

Testimony of David A. Keene

House Judiciary Committee's
Subcommittee on Crime, Terrorism and Homeland Security and the Constitution
November 8, 2007

Let me begin by thanking you, Mr. Chairman, and the members of the Subcommittee for the opportunity to appear before you this afternoon.

My name is David Keene and while I am Chairman of the American Conservative Union, I am here today not in that capacity but because as the father of a young man serving time in a federal prison, I have had an opportunity to see the impact of the Prison Litigation Reform Act or PLRA as it operates in the real rater than conceptual world.

The PLRA was enacted for the best of reasons ... to prevent abuse of the legal system by prisoners with a tendency to bring frivolous lawsuits and thereby tie up the courts and the prison system itself in time consuming, expensive and ultimately meaningless legal controversies that had little to do with furthering either the cause of justice or improving the real world operations of the prison system.

It's been a long time since I attended law school, but from what I remember of the Administrative Law course to which I was subjected some decades ago, an agency of the government that promulgates rules and regulations is required to follow those rules and regulations.

This simple rule is adhered to by most if not all federal agencies, but it turns out that within the various prisons administered by the Bureau of Prisons, the regulations can be and are enforced capriciously, selectively or not at all based more on the convenience of those who are supposedly required to follow them than anything else.

If a citizen dealing with any other agency of our government followed published rules and regulations only to be told that the agency isn't itself required to abide by them has recourse to the courts. A federal prisoner does not have that right under most circumstances at least until such time as he exhausts administrative remedies which require him to complain to the very same people he alleges have wronged him and submitted to their judgment on whether or not the actions they took or failed to take were in compliance with their own rules and regulations.

In virtually every case, their judgment is final. The result is that few prisoners file grievance for the simple reason that they know it is useless to do so and, just as importantly, because they know they are likely to face retaliatory punishment if they do.

As I indicated at the outset, my son is currently incarcerated and has run into these problems first hand. Prisoners who cite the rules and regulations inside the prison in which he is housed are told that the rules as written don't mean a thing because the rules at any given time are what the guards declare them to be and anyone who asks that they comply with written guidelines is forced to simply shut up.

When a prisoner decides to complain, he must do so on approved forms which are often "unavailable" and he quickly learns that a complaint that is not properly executed on the appropriate form will be summarily dismissed.

In one instance, my son was given what turned out to be the inappropriate form, filed it and after more than a month received notice that his complaint had been dismissed and that if he wanted to appeal the dismissal or renew the complaint he had twenty days from the date of the dismissal to do so. Unfortunately, he didn't receive this information until 28 days after the date of dismissal and was, as a consequence, told that his time for appeal had run out.

In another instance, the correspondence between him and his attorney was held and opened by prison officials though it was clearly designated as "Legal Mail" from the attorney's offices. When this was raised in court, the charge against prison officials for violating their own rules and my son's constitutional rights was dismissed because he could show no "physical damage."

This is apparently typical as was the fact that when we pressed forward seeking a remedy at law, he was roughed up by prison guards who told him they were tired of prisoners hiring lawyers when all they had to do was follow "procedures."

As he put it in a letter to me after one such incident, "these delays sprinkled throughout and the additional hurdles conspire to deprive inmates' access to an administrative remedy process ... and that, therefore, the process is broken." He concluded by writing, "It feels like I'm playing poker in a rigged game because in here the law is never your friend. The safeguards and rules are constantly flouted by the government. If laws are openly flouted by those whose duty it is to uphold them, what good are they?"

One doesn't have to believe that prison guards or those running our prisons are either corrupt or inhumane to realize that it is a bad idea in practice to allow those whose activities are being overseen to be their own overseers.

Those we incarcerate should not come away from their incarceration with the lessons they are learning in our prisons today. They are there because they didn't follow the law and are being told by the government that those in charge of our prisons don't have to do so unless they want to and that there is nothing they or anyone else can do about it.

The PLRA was passed for legitimate reasons, but as is often the case when laws written by men and women in rooms like this are put into practice under real world circumstances, it has had unintended consequences.

Those consequences are real and they need to be fixed. I urge the members of this subcommittee to make the adjustments in the law required to alleviate those consequences so that those we incarcerate can at least rely on the rules set for them and that those who abuse them or deprive them of the limited rights they have as prisoners can be brought to account.

The SAVE Coalition in testimony here today has proposed just the sorts of changes that are needed and I hope you will give their recommendations the serious consideration they deserve.