an average time served of 66 months, or 37 percent. However, even though California, for example, showed 85 percent of sentence imposed, the long 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 45 to 48 percent of their sentences, according to Justice Department. Thus, to reach the "truth in sentencing" goal of 85 percent, Marter 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-fifth of the nation's total), that would represent an increase of roughly 8,500 inmates. An extra 8,500 additional inmates would cost the state $425 million for prison construction plus $170 million per year for operations, Marter 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-fifth of the total) would amount to $210 million.

Further, state 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 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 1996. Needed, for example, are a definition of "violent offenses" and clarification on what the term "sentence imposed" means for purposes of the 85 percent calculation. If the definitions are too intrusive into the individual states' ability to qualify for the federal funds, then it will be critical for Congress to consider whether to legitimize the state's ability to qualify for grant funds, should the truth-in-sentencing states and local detention systems. State and local correctional systems are too diverse in their composition to be forced into a mold that is not appropriate fit for all.

The "truth in sentencing" concept, as it is being set forth in the 1995 legislative session, has been supported by many states and local detention systems. States and local detention systems. State and local correctional systems are too diverse in their composition to be forced into a mold that is not appropriate fit for all.

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The "truth in sentencing" concept, as it is being set forth in the 1995 legislative session, has been supported by many states and local detention systems. State and local correctional systems are too diverse in their composition to be forced into a mold that is not appropriate fit for all.
States and counties are soft on crime or have been reluctant to charge with a serious. As a result, they are not taken to State prisons. 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.

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 any crime control strategy when combined with a comprehensive, balanced approach that includes other effective tools aimed at prevention, policing, punishment and treatment. I 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 one 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 restraints 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. Mr. Chairman, the overcrowding of 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, 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 parti-
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 corrections 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 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) legislative committee 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 crisis 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 system in our country is inherently intergovernmental in its nature. For example, when someone is arrested charged with a serious felony they may be taken to a county jail, if there are no State or Federal prisons available. When Federal judges put population restrictions on State prison facilities to protect the constitutional rights of inmates—these 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.

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 come together to build effective, responsive county government, serving as the bridge between the states and cities, and the local government, serving as 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 600 or more inmates, were the most crowded, with a rate of more than 100 percent of capacity. More than half of the Nation’s jail inmates were housed in those large facilities."

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 cooperative relationship 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 ensures 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 the State of North Carolina has pursued a management approach that seeks to prioritize limited institutional resources. Let me suggest that the lack of prioritization and management is at the core of the problem.

Thank you, Mr. Chairman.

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 as a basis for determining 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 the best way was in another direction—that the best way was to make sure dangerous people are locked up.
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 PROGRAMS 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 misdemeanor 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 multi-county 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 misdemeanor 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.
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 truth in sentencing and a requirement that all violent offenders serve 85 percent of their sentences. 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 Title 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

Making Sentences Fit the Prisons to Control Demand for Prison Space

North Carolina Tries to Balance Punishment, State Resources

By William Claiborne
Associated Press

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 determine who qualifies for early release—makes the punishment fit the budget.

Officially called the "policy 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 movement to increasingly popular concept of criminal justice: balancing prison sentences with available cell capacity.

For several years, states have been turning to sentencing guidelines as an attempt to gain control over rapidly escalating prison populations. Maryland pioneered the approach, and prescriptive sentencing rules have been enacted in at least 10 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 enacted in the 1980s— with little regard for future prison costs—and are examining more economical alternatives.

"They're realizing that they have to prioritize who goes to prison and who pays for less costly community corrections programs," said Donald Murray, executive 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 maintaining prisons.
A CITIZEN'S GUIDE TO STRUCTURED SENTENCING FOR FELONIES

PREPARED BY:

THE NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION

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The Honorable Thomas W. Ross
Chairman
Robin L. Lutich
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.

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 offender's 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.

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 have 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 who 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 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. 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. Finnegans. 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. Finnegans. 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 and cameras 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. Finnegans. 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 hit 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 $1.6 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 build more beds, as many as 25,000 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 90-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 parole release rates for violent offenders of under 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 committed to prison loses contact with his family, his business, his occupation.

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 20, 30 percent. We have also come up with the community corrections legislation which seeks alter-
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 ABRAMHAM TO LYNN ABRAMHAM

Question 1. I understand that the 1994 Crime Bill made some effort to address the release order problem. Why did this fail? Did Congress need to do more and what more does Congress need to do? What alternative might be considered?

Answer 1. To my knowledge no jurisdiction has 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 cases where controls are most essential often before those cases are designated as in a state of crisis. The 1994 Crime Bill provision applies whether a defendant is convicted or not, and only in the case of pre-trial detainees. The 1994 Crime Bill provision did not address substantial problems with medical care, but instead focused on whether there is a violation of federal law and, if so, the expedient and narrow remedies for such violations. Federal judicial order is a function of the federal court's jurisdiction over the federal crime. Can anyone anticipate circumstances where consent decrees would actually infringe on state and local authorities' powers? Does that distinguish these decrees from plea agreements in individual cases?

Answer 2. Consent decrees are not a substitute for the state and local authorities' powers. Often parties to consent decrees do not have the power, under the state's system of checks and balances, to agree to any provisions 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 any other branch of power. For example, there is no segment of state government that usually has the power to appropriate funds in a particular manner. Consent decrees are not the product of self-regulation by state correctional officials in accordance with state law. Consent decrees are not the product of a particular decision in a particular case. Consent decrees are not the product of a particular settlement agreement. Consent decrees are a substitute for the state's system of checks and balances. Consent decrees are a substitute for the state's system of checks and balances.

Answer 3. Are you aware of any correctional facilities where genuinely unincarcerated 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 unincarcerated prison conditions is incorrect. Given the rise of corrections professionals, prisons today are a far cry from the restrictive and oppressive 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 ceilings 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 infringe on prisoners' rights?

Answer 5. Yes. Consent decrees often are the product of plaintiffs' 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 correctional center, even though that facility did not contain one prison cell. The federal courts should be focused on whether there is a violation of federal law and, if so, the expedient and narrow remedies for such violations. Federal court orders to micro-manage prisons removes the federal courts from its proper role—judicating constitutional questions and remedying them.

Question 6. How do decrees infringe on state and local authorities' powers? Does the presumption that federal judicial oversight is necessary to prevent unincarcerated conditions persist? Do we need federal judicial oversight to prevent this from occurring?

Answer 6. Consent decrees are much more difficult to enforce. Often parties to consent decrees do not have the power, under the state's system of checks and balances, to agree to any provisions 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 any other branch of power. Consent decrees are a substitute for the state's system of checks and balances.

Question 7. Are you aware of any correctional facilities where genuinely unincarcerated conditions persist? Do we need federal judicial oversight to prevent this from occurring?

Answer 7. Yes. Consent decrees infringe on state and local authorities' powers. Consent decrees are not the product of self-regulation by state correctional officials in accordance with state law. Consent decrees are not the product of a particular settlement agreement. Consent decrees are a substitute for the state's system of checks and balances. Consent decrees are a substitute for the state's system of checks and balances.
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 issuing ministerial judgments that is often far removed from constitutional requirements.

For example, limits the consent decrees that may be agreed to by counsel for the Commonwealth. Attached please find a copy of the Commonwealth Attorney General's consent decrees against 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.

I. What these 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, terrorism threats, drug dealing or gun charges, pretrial issues such as the defendant's dangerousness to the community are not considered. Issues such as whether the person is alcoholic 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 admissibility 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 plans 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. Every prison operational policy must be approved 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 Special Master's consultant, hired with the approval of the federal court, review the policy. If the prisoners' lawyers or consultant proposes changes in the policy, the consultant and the City do not agree to these proposed changes, the operational policy is 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, and all these new policies, if they are approved or disapproved, the policy is ordered to be completed. If the federal court disapproves the policy, the process starts all over again.

A third example of a Constitutionally-mandated prison policy set forth in the Consent Decree is the "Belmont Bridge Co., see especially 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 on the standards that are necessary to review a court-approved settlement agreement and on the standards that are necessary to review a court-approved settlement agreement.

Answer 9. 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 system is powerless to alter these agreements.

Question 7. How much has Philadelphia spent in connection with these consent decrees? Are you aware of any aspect of the legislation that is not necessary to review a court-approved settlement agreement and on the standards that are necessary to review a court-approved settlement agreement.

Answer 10. I do not have the information necessary to answer this question. It is clear that the vast majority of the provisions in these consent decrees are completely unrelated to any federal interest.

Question 8. How much has Philadelphia spent in connection with these consent decrees? Are you aware of any aspect of the legislation that is not necessary to review a court-approved settlement agreement and on the standards that are necessary to review a court-approved settlement agreement.

Answer 11. Philadelphia currently spends approximately $120,000 per year in Special Master's fees and expenses. Attached is information relating to appropriate expenses by a Special Master in Florida.

Answer 12. 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 also limit costs in time so that we can remove the issues from the federal courts. I do not think it is wise to appeal these cases beyond the federal courts.

Answer 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 15. Consent decrees should address litigation where the federal courts can, in the future, enter orders affecting state and local prison systems. Even when consent decrees have been approved, the courts have no time limit to enforce an order if the legislature passes new laws that are contrary to the consent decrees. If the legislature passes new laws that are contrary to the consent decrees, 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 fully address the state and local problems. The current standards make it extremely difficult for a government to modify the consent decrees.

A two-year time limitation clearly identifies all parties that these orders will be subject to review every two years. This type of time limit helps prevent subsequent administrations from unfairly increasing the number of lawsuits that would be brought against the City before the enactment date of this legislation. These lawsuits are being brought against the City because the City has not been able to correct the deficiencies in the prison systems. The two-year time limitation 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. Case law 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 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 Paulet 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 Rafo 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 trial, 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 trial 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 remand 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. S. 400 does not preclude a party from moving to remand 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.

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 ORIN 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 Biden and I introduced (along with Senators Cochran and Kassebaum) entitled the Juvenile Corrections Act of 1995, which would dedicate 10 percent of adult prison funds for juvenile facilities?

Answer 1. The State of Michigan supports federal legislation which does not tie the State's 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, i.e., if Michigan wanted to use all or none of its portion of federal prison funds for 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 in segregation to that State's needs.

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 juveniles from the needs to property to conserve space law enforcement resources?

Answer 2. Michigan shares 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 Delinquency Prevention, such that juvenile prisoners are not allowed to use the same eating utensils as adult prisoners. These and other restrictive regulations are an unnecessary strain on Michigan's 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 is to state that S. 400 would enhance the litigation process.

Question 2. S. 400 allocates standing to challenge an order which limits prison conditions.

Answer 2. 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 the continuing federal court's jurisdiction. 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 conditions. Privately, it allows prosecutors, elected officials, and any other government official to intervene in a case that may be affected by the order to intervene. What do you feel are the constitutional concerns with 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 would ensure that political subdivisions of the state are also affected by court orders. The rights of prison inmates 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 for the safety of nearby residents, must ensure that judges are not unmindful of its interest in ensuring that any remedial order will be the least restrictive and will adequately ensure 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 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 the continuing federal court's jurisdiction. 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 conditions. Privately, it allows prosecutors, elected officials, and any other government official to intervene in a case that may be affected by the order to intervene. What do you feel are the constitutional concerns with 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 would ensure that political subdivisions of the state are also affected by court orders. The rights of prison inmates 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 for the safety of nearby residents, must ensure that judges are not unmindful of its interest in ensuring that any remedial order will be the least restrictive and will adequately ensure 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.
requirements 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. From 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 violation? Or do some of 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 likely apply.

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 (e.g., unsanitary conditions) but provides a remedy which goes far beyond what is necessary to alleviate the unconstitutional condition (e.g., inadequate 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 $25 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 outside experts in connection with these consent decrees?

Answer 4. Since 1990 Michigan has spent over $100,000 on court appointed experts (e.g., experts to review fees paid to plaintiffs consent decree attorneys totals approximately 6.5 million dollars since 1997).

Question 5. Is there 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?

CRIPA is a statute which places specific limitations on the courts in prohibiting continuation of jurisdiction, 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 6. What Reform of CRIPA would you propose?

Answer 6. I have been reassured that the amendments to CRIPA which are necessary to strike a proper balance between a state 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, and allowing the Civil Rights Division to review the substance of the Attorney General's pre-filing certification so that the Attorney General could proceed with the CRIPA suit only if he/she has sufficient facts to do so. Additionally, a time limitation on the effect of limiting the legislation to purely prospective remedies orders and consent decrees.

Answer 7. The effect of limiting federal legislation to only prospective remedial relief would sufficiently limit the over extension of federal courts into the manage-
RESPONSES TO QUESTIONS FROM SENATOR KOHL TO ROBERT J. WATSON

Answer 1. Juvenile funding, in my opinion, should focus on areas other than correctional ones. And, though I am heed 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 in the country. Many thousands of dollars have been spent building jails and local detention facilities to comply with this requirement. To back away from this issue 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 already after long and difficult hearings. Opening the challenges to an array of elected officials has the potential of turning a responsible order of a federal judge into a libelous one. In my experience, these officials do not have a valid 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.

Governor is the chief executive officer of state government. Other elected officials have more limited rules, even those elected to statewide office. My recommendation is that the advice is 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 subject of juvenile justice to consideration to these important matters.

Sincerely,

ROBERT J. WATSON,
COMMISSIONER.

STEVe J. MARTIN,
ATTORNEY AT LAW, CORRECTIONS CONSULTANT,
Austin, TX, August 28, 1995.

U.S. Senate, Committee on the Judiciary,
Washington, DC. 20510-3375

DR. ORIN 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, 1996 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. Those attorneys who have no responsibility for the operation of correctional facilities may be motivated to take unreasonable and irresponsible positions in the hope that 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 involved in the management of the juvenile justice system.

The provision for wholesale intervention is one of many misguided aspects of the STOP Act. I am greatly concerned about the provisions that would寬 your face and prohibit the appointment of special masters. These provisions do not appear to be in response to any identifiable problem or concern. These provisions are difficult to implement for many local officials in the country. Many thousands of dollars have been spent building jails and local detention facilities to comply with this requirement. To back away from this issue 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.

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO KATHLEEN F. RUSSMAN

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. First, I consider my remarks in the context of the juvenile justice system. First, I applaud the recognition that juvenile crime is a big problem across America and that is growing in some areas. Many states 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 the advice is 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 subject of juvenile justice to consideration to these important matters.

Sincerely,

ROBERT J. WATSON,
COMMISSIONER.
ideas for creating a more punishing environment in our prisons without concomitantly punishing our citizenry?

Answer 2. We do not feel correctional services are anymore or less susceptible to low-balling than any other government requirement. Wackenhut removed its protest, the contract was awarded to Esmor, as the profit motive the "beat pencil sharpener", 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. 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 Sucking 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, their basis, and when they were enacted, and explain their effect on prison industries. If these limitations were restricted or repealed, what would be the effect on prison industries?

Answer 1. Ninety percent of American inmates are unemployed, according to the most recent statistics that have been released. I do not know the percentage for the federal prison system. 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. It is also reasonable to assume that employed prisoners would be more likely to commit additional crimes, in contrast to 10.1 percent of comparison offenders. In other reidivism studies conducted by the Bureau, about 25 percent of released inmates were revoked or rearrested within a year of their release. Please note that I refer to a report previously interviewed with 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 finds that recidivists 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. §11607), passed in 1929, permits states to bar the importation of goods made by prisoners. The Ashurst-Sumners Act (18 U.S.C. §11607), passed in 1925, makes it a federal offense to knowingly transport prisoner-made goods in interstate commerce. The Hawes Cooper Act (18 U.S.C. §11607), passed in 1925, makes it a federal offense to knowingly transport prisoner-made goods in interstate commerce. The minimum-wage law, prisoners would still be paid the prevailing wage (i.e., the union scale). These workers also may participate voluntarily.

These laws were enacted at the behest of organized labor to protect low-wage jobs that were then threatened by prison labor. Most of these jobs have now been lost anyway to lower-paid foreign workers. For further discussion of the history of these restrictions and the need for their repeal please see my book, pp. 117-23.

RESPONSES TO QUESTIONS FROM SENATOR KOHL TO ANDREW PEYTON THOMAS

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. 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. Limited exceptions for rural communities under the scenario presented would seem appropriate. However, in general, it is of course not a good idea to incorporate 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. We do not feel correctional services are anymore or less susceptible to low-balling than any other government requirement.

Question 2. Wackenhut withdrew its protest, the contract was awarded to Esmor, as the profit motive the "beat pencil sharpener", 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. 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 Sucking of America: The Roots of Chaos, pp. 117-23.
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 services in a meaningful way. The 34 construction grants, 34 planning grants, and 7 renovation grants the Administration has been moving forward in implementing the several correctional programs authorized under both the Department's fiscal year 1995 appropriations bill (Public Law 104-317), and the Violent Crime Control and Law Enforcement Act of 1994 (Crime Law) (Public Law 103-322). Through these programs, states and localities will be able to provide confinement space for both violent and non-violent 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 use as a state's overall correctional system.

To date, as a result of the fiscal year 1995 Camp Initiative, grants have been awarded to 28 jurisdictions for the planning of boot camp facilities; to 7 jurisdictions for the renovation of facilities for use as boot camp; 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, 6 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, in consultation with the Office of Justice Programs' (OJP) Correctional Assistance Office, develop and approve a comprehensive correctional strategy which, among other things, addresses the needs of their juvenile justice systems at the state, county, and municipal levels. With the inclusion of these systems in the overall planning process, states may then, at their discretion, fund juvenile justice programs from any monies received under these programs.

In addition, Title II-J of the 1994 Crime Law authorizes the Punishment for Young Offenders Program (see: 42 U.S.C. 1373(e)). This program, also administered under OJP, is designed to provide funding for, among other things, juvenile detention facilities for both violent and non-violent juvenile offenders. The Administration has requested $9.63 billion 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 jail. This creates large problems in some rural communities, and I have heard from many sheriffs throughout the country regarding these problems. For example, in many 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 any 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 federal statutory or constitutional requirements of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), as amended. You and other members of the Wisconsin congressional delegation have expressed concern to OJJDP recently and in the past. Under current law, OJJDP has no authority to extend or waive the congressional-ally 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 these difficulties, including the jail removal requirement. 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 law enforcement agencies to transport juveniles from a handled adult criminal case and the need for additional personnel or reimbursement.

First, the JDPA 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 Michigan law? 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 likely apply.

Answer 1. First, Cripa specifically does not permit the Attorney General to enforce federal statutory or constitutional requirements. 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 Michigan law? 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 likely apply?

Answer 2. The Consent Decree is under continuing assessment. The District Court has already dismissed large portions of the Decree and State Plan containing the Marguette Branch Prison and the Michigan Reformatory at Ionia. Michigan's compliance with outstanding provisions is presently under review.

Pursuant to the Decree, Michigan promulgated a State Plan for Compliance detailing measures to assure constitutional conditions and "other matters designed to increase the likelihood of compliance" Consent Decree, ¶ 11. 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 must 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, 43 F.3d 348, 352-356 (6th Cir. 1994).

Question 2. Has the Department of Justice retained the guidelines on prison litigation formerly adopted by the United States Attorney General 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 simi-
The Department routinely complies with 42 U.S.C. 1997(h) by sending a copy of the notification of the commencement of a CRIA case to the Departments of Health and Human Services and the Department of Education, as appropriate for the type of institution involved.

RESPONSES TO QUESTIONS FROM SENATOR KOLI 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. Specifically, we support a reasonable compromise that protects accused juveniles from hardened adult criminals while preserving scarce law enforcement resources.

RESPONSES TO QUESTIONS FROM SENATOR BIDEN TO WILLIAM P. BARR AND PAUL T. CAPPUCCIO

Question 1. The 1994 Crime Law enacts a new 18 U.S.C. 3626, which requires 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 “in 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 has been or will be suffered by the person bringing the suit. Standing is limited to persons who are threatened with some individualized injury. S. 400’s standing provisions may allow suits to be brought merely because the relief would benefit a noninjured third party or noninjured prisoners. I have not looked into the issue in any detail.

The Department is involved in 8 state correctional cases.

1. United States v. Montana, CA No. 94-95 (D. Mt.). Complaint attached.
2. United States v. Lynn, CA No. 95-6 (E.D. La.). Private attached.
5. United States v. California, CA No. 89-1233 (E.D. Ca.). Consent decree 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 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.

Virginia Islands: Golden Grove Adult Correction Facility.
California: California Men’s Facility at Vacaville.
Guam: Adult Correction 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 have this 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 intervener in prison litigation, what steps, within its discretion, is the Department taking to address these problems?

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.

RESPONSE TO QUESTIONS FROM SENATOR BARR 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 Council v. Dow, slip op at 35.

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. Specifically, we support a reasonable compromise that protects accused juveniles from hardened adult criminals while preserving scarce law enforcement resources.

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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 have this information.

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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.
Answer 1. No. Plant v. Spendthrift Farm, Inc., No. 93-1121 (U.S. Apr. 18, 1995), does not prevent Congress from relieving State and local correctional officers from unreasonable ongoing judicial supervision of prisons and jails. Under longstanding Supreme Court authority, Congress may directly supersede any future judicial authority in violation of the Constitution's separation of powers. Indeed, Plant resists Congress' authority to supersede a continuing judicial injunction like a consent decree without thereby contravening the principle of the separation of powers. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), the Court was careful to hold only that separation-of-powers principles require deference to the choice of the legislature to use federal courts to resolve prison conditions. The Court was not at that time, as it is today, inclined to defer to the States on such matters.

Question 2. Can parties settle litigation through private settlement agreements? Answer 2. Parties can, of course, settle litigation through private settlement agreements. 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 "prospective relief" to encompass private settlement agreements. In some ways, a settlement agreement if preferable to a consent decree. Most notably, a settlement will not intrude continuing federal court supervision of the correctional officials or the States and localities going forward, or limiting the circumstances and scope of any consent decree entered in the future by the federal courts regarding prison conditions.

Question 3. Are you aware of any ongoing violation of federal statutory or constitutional law by Michigan's correctional facilities? Answer 3. Mr. Capaccio visited several Michigan correctional facilities in 1995. 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 new 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? 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. However, 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 issue some kind of limitations on judicial remedies to the extent that it may well make more sense to tolerate and encourage consent decrees, but strictly limit their scope and duration.

Question 5. What steps do you believe are necessary to correct the 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. DIULIO, JR.

Question 1. My question to the panel is, do you believe that we should 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 have come up with a workable compromise between the need to protect accused juveniles from a hardened adult criminal class and the need to properly conserve scarce law enforcement resources?
RESPONSE TO QUESTION FROM SENATOR BIDEN TO JOHN J. DiIULIO, JR.

Question 1. S. 400 would automatically terminate all remedial orders—whether entered on consent 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. I fail to see how requiring the courts to terminate orders after two years creates such a risk. If actual violations are still occurring (if indeed they had ever occurred in the first instance), the courts would have every opportunity to re-examine 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 what the courts of jurisdictional 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 decades-old interventions that threaten public safety, inflate budgets, and have a mixed effect on prison conditions.

RESPONSES TO QUESTIONS FROM SENATOR ABRAMHAM 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 1981, 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 case of 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 institutional corrections administrators a new set of eight specific objective performance standards for criminal-justice agencies, including institutional corrections facilities (please see Appendix attached).

There is, to be sure, a clearer, more program-oriented, and more cost-effective than others. Even facilities in some smaller jurisdictions 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 are a care without undue suffering, and are afforded a wide range of life amenities and services while in confinement. As a general speaking, prison conditions are better than jail conditions, but in neither prisons nor jails do genuinely uncivilized conditions persist. While most prisoners and jails are not "country clubs" or out-and-out "resorts," even fewer are anything resembling "hellholes." 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- or open-bay dormitory 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 entirely the exception to the rule. All prison and jail conditions, which 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-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 inmates get relatively small and benefits, which are legal remedies and which can be employed to the limits of improvement and reform.

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 such situations?

Answer 2. As I attempted to explain 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 that would appear to comply with Judge Muenke's latest ideas about how to stock prison libraries would cost Arizona tax payers a huge amount of money. 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 that would appear to comply with Judge Muenke's latest ideas about how to stock prison libraries would cost Arizona tax payers a huge amount of money. 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 that would appear to comply with Judge Muenke's latest ideas about how to stock prison libraries would cost Arizona tax payers a huge amount of money. 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 that would appear to comply with Judge Muenke's latest ideas about how to stock prison libraries would cost Arizona tax payers a huge amount of money.

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 federal judges who have given new meaning to the term "imperial judiciary." We are talking about limiting government by consent decrees. Congress must act to check and balance Judge Shapiro and other federal judges who have given new meaning to the term "imperial judiciary." We are talking about limiting government by consent decrees. Congress must act to check and balance Judge Shapiro and other federal judges who have given new meaning to the term "imperial judiciary." We are talking about limiting government by consent decrees.
Appendix C

Criminal Justice Performance Measures

2. Survey and official crime measures of public performance
   a. Number of "serious" crimes reported
   b. Number of crimes cleared
   c. Percent of clearance
   d. Percent of convictions
   e. Percent of convictions for serious crimes
   f. Percent of convictions for violent crimes
   g. Percent of convictions for property crimes
   h. Percent of convictions for narcotics crimes
   i. Percent of convictions for other crimes
   j. Percent of convictions for violations

3. Survey and official social measures of public performance
   a. Number of people in prison
   b. Percent of prisoners who are black
   c. Percent of prisoners who are white
   d. Percent of prisoners who are Hispanic
   e. Percent of prisoners who are Asian
   f. Percent of prisoners who are Native American
   g. Percent of prisoners who are other races
   h. Percent of prisoners who are unknown race
   i. Percent of prisoners who are female
   j. Percent of prisoners who are male
   k. Percent of prisoners who are other gender
   l. Percent of prisoners who are unknown gender
   m. Percent of prisoners who are single
   n. Percent of prisoners who are married
   o. Percent of prisoners who are other marital status
   p. Percent of prisoners who are unknown marital status

4. Survey and official financial measures of public performance
   a. Total cost of prison operations
   b. Cost per capita of prison operations
   c. Cost per staff of prison operations
   d. Cost per inmate of prison operations
   e. Cost per day of prison operations
   f. Cost per month of prison operations
   g. Cost per year of prison operations
   h. Cost per decade of prison operations
   i. Cost per century of prison operations
   j. Cost per millennium of prison operations
   k. Cost per millennium of prison operations
   l. Cost per millennium of prison operations
   m. Cost per millennium of prison operations
   n. Cost per millennium of prison operations
   o. Cost per millennium of prison operations
   p. Cost per millennium of prison operations
   q. Cost per millennium of prison operations
   r. Cost per millennium of prison operations
   s. Cost per millennium of prison operations
   t. Cost per millennium of prison operations
   u. Cost per millennium of prison operations
   v. Cost per millennium of prison operations
   w. Cost per millennium of prison operations
   x. Cost per millennium of prison operations
   y. Cost per millennium of prison operations
   z. Cost per millennium of prison operations

5. Survey and official crime prevention measures of public performance
   a. Number of police officers
   b. Percent of police officers who are black
   c. Percent of police officers who are white
   d. Percent of police officers who are Hispanic
   e. Percent of police officers who are Asian
   f. Percent of police officers who are Native American
   g. Percent of police officers who are other races
   h. Percent of police officers who are unknown race
   i. Percent of police officers who are female
   j. Percent of police officers who are male
   k. Percent of police officers who are other gender
   l. Percent of police officers who are unknown gender
   m. Number of police officers per 1,000 residents
   n. Number of police officers per 1,000 square miles
   o. Number of police officers per 1,000 crimes
   p. Number of police officers per 1,000 inmates
   q. Number of police officers per 1,000 prisoners
   r. Number of police officers per 1,000 residents
   s. Number of police officers per 1,000 businesses
   t. Number of police officers per 1,000 schools
   u. Number of police officers per 1,000 hospitals
   v. Number of police officers per 1,000 libraries
   w. Number of police officers per 1,000 parks
   x. Number of police officers per 1,000 theaters
   y. Number of police officers per 1,000 sports facilities
   z. Number of police officers per 1,000 churches

6. Survey and official crime reduction measures of public performance
   a. Number of crimes prevented
   b. Percent of crimes prevented
   c. Percent of crimes solved
   d. Percent of crimes cleared
   e. Percent of crimes investigated
   f. Percent of crimes solved by arrest
   g. Percent of crimes solved by confession
   h. Percent of crimes solved by witness
   i. Percent of crimes solved by other means
   j. Percent of crimes solved by unknown means
   k. Percent of crimes solved by unknown means
   l. Percent of crimes solved by unknown means
   m. Percent of crimes solved by unknown means
   n. Percent of crimes solved by unknown means
   o. Percent of crimes solved by unknown means
   p. Percent of crimes solved by unknown means
   q. Percent of crimes solved by unknown means
   r. Percent of crimes solved by unknown means
   s. Percent of crimes solved by unknown means
   t. Percent of crimes solved by unknown means
   u. Percent of crimes solved by unknown means
   v. Percent of crimes solved by unknown means
   w. Percent of crimes solved by unknown means
   x. Percent of crimes solved by unknown means
   y. Percent of crimes solved by unknown means
   z. Percent of crimes solved by unknown means

7. Survey and official crime control measures of public performance
   a. Number of inmates released
   b. Percent of inmates released
   c. Percent of inmates paroled
   d. Percent of inmates pardoned
   e. Percent of inmates transferred
   f. Percent of inmates returned
   g. Percent of inmates deported
   h. Percent of inmates executed
   i. Percent of inmates imprisoned
   j. Percent of inmates incarcerated
   k. Percent of inmates detained
   l. Percent of inmates supervised
   m. Percent of inmates supervised by parole officers
   n. Percent of inmates supervised by probation officers
   o. Percent of inmates supervised by other agencies
   p. Percent of inmates supervised by unknown agencies
   q. Percent of inmates supervised by unknown agencies
   r. Percent of inmates supervised by unknown agencies
   s. Percent of inmates supervised by unknown agencies
   t. Percent of inmates supervised by unknown agencies
   u. Percent of inmates supervised by unknown agencies
   v. Percent of inmates supervised by unknown agencies
   w. Percent of inmates supervised by unknown agencies
   x. Percent of inmates supervised by unknown agencies
   y. Percent of inmates supervised by unknown agencies
   z. Percent of inmates supervised by unknown agencies

8. Survey and official crime reduction measures of public performance
   a. Number of police officers
   b. Percent of police officers who are black
   c. Percent of police officers who are white
   d. Percent of police officers who are Hispanic
   e. Percent of police officers who are Asian
   f. Percent of police officers who are Native American
   g. Percent of police officers who are other races
   h. Percent of police officers who are unknown race
   i. Percent of police officers who are female
   j. Percent of police officers who are male
   k. Percent of police officers who are other gender
   l. Percent of police officers who are unknown gender
   m. Number of police officers per 1,000 residents
   n. Number of police officers per 1,000 square miles
   o. Number of police officers per 1,000 crimes
   p. Number of police officers per 1,000 inmates
   q. Number of police officers per 1,000 prisoners
   r. Number of police officers per 1,000 residents
   s. Number of police officers per 1,000 businesses
   t. Number of police officers per 1,000 schools
   u. Number of police officers per 1,000 hospitals
   v. Number of police officers per 1,000 libraries
   w. Number of police officers per 1,000 parks
   x. Number of police officers per 1,000 theaters
   y. Number of police officers per 1,000 sports facilities
   z. Number of police officers per 1,000 churches

9. Survey and official crime control measures of public performance
   a. Number of inmates released
   b. Percent of inmates released
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   e. Percent of inmates transferred
   f. Percent of inmates returned
   g. Percent of inmates deported
   h. Percent of inmates executed
   i. Percent of inmates imprisoned
   j. Percent of inmates incarcerated
   k. Percent of inmates detained
   l. Percent of inmates supervised
   m. Percent of inmates supervised by parole officers
   n. Percent of inmates supervised by probation officers
   o. Percent of inmates supervised by other agencies
   p. Percent of inmates supervised by unknown agencies
   q. Percent of inmates supervised by unknown agencies
   r. Percent of inmates supervised by unknown agencies
   s. Percent of inmates supervised by unknown agencies
   t. Percent of inmates supervised by unknown agencies
   u. Percent of inmates supervised by unknown agencies
   v. Percent of inmates supervised by unknown agencies
   w. Percent of inmates supervised by unknown agencies
   x. Percent of inmates supervised by unknown agencies
   y. Percent of inmates supervised by unknown agencies
   z. Percent of inmates supervised by unknown agencies
Appendix
Criminal Justice Performance Measures for Prisons

Indicated 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 indications). "Rate per capita-6" means "divided by total number of inmates residing at home during a 6-month reference period." Data values are quoted for all scale items ("ranging of...", "perception of...", etc.).

Survey and official record measures of prison performance

Dimensions 1: Security ("keep them in")

A. Overall
1. Rating of how the building design affects surveillance of inmates
2. Security procedures (6-month period)
   a. Perceived frequency of watchdogs in the living area
   b. Perceived frequency of body searches
   c. Proportion of staff who have observed
      a. Any consequential problems within the institution
      b. Late security
      c. Poor assignment of staff
      d. Deviant security violations
      e. Staff ignoring inmate misconduct
      f. Staff ignoring complaints
   d. Other problems

4. Number of exit or lock area searches conducted in a 1-month period
   a. Rate per inmate
   b. Proportion finding contraband
5. Number of analyses made based on suspicion in a 1-month period
   a. Rate per inmate
   b. Proportion leading positive for opiates

C. Drugs (10-month period)
1. Drug-related incidents, number and rate per capita-6
2. Disciplinary reports related to drug or contraband, number and rate per capita-6

D. Significant incidents (6-month period)
   a. Significant incidents, total and rate per capita-6
5. Proportion of 6-month population involved in any incident
2. Incident, number and rate per capita-6

E. Community exposure (6-month period)
1. Fatalities, number and rate per capita-6
5. Freedom of movement
   a. Perceived freedom of movement for inmates: Day/Evening/Night

G. Staffing
1. Ratio of prison population to security staff

Dimensions 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 reported assaults involving inmates
3. Estimated rate (per 100 population) of assaults against inmates without a weapon
4. Railroad line (per 100 population) of minutes served upon inmates
5. Railroad yard (per 100 population) of minutes served upon inmates
6. Inmates' perceived danger of being:
   a. Killed by infield
   b. Paralyzed or seriously injured
   c. Inmates who say they have been physically assaulted by another inmate in a 6-month period
7. Proportion of inmates who say they have been physically assaulted by staff in a 6-month period
8. Discipline reports that involved fighting or assault, number and rate per capita
9. Significant incidents involving inmate injury, number and rate per capita

D. Facility adequacy
1. Proportion of staff and inmates who feel there are enough staff to provide for safety of inmates:
   a. Day / Evening / Night
2. Proportion of staff who feel there are enough staff to provide for their own safety:
   a. Day / Evening / Night

Dimensions E (Keep them in line)
A. Inmate misconduct (6-month period)
1. Proportion of inmate per day against staff
2. Use of force by inmates against inmates
3. Proportion of inmate personal property
4. Use of force by inmates as proportion of 6-month period
5. Discipline reports, total and rate per capita
6. Report per inmate among those write up
7. Significant incidents of disturbance or inclement to inmate number and rate per capita

B. Staff use of force (6-month period)
1. Proportion of inmate per day against staff
2. Significant incidents in which force was used, number and rate per capita
3. Significant incidents in which restraint was used, number and rate per capita

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. Perception of how much capital inmates have over other inmates:
   a. Day / Evening / Night
4. Perception of how much control staff have over inmates:
   a. Day / Evening / Night

D. Severity 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 reports convictions that received a sanction of:
   a. Warning/TA
   b. 15-30 extra hours of duty
   c. 15-30 extra hours of duty
   d. 31-45 extra hours of duty
3. Proportion of major reports convictions that received a sentence of:
   a. 2 yrs. probation
   b. Loss of good time
   c. Suspension and loss of good time
4. Average number of days inmates lose away
5. Average number of days to be spent in segregation
6. Proportion of inmate reports sanctions
   a. Suspended at commutation level
   b. Modified by written

Dimensions F (Keep them healthy)
A. Stress and illness (6-month period)
1. Incarcerated inmate reports feeling of mental, physical, and emotional stress
2. Average number of days as inmate was ill or injured
3. Average number of days as inmate was seriously ill enough that medical help was needed but did not go to sick call
4. Significant incidents involving suicide attempt or self-injury, number and rate per capita
5. Significant incidents requiring first aid or emergency room number and rate per capita

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 used emergency medical treatment who felt that it was adequately handled
3. Clinical outcomes, total and rate per capita
4. Sick calls, number and rate per capita
5. Medical appointments, number and rate per capita
6. Physical FB tests, number and rate per capita
7. Lab appointments, number and rate per capita
8. Inpatient clinic visits, number and rate per capita

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

D. Counseling (6-month period)
1. The alcohol and drug counseling services have been satisfactory (agreed/disagreed)
2. Other counseling services have been satisfactory (agreed/disagreed)
1. Proportion of inmates who report having participated in some kind of counseling:
   a. Drug/alcohol counseling
   b. Therapy
   c. Psychiatric case notes per capita for 1 month
   d. Number of inmates hours per week (number per capita)

2. Proportion of inmates who were involved in the following programs:
   a. Psychiatric/psychiatric; includes substance abuse
   b. Employment and pre-release counseling
   c. Psychiatric status over a 6-month period; number and rate per capita

B. Staffing for programs and services
   i. Number of program or services delivery staff (FTE)
      a. Medical clinicians
      b. Education
      c. Psychologists/counselors
      d. TOTAL
   ii. Number of inmates (average daily resident population) per FTE staff position in programs or services:
      a. Per medical clinician
      b. Per education
      c. Per psychologist/counselor
      d. Per total program/service staff
   iii. Program or services delivery staff as a proportion of total staff

Dimension 5: Activity ("how they treat")
A. General
   1. Inmates usually have things to do to keep them busy

46. Performance Measures for the Criminal Justice System

B. Work and industry involvement (6-month period)
   i. Involvement in prison industry, work release, or institutional job:
      a. Proportion of population eligible
      b. Proportion working
   ii. Among eligible inmates, proportion involved in:
      a. Prison industry
      b. Work release
      c. Institutional jobs
   iii. Number of hours per week among employed inmates

C. Work and industry evaluation (6-month period)
   i. The work training program has been satisfactory (agreement)
   ii. 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
   iii. Gravestones that involved problems with work, number and rate per capita

D. Education and training involvement (6-month period)
   i. Proportion of inmates who report having participated in some educational program
      a. Educational
      b. Vocational
   ii. Enrollment in education or vocational training classes:
      a. Proportion of population eligible
      b. Proportion enrolled
   iii. Among eligible inmates, proportion involved in the following programs:
      a. Adult basic education
      b. Secondary education

E. Limited use of force (3-month period)
   i. Staff use force only when necessary (agreement)
   ii. Perceived frequency with which staff have used force (agreement)
   iii. Significant incidence of force used, number and rate per capita
   iv. Significant incidence in which responses were used, number and rate per capita

C. Gravestone volume (6-month period)
   i. Proportion of inmates who reported filing a grievance with no response in last 6 months
   ii. Proportion of inmates who reported filing a grievance against staff or management
   iii. Inmates filing grievances, number and proportion of 6-month population
   iv. Gravestones filed, total, and rate per capita
   v. Number of grievances directed to individual staff
   vi. Proportion of all grievances
   vii. Rate per capita

D. The grievance process (6-month period)
   i. Perceived effectiveness of the grievance procedure
   ii. Perceived benefits of the grievance procedure
   iii. Perceived effect of grievance procedure on the quality of life
   iv. Proportion of inmates who report their grievance was taken care of:
      a. Completely
      b. Partially
      c. Not at all
   v. Proportion of inmates who did not file a grievance, who filed 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 reason
6. Proportion of all grievances that were appealed

B. 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 days
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

P. 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-d

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 grievances report until resolved by grievance officer:
   a. Average number of days
   b. Proportion beyond 20 days
4. From date of grievances report until resolution approved by warden:
   a. Average number of days
   b. Proportion beyond 20 days

F. Sanitation (6-month period)
1. Perceived occurrence of insects, roaches, or dirt in the housing unit
2. Perceived occurrence of insects, roaches, or dirt in the dining hall
3. Perceived occurrence of a bed slash or poor air circulation in the housing unit

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 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-d

I. Commisary (6-month period)
1. There is an adequate commissary selection (agreed/disagreed)
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 and family and friends

52 Performance Measures for the Criminal Justice System

Dimension 7: Conditions ("without undue suffering")

A. General
1. The administration is doing its best to provide good living conditions (agreed/disagreed)

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 in 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:
   a. Day 1 - Evening / Night
   b. Proportion of inmates who were confined to housing units for over 10 hours per day

E. Facilities and maintenance (6-month period)
1. Resident vs. convenience in living areas:
   a. Inmates per shower
   b. Inmates per sink
   c. Inmates per toilet

Dimensions II: Management ("as efficiently as possible")

A. Job satisfaction (6-month period)
1. Institution satisfaction index: average across 3 items concerning positive feelings toward the institution
2. Proportion of staff who report filling a grievance against management
3. Proportion of staff who have not filed a grievance, who cite the following reasons:
   a. Never had a justified 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 at the job
2. Hastening-toward-inmates index: average across 3 items regarding how often staff feel insufficient or hastened to inmate

54 Performance Measures for the Criminal Justice System
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:
   a. Staff on reference date divided by:
      i. Vacancies on reference date
   b. Terminations during previous 6 months
   c. Termination rate divided by relevant BOP tenure-specific rate.

D. Staff and management relations:
   i. Management and communication index: average across 10 items expressing positive appraisal of the organization and authority of management.
   ii. Relationship with supervision index: average across 6 items regarding how positive staff feel toward their supervisor.
   iii. Rating of how the building design affects communication among line staff.
   iv. 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
   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.

56. Performance Measures for the Criminal Justice System

H. Salary and overtime (6-month period):
   1. Average salary (in $1,000s):
      a. Total, mean 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. Overtime 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, victim's rights, 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 Senator, 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 abuse 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 the most important and the most critical problem that is going on currently in this country.

Federico, 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 abuse 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 the most important and the most critical problem that is going on currently in this country.

It is the belief of this country's most knowledgeable and respected judges that the abuse of power on the Federal bench is a serious threat to the future of this country. The Federal judges' have repeatedly warned that the abuse of power on the Federal bench is a serious threat to the future of this country.

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PREPARED STATEMENT OF THE AMERICAN BAR ASSOCIATION

On February 18, 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 potential for unforeseen 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. 490). Set forth below is an analysis prepared by the American Bar Association regarding some of the many problems with the Act. Because of these many problems, the American Bar Association urges the members of the Senate to reject 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 effect of inmate violence and provide recommendations to Congress about steps that can be taken to minimize the burdens on courts and correctional officials. The ABA also recommends the immediate termination of prospective relief in conditions-of-confinement cases brought by 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 for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates. Subsection (a)(2) further provides for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates. Subsection (a)(3) further provides for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates. Subsection (a)(4) further provides for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates.

2. Section 3626(b). This section of S.T.O.P. provides for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates. Subsection (b)(1) provides for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates. Subsection (b)(2) further provides for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates. Subsection (b)(3) further provides for the immediate termination of prospective relief in conditions-of-confinement cases brought by adult and juvenile inmates.
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 federal courts. As of January 1, 1994, thirty-nine states and the District of Columbia, Puerto Rico, the Virgin Islands, and the Northern Mariana 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 50 largest jails are also operating under court order. See S. Stat., U.S. Dept. of Just., Jail Inmates 1992 5 (Aug. 1993). When these court orders are adhered to, the situation involving some smaller jails and juvenile correctional facilities, the number of correctional facilities operating under court order because of constitutional violations is included. As mentioned earlier, a large number of these court orders stem from a settlement agreement between the parties. As part of these agreements, the parties typically agree in the consent decree to a statement to the effect that the defendants agree 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(c)(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 these facilities will most likely bring another lawsuit, thereby placing on the court 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 prison officials. 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, Congress is not only permitting defendants or other government officials who have standing under S.T.O.P. to file a motion to end prospective relief in a conditions-of-confinement case, a statement will go into effect, whether or not conditions in the correctional facility are still unconstitutional and life threatening. Section 3626(c)(2) therefore not only permits correctional and other government officials to usurp judicial authority but also to 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(c): 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 violations of the court orders are raised 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 the implementation of court orders rather than the wardens, correctional superintendents, or the other professional 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 eradicating the constitutional rights of adult and juvenile inmates and, like so many other parts of S.T.O.P., reflects an insensitivity to the constitutional rights of adult and juvenile inmates to obtain redress for the violation of their constitutional rights through federal courts in cases involving unconstitutional conditions of confinement.

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, 578–578 (1986). Section 1988 is designed not only to protect individuals whose civil rights have been violated, but to further the public's interest in the enforcement of the Constitution and civil-rights laws. Id. at 574.

This purpose will, however, be substantially undermined by §3626(f) since the limitations which it places on attorney's fees will discourage attorneys from representing litigants who have brought an unconstitutional violation of constitutional rights unless, for example, requires that the attorney's fees be proportionally related to the correctional violation obtained by adult or juvenile inmates. In Riverside v. Rivera, 477 U.S. 561 (1986), the Supreme Court recognized the fact that strict proportionality requirement failed to forestall courts from ordering the same smaller jails and juvenile correctional facilities, in conditions-of-confinement cases. The Court recognized that a strict proportionality requirement failed to forestall courts from ordering the same smaller jails and juvenile correctional facilities, in conditions-of-confinement cases.
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 believe, 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,

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. 697. 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" imposes 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 capitalized 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 just 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 delay 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 Procedure and Legal Remedies and Encroaches on States' Rights. STOP imposes 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. E.g., 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 authority, to devise a remedial package which most effectively redresses illegal conditions of confinement, even if the accepted-upon relief goes somewhat beyond the EEOC’s 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’ conditions of confinement are unconstitutional. The courts order the juveniles to be moved into a secure facility. Part of the decree provides for more training of correctional officers in the handling of juveniles to avert the unconstitutional 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 orders. 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 judges they need to deal with 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 fueled 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 protect the secured 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 shall have "free and meaningful access to the judicial process" and 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 JDA/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 juvenile inmates’ right of access to the courts. The curbs on attorneys’ fees in STOP would, for example, undermine juvenile inmates’ right of access to the courts.

For all 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 called upon to further explain the grave problems created by STOP, and related provisions in H.R. 667.

As the American Bar Association, 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 Commission of the American Bar Association and the 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 KULPERS, PHD., ON BEHALF OF THE NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am Kenneth Kulpers, PhD. of Grand Rapids, Michigan where I am a County Commissioner of Kent County. I am also the National Association of Counties (NACO) 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 legislative pending consideration.

At the outset, let me say that my personal concerns in regard to the ST.O.P. legislation are the same as those of the National Congress of American Indians. While the most discussion surrounds the effect of the bill’s provisions on prisons and prison inmates, passage of S. 400 will have an equal or even greater effect on county governments in their responsibility to provide for the health care of their inhabitants. I must tell you that correctional facilities are faced with the same constraints as those affecting the health care of our nation’s prison inmates: considerable staff shortages, workloads exceeding the ability of the staff to perform to standards, and the inability to provide services to meet the needs of offenders.

In 1982, Congress passed comprehensive health-care reform legislation which focused on the need for comprehensive health care for all citizens. The Environmental Protection Agency requested in a 1989 report that the federal government fund the primary care needs of the uninsured.

Unfortunately, today’s political climate makes it impossible to achieve the goals of reforming our health-care delivery system in a reasonable manner. A major reason is the increasing number of uninsured Americans. This problem is particularly acute in our nation’s corrections facilities. 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 inmate population has been solved. There are a good number of correctional institutions that have not yet subscribed to meeting rational 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 courts order 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 judgment. But these, in our experience, are not the norm. Instead, what has come to pass since the 1970's is the complete turnaround of conditions in county jails and prisons. Turnaround that are often the result of court actions or the effect of such actions being visited upon 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.

Of course, let me note that we often quietly hear from corrections administrators that they are grateful for 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—paragraph (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 cases 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' ability to curtail or diminish such abuses 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 violation of a federal right or the enactment of this legislation. In our experience, two years does not even cover our experience, two years does not even cover the process of remedying one fault, another more substantial one may be created. An automatic termination of the court's involvement in the follow-up to its decree, with regard to whether serious faults have been remedied, is, in our opinion, simply wrong.

Section 3626(c) 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. In our experience that the health services issues assigned to the special masters and monitor are almost always of complicated factual situations. While the federal masters may be 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 monitors are well qualified by experience and education to enter into the morass of complicated medical and administrative issues, and can make a successful conclusion for all the involved parties.

Further, the restriction against extending the function of a special master is not, in our view, 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 monitor or consultant 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 relief 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 and juvenile confinement facilities. The courts have helped a maturing society in its understanding of the purpose of incarceration—effective punishment through the deprivation of liberty. We should not be looking back to the way it was. Not for the counties' and states' sake; not for the correctional institutions' sake; not for the sake of an 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 Associations
- American Counseling Association
- American Dietetic 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 Academy of Addiction Medicine
- John Howard Association
- National Association of Counties
- National Association of County Health Officials
- National Council of Juvenile & Family Court Judges
- National Council for the Prevention of Child Abuse
- 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 write this letter to thank you for the time to consider my views regarding the Stop Turning Out Prisoners Act, otherwise known as STOP.

The bill was drafted with the assistance of Philadelphia District Attorney Lynne Abraham, the bills most vocal proponent. Ms. Abraham testified in favor of the bill on January 19, 1996 before the Subcommittee on Crime of the House of Rep-
representatives and is scheduled to present testimony in defense of the bill to this Committee on July 27, 1966. If, however, by the time before the House of Representatives, I anticipate that Ms. Abraham will portray the 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.

First, a word about my background. A lawyer for 26 years, I am a partner in the Philadelphia office of Pepper, Hamilton & Schuetz. My practice primarily involves 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 364-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 1980, 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.

Then District Attorney Norma Shapiro, who is revisited 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. 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 current conditions in light of the current state of Harris v. Pate, the Supreme Court's decision in the case.

The City faced with the harsh reality that for much of the United States, the only 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 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 would worsen. The City could not, for example, reduce the prison population by diverting inmates to trials in prison-based programs or to mental hospitals. The City could not, for example, reduce the prison population by diverting inmates to trials in prison-based programs or to mental hospitals.

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, the City could not only avoid the costs of defending itself but also improve the criminal justice system whose notorious inefficiencies were a source of the severe prison overcrowding.

The two consent decrees entered into by the City in 1988 and 1991 marked a comprehensive approach to improving Philadelphia's jails and improving the criminal justice system. The decrees required the City to enter into an agreement with the District Attorney in preference to defending a system that needed fixing, not defending. Eight years later, the wisdom of that course is not rationally assessable.

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 new downtown jail and a modern courtroom complex. And, by year's end, Philadelphia will have shut down an unsalvageable, 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 instituting as computerized information system that will connect the police, courts, prosecutors, defenders, prison officials, parole officers, and others. These programs and procedures are still subject to the consent decrees and cause I will not be able to present my views in person, I am presenting my testimony for inclusion in the record.

In conclusion, the proposed policies in the Reform of Pennsylvania's Courts Act is not in the public interest. The deficiencies in the proposed bill are too great and the reform effort is too limited. The reforms that are needed are broader and more comprehensive. The reforms that are needed are broader and more comprehensive. The reforms that are needed are broader and more comprehensive.

REBUILIT 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 2,750 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 into jails. 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 "allowed population." For the most part, the population has hovered between 6000 and 6000 inmates, or anywhere from 20 to 40 percent over the cap.

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.

Moreover, on an appeal of the decision made by the Judge for the District Court, the Seventh Circuit Court of Appeals affirmed, thereby preventing any further appeal to the Supreme Court.

Agitation: The two consent decrees in the case were entered "under pressure from the federal judge."

Fact: Both decrees were arrived at through arm's-length negotiations between the parties without any involvement by the Judge, although the second decree benefited from a result of long delays in bringing defendants to trial and sentencing.

That perception was born out in a series of independent studies in ensuing years by criminal justice researchers who uniformly found that overcrowding in Philadelphia's jails was not only the product of an inefficient and maladministration but also of an underfunded criminal justice system.

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, the City could not only avoid the costs of defending itself but also improve the criminal justice system whose notorious inefficiencies were a source of the severe prison overcrowding.

The two consent decrees entered into by the City in 1988 and 1991 marked a comprehensive approach to improving Philadelphia's jails and improving the criminal justice system. The decrees required the City to enter into an agreement with the District Attorney in preference to defending a system that needed fixing, not defending. Eight years later, the wisdom of that course is not rationally assessable.

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 new downtown jail and a modern courtroom complex. And, by year's end, Philadelphia will have shut down an unsalvageable, 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 instituting as computerized information system that will connect the police, courts, prosecutors, defenders, prison officials, parole officers, and others. These programs and procedures are still subject to the consent decrees and cause I will not be able to present my views in person, I am presenting my testimony for inclusion in the record.

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Alllegation: 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 no authority under Pennsylvania law to release any defendants who could be released and tried. The failure to pursue and arrest defendants who fail to appear for court does not result from the dictates of the consent decree and begs some other explanation.

Alllegation: 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 decree has not resulted in the diversion of any more defendants from pretrial custody than were diverted before the lawsuit.

Alllegation: 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 60,000 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 decree, 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 humanly all members of our society who break the law” (as well as, she might have added, 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 half that population. Some form of population limitation is indispensable under these circumstances as is the administration of intermediate punishments including treatment for drug and alcohol abuse.

Alllegation: 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 1992 when the population limits took effect. Since 1990, arrests for crimes of violence have increased in Philadelphia by nearly 20 percent. The incidence of serious crime in Philadelphia mirrors the national picture; it is no worse. The number of crime arrests in Philadelphia is much higher since the inception of Harris than it was before.

Alllegation: 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 significant, the rate of re-arrest for new crimes among those released pretrial under Harris is comparable to the rate for 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 release. 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 late 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 under Harris and today in Philadelphia. There is little reason to believe that the rearrest rate among that population will materially differ from the existing rate.
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-STIPPING MEASURE

In addition to correcting the misperceptions 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 national government have treated the prisoners thereon as lose 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 impress 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 curtailing 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 striping 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 naiveté of any such expectation.

If the City of Philadelphia made a bargain that is no longer sensible, fair, or just, the Harris consent decree modification and termination gives the City the power of means to change or bring an end to the arrangement. STOP's erosion of the power of the 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 WESTBURY DEPARTMENT OF CORRECTIONS

Good Morning, I would like to thank all of you for giving me the opportunity to testify before this distinguished Committee.

I am 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 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 Prisons Lawsuits Act; however, the most discouraging and worrisome legislation under consideration is that known as STOP. As a preliminary matter, I would like to dispel any confusion between those that are "frivolous" or "frivolous lawsuits" bill is concerned, among other things, with limiting frivolous prisoner lawsuits. STOP, on the other hand, is targeted at 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 promotes 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 usurpation of what have heretofore been the prerogatives of state or local jurisdictions
3. The enormous fiscal impact such legislation would 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 nations. This country has historically extended constitutional rights to all—wealthy or obscure, 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 government systems and lawsuits than physical confrontation and destruction to resolve their problems. In fact, I see as productive to teach them to use these socially acceptable means of challenge in hope 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. In my opinion this bill will overly restrict individual constitutional protections and overly limit a socially acceptable outlet for frustrated people.

We would like to deal with our second concern—usurping of prerogatives of states and counties and the potential enormous fiscal impact on state and local governments. Our memories are sharpened by the events in 1971 in Pennsylvania and in 1980 in those states and counties that were able to confront and defeat government attempts to strip states and counties of their rights to manage their own affairs. They have defeated those attempts by using the civil rights laws to challenge the constitutionality of legislation that would force them to create modern medical and educational programs. Such conditions, accompanied by overcrowding, were not expected 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 thousand inmates, the number of inmates being far below the number of staff were poorly trained; medical services were grossly inadequate; and educational and work opportunities were nonexistent to the black inmate population. Inmates, for all practical purposes, ran the institution. Inmate assaults and murders were common; assaults on staff and staff murders were frequent. It became so bad that full institutions were locked down because the cell where inmates were murdered, 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 a number of grounds. The state has since substantially expanded its prisons to bring the physical and operational activities up to at least constitutional minimums. Today, the prison, still holding over 3,000 inmates, has an assault and inmate death rate below the national average. The state has been able to do this with the help of federal court intervention, but 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; if the State of Washington were to find itself in a similar circumstance today, the STOP bill would have re-established those costs; it would not even have had the option of reserving 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 these orders and decrees. My experience has also convinced me of the necessity of assuming the position as the director of a correctional system, where consent decrees and post-trial orders are essential, at that point in time. For example, I recently signed a decree that governed the medical care provided to women prisoners in Washington. There were clear problems at the facility that prevented inmates from giving the inmates minimum 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. The decree will result in the allocation of resources that are necessary to remedy those problems.

Too often, it appears that 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 presumed 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 in 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 unreasonable. 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 substantial, 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 typically last 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 resources required 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 re-litigate 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 re-litigating 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 would 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, and Oregon, 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 funds to help with overcrowding. 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 to provide sufficient resources to meet constitutional minimums. Indeed, it is my experience that Governors and Legislatures in states that have experienced prison disturbances or have 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 purpose 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 this 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 court 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 the 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.