

tion of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of such Title, the amendments made by such Title, and the application of the provisions of such Title to any person or circumstance not affected thereby, see section 101[a] [Title VIII, § 810] of Pub.L. 104-134, set out as a note under section 3626 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99-646, see 1986 U.S. Code Cong. and Adm. News, p. 6139. See, also, Pub.L. 98-473, 1984 U.S. Code Cong. and Adm. News, p. 3182; Pub.L. 101-647, 1990 U.S. Code Cong. and Adm. News, p. 6472; Pub.L. 103-322, 1994 U.S. Code Cong. and Adm. News, p. 1801; Pub.L. 104-66, 1995 U.S. Code Cong. and Adm. News, p. 674.

§ 3625. Inapplicability of the Administrative Procedure Act

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2010.)

HISTORICAL AND STATUTORY NOTES

Effective Date

Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Legislative History

For legislative history and purpose of Pub.L. 98-473, see 1984 U.S. Code Cong. and Adm. News, p. 3182.

§ 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.—

(1) **Prospective relief.**—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) **Preliminary injunctive relief.**—In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) **Prisoner release order.**—(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless—

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be

considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.—

(1) Termination of prospective relief.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervenor—

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief.—In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that

the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief.—Nothing in this section shall prevent any party or intervenor from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.—

(1) Consent decrees.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies.—The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.—

(1) Generally.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay.—Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period—

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay.—The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) **Order blocking the automatic stay.**—Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) **Special masters.**—

(1) **In general.**—(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) **Appointment.**—(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) **Interlocutory appeal.**—Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) **Compensation.**—The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) **Regular review of appointment.**—In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event

shall the appointment of a special master extend beyond the termination of the relief.

(6) **Limitations on powers and duties.**—A special master appointed under this subsection—

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) **Definitions.**—As used in this section—

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

(Added Pub.L. 103-322, Title II, § 20409(a), Sept. 13, 1994, 108 Stat. 1827, and amended Pub.L. 104-134, Title I, § 101(a)[Title VIII, § 802(a)], Apr. 26, 1996, 110 Stat. 1321-66; renumbered Title I Pub.L. 104-140, May 2, 1996, 110 Stat. 1327, and amended Pub.L. 105-119, Title I, § 123(a), Nov. 26, 1997, 111 Stat. 2470.)

Repeal of Section

Section 20409(d) of Pub.L. 103-322, which provided for the repeal of this section effective 5 years after Sept. 13, 1994, was repealed by Pub.L. 104-134. See Effective Date note under this section.

HISTORICAL AND STATUTORY NOTES

References in Text

The date of enactment of the Prison Litigation Reform Act, referred to in subsec. (b)(1)(A)(iii), is the date of enactment of Pub.L. 104-134, which was approved April 26, 1996.

Effective Date of 1997 Amendments

Section 123(b) of Pub.L. 105-119 provided that: "The amendments made by this Act [sic] [probably means section 123 of Pub.L. 105-119, which amended subsecs. (a), (b), and (e) of this section] shall take effect upon the date of the enactment of this Act [Nov. 26, 1997] and shall apply to pending cases."

Effective Date of 1996 Amendments

Pub.L. 104-134, Title I, § 101(a)[Title VIII, § 802(b)(1)], Apr. 26, 1996, 110 Stat. 1321-70; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327, provided that: "Section 3626 of title 18, United States Code [this section], as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title [Apr. 26, 1996]."

Effective Date

Section 20409(b) of Pub.L. 103-322, which provided that this section applied to all court orders outstanding on Sept. 13, 1994, was repealed by Pub.L. 104-134, Title I, § 101(a)[Title VIII, § 802(b)(2)], Apr. 26, 1996, 110 Stat. 1321-70; renumbered Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327.

Section 20409(d) of Pub.L. 103-322, which provided for the repeal of this section 5 years after Sept. 13, 1994, was repealed by Pub.L. 104-134, Title I, § 101(a)[Title VIII,

§ 802(b)(2)], Apr. 26, 1996, 110 Stat. 1321-70; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327.

Severability of Provisions

Pub.L. 104-134, Title I, § 101(a)[Title VIII, § 810], Apr. 26, 1996, 110 Stat. 1321-77; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327, provided that: "If any provision of this title [for distribution of which to the Code, see Short Title of 1996 Amendments note set out under section 3601 of this title and Tables], an amendment made by this title, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this title, the amendments made by this title, and the application of the provisions of such [sic] to any person or circumstance shall not be affected thereby."

Notice to Crime Victims of Pending Damage Award

Pub.L. 104-134, Title I, § 101(a)[Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-78; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327, provided that: "Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending amount of any such compensatory damages."

Payment of Damage Award in Satisfaction of Pending Restitution Orders

Pub.L. 104-134, § 101(a)[Title VIII, § 807], Apr. 26, 1996, 110 Stat. 1321-75; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327, provided that: "Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner."

Special Masters Appointed Prior to Apr. 26, 1996; Prohibition on Use of Funds

Pub.L. 104-208, Div. A, Title I, § 101(a) [Title III, § 306], Sept. 30, 1996, 110 Stat. 3009-45, provided that: "None of the funds available to the Judiciary in fiscal years 1996 and 1997 and hereafter shall be available for expenses authorized pursuant to section 802(a) of title VIII of section 101(a) of title I of the Omnibus Consolidated Reversions and Appropriations Act of 1996, Public Law 104-134 [enacting this section], for costs related to the appointment of Special Masters prior to April 26, 1996."

Legislative History

For legislative history and purpose of Pub.L. 103-322, see 1994 U.S. Code Cong. and Adm. News, p. 1801. See, also, Pub.L. 105-119, 1997 U.S. Code Cong. and Adm. News, p.

Stand alone

Sen hold put on the bill?

DeLan From: Ingrid M. Schroeder on 05/14/98 02:56:58 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: James J. Jukes/OMB/EOP, James C. Murr/OMB/EOP

Subject: HR 3718 - Prohibiting Early Release from Prison for Certain Prisoners

Below is the text of H.R. 3718 - which just popped up on the preliminary House floor scheduled for next Tuesday under suspension of the rules. H.R. 3718 would prohibit the early release of prisoners from certain prisons based on a civil actions related to prison conditions.

During House floor action on H.R. 1252 - Judicial Reform Act - (April 23, 1998) an amendment (identical to H.R. 3718) was added to the bill. The Administration did not take a position on this amendment.

Justice is looking at the bill and will hopefully give us an informal read of it later this afternoon.

HR 3718 IH

105th CONGRESS

2d Session

H. R. 3718

To limit the jurisdiction of the Federal courts with respect to prison release orders.

IN THE HOUSE OF REPRESENTATIVES

April 23, 1998

Mr. DELAY introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To limit the jurisdiction of the Federal courts with respect to prison release orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LIMITATION ON PRISONER RELEASE ORDERS.

(a) IN GENERAL- Chapter 99 of title 28, United States Code, is amended by adding at the end the following new section:

Sec. 1632. Limitation on prisoner release orders

will pass tomorrow
DOT looking @
OLC → serious const. problems(?)

Bill Marshall → hates this bill
DOT likely to oppose

No Admin. posit

Tomorrow after 5pm

` (a) LIMITATION- Notwithstanding section 3626(a)(3) of title 18 or any other provision of law, in a civil action with respect to prison conditions, no court of the United States or other court listed in section 610 shall have jurisdiction to enter or carry out any prisoner release order that would result in the release from or nonadmission to a prison, on the basis of prison conditions, of any person subject to incarceration, detention, or admission to a facility because of a conviction of a felony under the laws of the relevant jurisdiction, or a violation of the terms or conditions of parole, probation, pretrial release, or a diversionary program, relating to the commission of a felony under the laws of the relevant jurisdiction.

` (b) DEFINITIONS- As used in this section--

` (1) the terms `civil action with respect to prison conditions', `prisoner', `prisoner release order', and `prison' have the meanings given those terms in section 3626(g) of title 18; and

` (2) the term `prison conditions' means conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison.

(b) CONFORMING AMENDMENT- The table of sections for chapter 99 of title 28, United States Code, is amended by adding at the end the following new item:

` 1632. Limitation on prisoner release orders.'.

(c) CONSENT DECREES-

(1) TERMINATION OF EXISTING CONSENT DECREES- Any consent decree that was entered into before the date of the enactment of the Prison Litigation Reform Act of 1995, that is in effect on the day before the date of the enactment of this Act, and that provides for remedies relating to prison conditions shall cease to be effective on the date of the enactment of this Act.

(2) DEFINITIONS- As used in this subsection--

(A) the term `consent decree' has the meaning given that term in section 3626(g) of title 18, United States Code; and

(B) the term `prison conditions' has the meaning given that term in section 1632(c) of title 28, United States Code, as added by subsection (a) of this section.

END

Message Sent To:

David J. Haun/OMB/EOP
Ellen J. Balis/OMB/EOP
William P. Marshall/WHO/EOP
Steven D. Aitken/OMB/EOP
Julie A. Fernandes/OPD/EOP
jonesgre @ justice.usdoj.gov@inet

** The Admin. staff opposes
Undermines the ability
of federal courts to
provide adequate
remedies for
8th amendment
violations.*

SEC. 20408. AMENDMENTS TO THE DEPARTMENT OF EDUCATION ORGANIZATION ACT AND THE NATIONAL LITERACY ACT OF 1991.

(a) **TECHNICAL AMENDMENT.**—The matter preceding paragraph (1) of section 214(d) of the Department of Education Organization Act (20 U.S.C. 3423a(d)) is amended by striking “under subsection (a)” and inserting “under subsection (c)”.

(b) **ESTABLISHMENT OF A PANEL AND USE OF FUNDS.**—Section 601 of the National Literacy Act of 1991 (20 U.S.C. 1211-2) is amended—

(1) by redesignating subsection (g) as subsection (i); and

(2) by inserting after subsection (f) the following new subsections:

“(g) **PANEL.**—The Secretary is authorized to consult with and convene a panel of experts in correctional education, including program administrators and field-based professionals in adult corrections, juvenile services, jails, and community corrections programs, to—

“(1) develop measures for evaluating the effectiveness of the programs funded under this section; and

“(2) evaluate the effectiveness of such programs.

“(h) **USE OF FUNDS.**—Notwithstanding any other provision of law, the Secretary may use not more than five percent of funds appropriated under subsection (i) in any fiscal year to carry out grant-related activities such as monitoring, technical assistance, and replication and dissemination.”.

SEC. 20409. APPROPRIATE REMEDIES FOR PRISON OVERCROWDING.

(a) **AMENDMENT OF TITLE 18, UNITED STATES CODE.**—Subchapter C of chapter 229 of part 2 of title 18, United States Code, is amended by adding at the end the following new section:

“§3626. Appropriate remedies with respect to prison crowding

“(a) **REQUIREMENT OF SHOWING WITH RESPECT TO THE PLAINTIFF IN PARTICULAR.**—

“(1) **HOLDING.**—A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

“(2) **RELIEF.**—The relief in a case described in paragraph (1) shall extend no further than necessary to remove the conditions that are causing the cruel and unusual punishment of the plaintiff inmate.

“(b) **INMATE POPULATION CEILINGS.**—

“(1) **REQUIREMENT OF SHOWING WITH RESPECT TO PARTICULAR PRISONERS.**—A Federal court shall not place a ceiling on the inmate population of any Federal, State, or local detention facility as an equitable remedial measure for conditions that violate the eighth amendment unless crowding is inflicting cruel and unusual punishment on particular identified prisoners.

“(2) **RULE OF CONSTRUCTION.**—Paragraph (1) shall not be construed to have any effect on Federal judicial power to issue

equitable relief other than that described in paragraph (1), including the requirement of improved medical or health care and the imposition of civil contempt fines or damages, where such relief is appropriate.

“(c) **PERIODIC REOPENING.**—Each Federal court order or consent decree seeking to remedy an eighth amendment violation shall be reopened at the behest of a defendant for recommended modification at a minimum of 2-year intervals.”.

(b) **APPLICATION OF AMENDMENT.**—Section 3626 of title 18, United States Code, as added by paragraph (1), shall apply to all outstanding court orders on the date of enactment of this Act. Any State or municipality shall be entitled to seek modification of any outstanding eighth amendment decree pursuant to that section.

(c) **TECHNICAL AMENDMENT.**—The subchapter analysis for subchapter C of chapter 229 of title 18, United States Code, is amended by adding at the end the following new item:

“3626. Appropriate remedies with respect to prison crowding.”.

(d) **SUNSET PROVISION.**—This section and the amendments made by this section are repealed effective as of the date that is 5 years after the date of enactment of this Act.

SEC. 20410. CONGRESSIONAL APPROVAL OF ANY EXPANSION AT LORTON AND CONGRESSIONAL HEARINGS ON FUTURE NEEDS.

(a) **CONGRESSIONAL APPROVAL.**—Notwithstanding any other provision of law, the existing prison facilities and complex at the District of Columbia Corrections Facility at Lorton, Virginia, shall not be expanded unless such expansion has been approved by the Congress under the authority provided to Congress in section 446 of the District of Columbia Self-Government and Governmental Reorganization Act.

(b) **SENATE HEARINGS.**—The Senate directs the Subcommittee on the District of Columbia of the Committee on Appropriations of the Senate to conduct hearings regarding expansion of the prison complex in Lorton, Virginia, prior to any approval granted pursuant to subsection (a). The subcommittee shall permit interested parties, including appropriate officials from the County of Fairfax, Virginia, to testify at such hearings.

(c) **DEFINITION.**—For purposes of this section, the terms “expanded” and “expansion” mean any alteration of the physical structure of the prison complex that is made to increase the number of inmates incarcerated at the prison.

SEC. 20411. AWARDS OF PELL GRANTS TO PRISONERS PROHIBITED.

(a) **IN GENERAL.**—Section 401(b)(8) of the Higher Education Act of 1965 (20 U.S.C. 1070a(b)(8)) is amended to read as follows:

“(8) No basic grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution.”.

(b) **APPLICATION OF AMENDMENT.**—The amendment made by this section shall apply with respect to periods of enrollment beginning on or after the date of enactment of this Act.

SEC. 20412. EDUCATION REQUIREMENT FOR EARLY RELEASE.

Section 3624(b) of title 18, United States Code, is amended—

(1) by inserting “(1)” after “behavior.—”;



Department of Justice

ESPECIALLY SEE PAGE 8-13

ALSO

ADM. SUPPORTED) COMPROMISE IN PLRA

TESTIMONY OF

18 USC 3626

JOHN R. SCHMIDT

ASSOCIATE ATTORNEY GENERAL .

DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

OVERHAULING THE NATION'S PRISONS

PRESENTED ON

JULY 27, 1995

Mr. Chairman and Members of the Committee:

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

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

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

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

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

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

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

Boot Camp Initiative

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

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

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

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

Violent Offender/Truth in Sentencing Programs

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

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

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

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

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

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

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

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

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

Reforms Relating To Prisoner Litigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. S. 866

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

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

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

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

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

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

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

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

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

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

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

C. The STOP Provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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