Calendar No. 446

96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-416

CIVIL RIGHTS

OF THE

INSTITUTIONALIZED

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 10

together with

MINORITY AND ADDITIONAL VIEWS

NOVEMBER 15, 1979.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1979

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[96th Congress]

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96TH CONGRESS, 1st Session } SENATE { REPORT No. 96-416

CIVIL RIGHTS OF THE INSTITUTIONALIZED

NOVEMBER 15, 1979.—Ordered to be printed

Mr. BAYH, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany S. 10 as amended]

The Committee on the Judiciary, to which was referred the bill (S. 10) to grant the United States Attorney General statutory authority to initiate and to intervene in civil actions brought to redress systematic deprivations of constitutional and Federal statutory rights of persons residing in state institutions, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill do pass.

I. PURPOSE

One measure of a nation's civilization is the quality of treatment it provides persons entrusted to its care. The past decade has borne testimony to the growing civilization of this country through its commitment to the adequate care of its institutionalized citizens.[1] Nowhere is that commitment more evident than in the actions of the United States Justice Department.

Since 1971, the Attorney General has participated in a series of civil actions seeking to redress widespread violations of constitutional and federal statutory rights of persons residing in state institutions. Through litigation conducted by the Civil Rights Division, the Justice

[1] See, *e.g.* Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. 6010 *et seq.* (Pub. L. No. 94-103); Rehabilitation Act of 1973, 29 U.S.C. 794; (Pub. L. No. 93-112); Education of All Handicapped Children Act of 1975 (Pub. L. No. 94-142); Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601 *et seq.* (Pub. L. No. 93-415); Omnibus Crime and Safe Streets Act, 42 U.S.C. 3701 (Pub. L. No. 90-351); Parole Commission and Reorganization Act of 1976, 18 U.S.C. 4201 *et seq.* (Pub. L. No. 94-233).

Department has participated as *amicus curiae* or plaintiff-intervenor in more than 25 suits brought to secure decent and humane conditions in institutions housing the mentally ill, the retarded, the chronically physically ill, prisoners, juvenile delinquents, and neglected children. In addition, the Attorney General has participated in suits successfully challenging the constitutionality of several state commitment statutes.

At least ten Federal district courts have requested the Justice Department to participate in litigation concerning the rights of institutionalized individuals. The Attorney General has also petitioned to intervene in pending cases, to represent the interests of the United States in securing basic constitutional rights for its institutionalized citizens. Whether by request of the court or by petition to intervene, however, the Justice Department invariably has brought to the litigation process investigative resources, technical advice, and legal expertise unavailable to private litigants. Courts have been openly appreciative of these efforts.[2]

Apart from their salutary effects on the management of such litigation, the Justice Department's activities have enhanced the lives of thousands of institutionalized individuals throughout the country. In every suit in which the Department has participated, the trial and appellate courts have upheld the plaintiffs' claims and ordered extensive relief. As a result, conditions have improved significantly in dozens of institutions across the Nation: decent and humane living environments have been secured for mentally ill and retarded residents in state hospitals; barbaric treatment of adult and juvenile prisoners has been curbed; persons unnecessarily or improperly committed have been released or relocated in less restrictive community placements; and States facing the prospect of suit by the Attorney General have voluntarily upgraded conditions in their institutions and rewritten State commitment laws to comply with previously announced constitutional standards.

Despite the proven effectiveness of the Department's efforts, its litigation program stands threatened by two recent Federal court decisions. District courts in both Maryland and Montana recently ruled that, absent express statutory authority, the Attorney General lacked standing to initiate civil actions challenging conditions in two State facilities for the mentally retarded.[3] Both suits were recently upheld on appeal.[4]

Although Congress has, in other contexts, given the Attorney General explicit authority to redress systematic deprivations of constitutional rights,[5] it has never expressly authorized him to enforce funda-

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[2] See text at note 7 *infra*. See also comments of Judge Nicholas J. Walinski, Hearings on S. 1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess., 548, 552–53 (1977) [hereinafter cited as S. 1393 Hearings]. The Department's efforts have also been favorably commented upon in legal periodicals, see, *e.g.*, Herr, Civil Rights, Uncivil Asylums and the Retarded, 43 CIN. L. REV. 679, 779 (1974).

[3] *United States* v. *Solomon*, 419 F. Supp. 358 (D. Md. 1976) (Rosewood State Hospital); *United States* v. *Mattson*, C.A. No. 74–138–BU (D. Mont., September 29, 1976), *appeal docketed*, No. 76–3568, 9th Cir., October 19, 1976 (Boulder River Hospital).

[4] *United States* v. *Solomon*, C.A. No. 76–2184 (4th Cir., October 12, 1977). *United States* v. *Mattson* 600 F. 2d 1295 (9th Cir. 1979).

[5] *E.g.*, Title VI of the Civil Rights Act of 1960, 42 U.S.C. 1971(c) (discrimination in voting); Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a–5(a) (discrimination in public accommodations); Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000b(a) (discrimination in public facilities); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6(a) (employment discrimination); Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h–2 (denial of equal protection); Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6(a) (discrimination in public education).

mental Federal rights of institutionalized individuals. The Maryland and Montana decisions make clear that without a Federal statute clarifying the Attorney General's authority to initiate and to intervene in such suits, the Department's litigative efforts to protect the institutionalized will be paralyzed.

S. 10 provides that authority. It creates no new substantive rights. It simply gives the Attorney General legal standing to enforce existing constitutional and Federal statutory rights of institutionalized persons. By codifying the authority of the Attorney General to initiate and to intervene in suits to redress serious and pervasive patterns of institutional abuse, S. 10 ensures that institutionalized citizens will be afforded the full measure of protections guaranteed them by the Constitution of the United States.

II. Text of Senate Bill 10

The text of S. 10 is as follows:

A BILL To authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

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

Section 1. Whenever the Attorney General has reasonable cause to believe that any State or political subdivision, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in an institution, as defined in section 8, to egregious or flagrant conditions (conditions which are willful or wanton or conditions of gross neglect) which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this act to persons residing in an institution as defined in section 8(a)(2)(B) only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States. In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. The Attorney General shall personally sign the complaint in such action.

Sec. 2. (a) At the time of the commencement of an action under section 1, the Attorney General shall certify to the court—

(1) that at least fifty-six days previously he has notified in writing the Governor or chief executive officer

and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts given rise to the alleged conditions, and the alleged pattern or practice, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred, the identity of all persons, reasonably suspected of being involved in causing the alleged certification, and the date(s) on which the alleged conditions and pattern or practice at the time of the conditions and pattern or practice were first brought to the attention of the Attorney General;

(C) the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistence;

(2) that he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of his intention to commence an investigation of said institutions(s) and that from the time of such notice—

(A) he or his designee has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which he believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) he has endeavored to eliminate the alleged conditions and pattern or practice of resistance by informal methods of conference, conciliation, and persuasion, including discussion with appropriate State officials of the possible costs and fiscal impacts of the alternative minimum remedial measures, and it is his opinion that all efforts at voluntary compliance have failed; and

(C) he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or pro-

cedural requirements, and any other extenuating circumstances involved in correcting such conditions;

(3) that he believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 3. (a) Whenever an action has been commenced in any court of the United States seeking relief from conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, many intervene in such action upon motion by the Attorney General in accordance with the Federal Rules of Civil Procedures.

(b) (1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a)—

(A) that he has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution of—

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) the minimum measures which he believes may remedy the alleged conditons and the alleged pattern or practice of resistance; and

(B) that he believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) Any certification made by the Attorney General pursuant to this subsection shall be personally signed by him.

(c) Any motion to intervene made by the Attorney General pursuant to this section shall be personally signed by him.

(d) In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party other than the United States a reasonable attorney's fee against the United States as part of the costs: *Provided*, That nothing in this subsection precludes the award of attorney's fees available under any other provisions under the United States Code.

SEC. 4. No person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting.

SEC. 5. (a) (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, or pretrial detention facility, the court may, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

(b) (1) No later than one hundred and eighty days after the date of enactment of this act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution, or pretrial detention facility (at the most decentralized level as is reasonably possible) in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c) (1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) Noncompliance by an institution with the minimum standards promulgated under subsection (b) shall not constitute the deprivation of rights, privileges, or immunities secured or protected by the Constitution.

SEC. 6. The Attorney General shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code: (a) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced; (b) a detailed explanation of the procedures by which the Department has received, reviewed, and evaluated petitions or complaints regarding conditions in institutions; (c) an analysis of the impact of actions instituted pursuant to this Act, including an estimate of the costs incurred by States and other political subdivisions; (d) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and (e) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

SEC. 7. The Comptroller General of the United States shall evaluate the adequacy of programs of financial, technical, or other assistance which are currently available to the States from the United States to assist in the correction of the conditions which are alleged to deprive a person of the rights, privileges, or immunities secured or protected by the constitution or laws of the United States, including but not limited to the application procedures used, the coordination between different Federal agencies, and the level of funding.

SEC. 8. As used in this act—

(a) The term "institution" means any facility or institution—

(1) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(2) which is—

(A) for persons who are mentally ill, disabled, or retarded;

(B) a jail, prison, or other correctional facility;

(C) a pretrial detention facility;

(D) for juveniles—

(i) held awaiting trial;

(ii) residing in such facility or institution for purposes of receiving care or treatment; or

(iii) residing in such facility or institution for any State purpose, other than a facility or institution for juveniles who have not been adjudicated delinquents or are not neglected juveniles or are not mentally ill, disabled, or retarded who are residing in such facility or institution for the sole purpose of receiving elementary or secondary educational training or services; or

(E) for the chronically ill or handicapped, including any State-supported intermediate or long-term care or custodial care facilities.

(b) Privately owned and operated facilities shall not be deemed "institutions" under this Act if—

(1) the licensing of such facility by the State constitutes the sole nexus between such facility and such State; or

(2) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State; or

(3) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State.

(c) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

SEC. 9 (a). It is the desire and intent of Congress that deplorable conditions in institutions covered by this law amounting to constitutional deprivations be corrected and eliminated, not only by litigation, as contemplated herein, but by the volunteer good faith efforts of the State and local governments. It is the sense of the Congress that where Federal programs contain purposes and provisions for funds which are designated or designed to assist a given State in improving or upgrading institutions against which the Attorney General has commenced or intervened in litigation under the provisions of this Act or related treatment or rehabilitation programs, then priority should be given to the correction or elimination of such unconstitutional conditions from that

portion of such Federal programs so designated or designed. It is not the intent of this provision to cause the redirection of funds for one program to another or from one State to another.

(b) When the Attorney General is contemplating actions under section 1 or 3 of this Act, he shall notify any Federal department, agency, or entity with an interest in such institution, of the alleged unconstitutional conditions.

SEC. 10. Provisions of this Act shall not authorize promulgation of regulations defining standards of care.

III. LEGISLATIVE HISTORY

Since 1976 Congress has indicated a desire to assist the Attorney General in conducting his litigation program on behalf of the institutionalized.

On April 26, 1977, Senator Birch Bayh introduced S. 1393, a bill to grant the U.S. Attorney General statutory authority to initiate and to intervene in litigation seeking to redress widespread deprivations of institutionalized persons' constitutional and Federal statutory rights. The bill was referred to the committee, which referred it to the Subcommittee on the Constitution. Five days of hearings were held in Washington, D.C., on June 17, 22, 23, 30, and July 1, 1977. A total of 40 witnesses testified on S. 1393, including former institution residents, superintendents of mental and correctional facilities, public health officials, State attorneys general, doctors, lawyers, experts in the fields of mental retardation, mental health, and penology, and representatives of numerous organizations interested in the care of the institutionalized.

The Subcommittee on the Constitution met on November 15, 1977 to consider S. 1393. By a vote of 4 to 0, the subcommittee reported the bill to the committee, with the recommendation that favorable action be taken on it.

The Committee on the Judiciary considered and discussed the bill at several meetings in 1978, and on July 18, 1978 met for the purpose of final consideration on reporting the bill. The committee, by a vote of 11 to 6 ordered S. 1393 reported with a recommendation that it be passed by the Senate. However, the Senate failed to act on S. 1393 in 1978.

Senator Bayh and Senator Hatch along with 27 other Senators introduced S. 10 on January 15, 1979. The bill was referred to the Subcommittee on the Constitution following which, three days of hearings were held on February 9, March 28 and March 29, two of which were devoted, at the request of Senators Thurmond and Morgan, to opposition to the legislation. On September 7, 1979, the Subcommittee on the Constitution voted to allow full committee consideration of the legislation by a vote of 5 to 2 after approving nine amendments to the bill.

The Committee on the Judiciary considered and discussed the bill at two meeting on October 23 and October 30 and by a vote of 12 to 4 ordered S. 10 reported with recommendation that it be passed by the Senate. All but one of the amendments which were voted upon failed. An amendment offered by Senator Dole which refined certification language in section 3 was accepted by the committee by a vote of 13 to 2.

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IV. Background

In 1971, guardians for a class of patients at Alabama's Bryce Hospital for the mentally ill brought suit against institution administrators and State officials, alleging that the conditions at Bryce and the State's two other hospitals for the mentally handicapped fell below the minimum levels of care and treatment required by the Federal Constitution. That case, *Wyatt* v. *Stickney*,[6] marked not only the beginning of a series of lawsuits brought to secure fundamental rights for institutionalized individuals, but the inauguration of the Justice Department's litigation program to assist in that effort. For it was in *Wyatt* that Judge Frank M. Johnson, Jr. first ordered the Attorney General to appear as litigating *amicus curiae*, to assist the court in gathering evidence of institutional conditions, to evaluate the adequacy of the hospital's treatment programs, and to assist institution officials in meeting Federal standards for adequate care. At the conclusion of trial, the court took special notice of the "exemplary service" provided by the Department.[7]

Since 1971, the Office of Special Litigation and Office of Public Accommodations and Facilities of the Civil Rights Division of the Justice Department have continued to participate in *Wyatt*-type suits challenging conditions of confinement in State institutions across the Nation, and successfully attacking the constitutionality of several State commitment statutes.[8] Often the Department has requested or been ordered to appear by courts in suits initiated by private parties; in such cases the Department has acted in the capacity in litigating *amicus* or plaintiff-intervenor. More recently, the Department initiated suit as the sole plaintiff, on behalf of the United States, to secure humane and adequate treatment for its institutionalized citizens.[9]

Common to every suit in which the Department has participated has been the revelation of conditions so deplorable that courts have uniformly ordered immediate and unconditional relief. A sample of those conditions and the impact of the Attorney General's involvement in suits brought to ameliorate such conditions merits careful consideration.

A. Institutional Conditions

Mental institutions.—The conditions documented in the *Wyatt* decision and subsequent suits dispel any doubt as to the existence, severity, or scope of institutional abuse. In *Wyatt*, the record revealed that Alabama's mental hospitals were severely overcrowded and understaffed. Retarded persons were tied to their beds at night in the absence of sufficient staff to care for them; toilet paper was locked up to avoid additional cleanup work. One patient was regularly confined in a straightjacket for 9 years, as a result of which she lost the use of

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[6] 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1971–72), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974).

[7] 344 F. Supp. at 375, n. 3.

[8] *Stamus and United States* v. *Leonhardt and State of Iowa*, 414 F. Supp. 439 (S.D. Iowa 1976); *Alexander and United States* v. *Hall*, C.A. No. 72–209 (D.S.C. 1974); *Bartley* v. *Kremens*, 402 F. Supp. 1039. (E.D. Pa. 1975) (three-judge court), *vacated and remanded sub nom. Kremens* v. *Bartley*, No. 75–1074, S. Ct., decided May 16, 1977; *Ewing* v. *Gaver*, C.A. No. C–74–147 (N.D. Ohio 1974).

[9] *United States* v. *Solomon*, 419 F. Supp. 358 (D. Md. 1976), *aff'd* C.A. No. 76–2184 (4th Cir., October 12, 1977); *United States* v. *Mattson*, C.A. No. 74–138–BU (D. Mont., September 29, 1976), *appeal docketed*, No. 76–3568, 9th Cir., October 19, 1976.

both arms.[10] The State ranked 50th in the Nation in per patient expenditures and the less than 50 cents per patient per day spent on food resulted in a diet "coming closer to punishment by starvation than nutrition." [11] The court ultimately characterized conditions at the State hospital for the mentally retarded as "conducive only to the deterioration and debilitation of the residents * * * and substandard to the point of endangering [their] health and lives." [12]

The conditions documented in *Wyatt* were neither unique to Alabama facilities nor endemic to the South. In a suit challenging the adequacy of care at New York's Willowbrook State School for the Mentally Retarded, the trial record revealed equally appalling conditions.[13] Participating as litigating *amicus*, the Department assisted plaintiffs in producing evidence of massive overdrugging of retarded children by staff, and physical abuse of weaker residents by stronger ones. In the absence of adequate supervision, children suffered broken teeth, loss of an eye, and loss of part of an ear bitten off by another resident. In an 8-month period, the 5,000-resident facility reported over 1,300 incidents of injury, patient assault, or patient fights. Unsanitary conditions led to 100 percent of the residents contracting hepatitis within 6 months of their admission.[14]

The trial court characterized conditions at Willowbrook as "shocking," "inhumane," and "hazardous to the health, safety, and sanity of the residents." [15]

Facilities for juveniles.—In a 1974 case challenging conditions in Texas' five juvenile detention facilities, the Justice Department was again ordered by the court to appear as litigating *amicus*.[16] After a year of discovery and six weeks of trial, the court determined that the staff was engaged in "a widespread practice of beating, slapping, kicking, and otherwise physically abusing juvenile inmates, in the absence of any exigent circumstances." [17] Brutality was found to be "a regular occurrence * * * encouraged by those in authority." [18]

In *Gary W.* v. *Stewart*,[19] the Justice Department participated as

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[10] The evidence at trial revealed that four patients died as the result of inadequate supervision: one when a garden hose was inserted in his rectum by a fellow patient charged with the responsibility of cleaning him; another when a fellow patient pushed the wheelchair in which he was confined through a shower of scalding water; a third when soapy water was forced down his throat; and a fourth when he ingested an overdose of drugs left unattended and unsecured. 503 F. 2d at 1311, n. 6.

[11] *Wyatt* v. *Stickney*, 334 F. Supp. at 1343; *Wyatt* v. *Aderholt*, 503 F. 2d at 1310–11.

[12] *Wyatt* v. *Aderholt*, 503 F. 2d at 1309, n. 4.

[13] *New York State Ass'n for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973), *sub nom.*, *NYSARC* v. *Carey*, 393 F. Supp. 715 (E.D. N.Y. 1975)) (consent decree).

[14] A cerebral palsy victim mistakenly diagnosed as mentally retarded spent 16 years at Willowbrook. Testifying on the conditions in the institution, he recalled that wards of 40 residents were fed in a period of 3 to 4 minutes with the courses of an individual meal mixed together and shoveled down the throats of those unable to feed themselves. Testimony of Bernard Carabello. S. 1393 hearings, 76. Confirming this testimony, Dr. Michael Wilkins, a former staff physician at Willowbrook, testified that the foremost cause of resident death was pneumonia resulting from the inhalation of rapidly force-fed food. He also noted that sexual assaults were "a common practice" at Willowbrook. S. 1393 hearings, 74.

[15] 357 F. Supp. at 756, 770.

[16] *Morales* v. *Turman*, 364 F. Supp. 116 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974); *rev'd for absence of a three-judge court*, 535 F. 2d 864 (5th Cir. 1976), *judgment of Court of Appeals rev'd and remanded*, 430 U.S. 322 (1977).

[17] 364 F. Supp. at 173.

[18] 383 F. Supp. at 73. Juveniles were teargassed "in situations in which no riot or other disturbance was imminent." 364 F. Supp. at 170. One youth was sprayed while confined in a cell, another while being held by two correctional officers, and a third while attempting to flee a beating. *Id.* Selected youths were confined in cells lacking "the minimum bedding necesary for comfortable and healthful sleep," while others were denied regular access to bathroom facilities. *Id.* at 172. Some were placed in homosexual dormitories as a form of punishment.

[19] No. 74–2412 (E.D. La., filed July 26, 1976).

plaintiff-intervenor in a suit successfully challenging Louisiana's practice of sending hundreds of retarded, disturbed, neglected, abandoned, and otherwise dependent children to out-of-State residential placements, where conditions of care and treatment were often inadequate. The Justice Department's discovery, conducted throughout the State of Texas, revealed that children were physically abused, handcuffed, beaten, chained, tied up, kept in cages, and overdrugged with psychotropic medication.[20]

Correctional facilities.—Justice Department-assisted litigation challenging conditions of confinement in prisons and jails revealed that conditions in correctional facilities across the Nation were, if possible, worse than those in mental institutions. In a suit attacking conditions in the prisons of Oklahoma's State Penitentiary System,[21] the court found that facilities designed to accommodate 2,400 inmates housed 4,600. Inmates were compelled to sleep in garages and stairwells. Groups of four men were regularly confined in 6-by-6-foot cells with no ventilation, no hot water, and sewage leaks. Over a 3-year period, one facility reported 40 stabbings, 44 serious beatings, and 19 violent deaths.[22] Kitchen and food storage areas were found to be infested with mice, rats, and vermin, and firefighting capabilities were deemed "nonexistent." The court ultimately concluded that conditions in the prisons constituted "an immediate and intolerable threat to the safety and security of inmates, prison personnel, and the State." [23]

A similar conclusion was reached by a trial court evaluating evidence in a suit brought with the assistance of the Justice Department against Mississippi State Penitentiary at Parchman.[24] Dead rats surrounded the barracks, broken windows were stuffed with rags to keep out the cold and rain, exposed wiring posed a constant threat of fire, and open sewage contributed to the spread of contagious disease. In one camp, 80 men shared three wash basins, which consisted of oil drums cut in half.[25] Milk of magnesia was forceably administered to inmates as a disciplinary measure; cattle prods were used to keep inmates standing or moving. In a 6-by-6-foot cell with no light, toilet, sink, bed, or mattress, inmates were confined naked for up to three days, without hygienic materials, heat, or adequate food. The court characterized the prison as "unfit for human habitation under any modern concept of decency." [26]

The conditions cited above do not begin to exhaust the range of institutional abuses brought to light by Justice Department-assisted litigation. They do, however, constitute a representative sampling of the practices documented in dozens of decisions issued by courts in virtually every part of the country.[27]

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[20] S. 1393 hearings 788.
[21] *Battle* v. *Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974). —— F. Supp. —— (June 14, 1977).
[22] 376 F. Supp. at 410, 412.
[23] Order of June 14, 1977, —— F. Supp. ——.
[24] *Gates* v. *Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F. 2d 1291 (5th Cir. 1974).
[25] 501 F. 2d at 1300.
[26] *Id.*
[27] *E.g.*, *Wyatt* v. *Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1971–72), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *New York State Ass'n for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973); *Halderman* v. *Pennhurst*, C.A. No. 74-1345 (E.D. Pa., December 23, 1977); *Morales* v. *Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 1974); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part*, 550 F. 2d *Collier*, 349 F. Supp. 881 (N.D. Miss. 1972); *Battle* v. *Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974); *Newman* v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F. 2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Pugh* v. *Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); *Williams* v. *Edwards*, 547 F. 2d 1206 (1977).

B. JUSTICE DEPARTMENT INVOLVEMENT

1. Legal bases for relief

In all of the cases cited above, the plaintiffs and the Justice Department challenged conditions and practices of the institutions in question as violative of their residents' fundamental rights under the Federal Constitution and in some instances their rights under Federal statutes as well. In every case they prevailed, and it is now generally accepted that the Federal Constitution guarantees institutionalized citizens a decent and humane living environment.[28]

Theories of relief have varied, depending on the circumstances of the commitment. In the area of civil commitments, some courts have recognized an express "right to treatment" under the 14th amendment.[29] Others have found that the 8th amendment's prohibition against cruel and unusual punishment encompasses a right to "protection from harm," which ensures civilly committed persons the safeguards necessary to protect them from conditions that threaten their safety or guarantee their further deterioration.[30]

In the case of prison inmates and pretrial detainees, no right to rehabilitative treatment has ever been articulated. However, courts have consistently held that where conditions of confinement are "so base, inhumane, and barbaric" as to "shock the conscience of any right thinking person" they may constitute cruel and unusual punishment in violation of the 8th amendment.[31]

Regardless of the legal basis for relief, however, in every case in which the Justice Department has participated, whether on behalf of the civilly or criminally committed, the adjudicating court has held that the Federal Constitution guarantees institutionalized persons the minimal amenities of life which comprise a safe and humane environment. In the words of a prominent Federal judge, "a tolerable living environment is now guaranteed by law." [32]

As noted above, the Justice Department has also been involved in suits challenging the constitutionality of several States' civil commitments statutes. In some States, prior to Justice Department litigation, both the procedures and standards for committing persons were in clear violation of the 14th amendment's due process clause, as previ-

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[28] See *e.g.*, *Wyatt* v. *Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1971–72), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *New York State Ass'n for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973); *Davis* v. *Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *Morales* v. *Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (1974); *Horacek and U.S.* v. *Exon*, 357 F. Supp. 71 (D. Neb. 1973) (jurisdictional issues); *Gates* v. *Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F. 2d 1291 (5th Cir. 1974); *Welsch* v. *Liking*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part*, 550 F. 2d 1122 (8th Cir. 1977); *Gary W.* v. *Stewart*, No. 74–2412 (E.D. La., filed July 26, 1976); *Inmates of Boys' Training School* v. *Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Stachulak* v. *Coughlin*, 364 F. Supp 686 (N.D. Ill. 1973); *Martarella* v. *Kelley*, 349 F. Supp. 575 (S.D. N.Y. 1972); *Nelson* v. *Heyne*, 491 F. 2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Halderman* v. *Pennhurst*, C.A. No. 74–1345 (E.D. Pa., December 23, 1977).

[29] See, *e.g.*, *Wyatt* v. *Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1971–72) *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Davis* v. *Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *Morales* v. *Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (1974); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974).

[30] See, *e.g.*, *New York State Ass'n. for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973).

[31] See, *e.g.*, *Gates* v. *Collier*, 501, F. 2d 1291, 1301; *Williams* v. *Edwards*, 547 F. 2d 1206 (5th Cir. 1977); *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F. 2d 304 (8th Cir. 1971); *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967); *Newman* v. *Alabama*, 349 F. Supp. 278 (1972), *aff'd in part* 503 F. 2d 1320 (5th Cir. 1974); *Battle* v. *Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), —— F. Supp. —— (June 14, 1977).

[32] Circuit Judge Irving Kaufman, Book Review, 86 HARV. L. REV. 637, 639 (1973) citing *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967).

ously interpreted by the Supreme Court.[33] Nonetheless, in the absence of litigation challenging such laws, they remained in force. Only after the United States initiated or participated in suits attacking the constitutionality of such statutes, were they repealed. In every State in which the United States participated in litigation challenging a State commitment statute, the legislature responded by passing a new law, bringing into constitutional compliance the substantive and procedural standards for committing its citizens.[34]

2. Impact of Justice Department efforts

The results of Justice Department-assisted litigation on behalf of the institutionalized are impressive. Not only have courts given legal recognition to the fundamental rights of institutionalized individuals, but State and local officials under court order have made significant progress in implementing those rights.

As a result of a consent decree agreed to by the parties in the *Willowbrook* case and ratified by the court in 1975, the State has proceeded with a program for reducing significantly the population of Willowbrook. The New York Department of Mental Hygiene has established a metropolitan placement unt designed to provide community living arrangements for former Willowbrook inmates; since the decree was entered, hundreds of persons have been removed from the 5,000-patient facility and relocated in community placements. Additional patients continue to be relocated in what one attorney has characterized as "good quality placements." [35]

The decrease in the number of Willowbrook patients, coupled with increased staff hiring provided by the consent decree, has resulted in cleaner, healthier conditions for those still residing in Willowbrook. Moreover, a steadily increasing number of patients now receive daily training. Finally, a review panel of mental retardation experts continues to monitor the State's compliance with the consent decree to ensure its continued implementation.[36]

Juveniles.—The implementation of the court's decree in *Gary W.*, the suit challenging Louisiana's practice of sending dependent children to out-of-State facilities, provides further visible proof of the efficacy of the Justice Department's assistance. Under the terms of the court order, the affected children are being returned to their home State, where a team of specialists from Louisiana State University Medical School evaluates each child previously placed in an out-of-State facility. Treatment programs are prescribed with the aim of placing children either with their families with services, or in the least restrictive setting within a reasonable proximity to their families. Plaintiff's attorneys receive reports from the Medical School team and the State, describing the placement found for each child.[37] Stephen Berzon, lead attorney in the *Gary W.* case, stated to the Senate Constitution Subcommittee during the hearings on S. 1393:

> I can assure the Subcommittee that these children are being placed in foster homes, in group homes, or with families near

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[33] See, *e.g.*, *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *In re Gault*, 387 U.S. 1 (1967).
[34] The States are Iowa, South Carolina, Pennsylvania, and Ohio. See cases cited note 8 *supra*.
[35] Telephone conversation with Chris Hansen, June 16, 1977.
[36] *Id.*
[37] Testimony of Stephen Berzon, legal director, Children's Defense Fund, S. 1393 hearings, 789.

> their homes, and it can be done. It is because of the Justice Department's involvement in this case that we were able to accomplish this result.[38]

Prisoners.—Correctional and pretrial detention facilities have improved markedly as a result of suits brought or assisted by the Justice Department. As a result of the court order in *Gates* v. *Collier*,[39] seven of the most dilapidated camps at Mississippi's Parchman State Prison have been closed and replaced by modern facilities meeting recognized correctional standards. In the wake of the *Battle* case, in which the Justice Department participated as plaintiff-intervenor, Oklahoma State officials have initiated improvements in the facilities of the penitentiary system. Racial segregation has been eliminated; the most severe overcrowding has been reduced, and continuing efforts are under way to relocate 150 prisoners per month, until the population reaches design capacity.[40]

It should be noted that many of the orders imposed on corrections administrators have involved neither excessive time nor money. Some, for instance, have required merely that prison officials cease to engage in flagrantly unconstitutional practices, such as beating, shooting, and gassing inmates, censoring and suppressing mail, depriving prisoners of hygienic materials, and confining inmates in "dark-hole" isolation cells for prolonged periods. These abuses have also been curbed as a direct result of Justice Department litigation.

The success of the Attorney General's litigation program on behalf of the institutionalized, both on paper and in action, is eloquent testimony to the potential of the United States to serve as a catalyst in activating State officials to fulfill constitutional and Federal statutory duties to their institutionalized populations. In the words of Harry Rubin, chairman of the Litigation Panel of the Mental Health Association, "litigation is the single most effective way of dealing with a continuing inertia among State bureaucracies, and the single most effective litigant * * * is the U.S. Department of Justice." [41]

V. Obstacles to Continued Litigation by the Justice Department

A. The Attorney General's Existing Authority to Enforce Constitutional Rights of Institutionalized Persons

The civilly committed.—The Attorney General has never been given express statutory authority to initiate or to intervene in litigation to enforce basic constitutional rights of institutionalized persons. For this reason, much of the Justice Department's litigative activity has been the result of requests by courts to appear as *amicus curiae*,[42] or through petitions to intervene in pending suits. While intervention has proven an effective means of securing constitutional rights for residents of institutions already the subject of pending litigation, it has limited the Attorney General in his selection of appropriate cases

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[38] *Id.*

[39] 349 F. Supp. 881 (N. D. Miss. 1972), *aff'd*, 501 F. 2d 1291 (5th Cir. 1974).

[40] Telephone conversation with Paul Douglas, Office of Public Accommodations and Facilities, U.S. Department of Justice, Civil Rights Division, December 1, 1977.

[41] S. 1393 hearings, 452.

[42] As noted above, at least 10 Federal courts have called upon the United States to participate in litigation involving constitutional rights of the institutionalized. See testimony of Drew S. Days III, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, S. 1393 hearings, 33.

for Justice Department action. Since institutionalized citizens and their guardians are less likely to initiate suit than are other citizens, it is not uncommon for deplorable conditions to exist in institutions against which no suit has been filed. Under present law, however, the Attorney General's dependence on the selection of litigation by private parties constitutes a barrier to the most efficient and effective utilization of the Justice Department's resources.

Prisoners.—Similarly, in the field of correctional institutions no statute currently exists giving the Attorney General authority to redress widespread deprivations of prisoners' constitutional rights. However, under title III of the Civil Rights Act of 1964, 42 U.S.C. 2000b, the Attorney General is empowered to initiate suit to desegregate public facilities (including jails) operated by the States and their subdivisions. Similar statutory authority is given the Attorney General under title IX, 42 U.S.C. 2000h–2, to intervene in pending litigation seeking relief from the denial of equal protection on account of race, color, religion, sex, or national origin. Under these two statutes, the Attorney General has initiated and intervened in suits against penal facilities that continue to maintain segregated facilities or otherwise engage in practices that violate their inmates' rights to equal protection of the law.[43] Once admitted as a party to such actions, he has been able to append additional charges challenging the constitutionality of the conditions of confinement. However, where no evidence exists to suggest either racial segregation or other grounds for claiming a denial of equal protection, the Attorney General faces the same lack of statutory authority that exists with respect to institutions for the civilly committed.[44]

B. *SOLOMON* AND *MATTSON* DECISIONS

As noted above, not all instances of institutional abuse are the subject of pending litigation by private parties. In recognition of the need to protect the rights of institutionalized individuals, even in the absence of pending litigation, the Attorney General 3 years ago filed *United States* v. *Solomon*,[45] a suit against Maryland's Rosewood State Hospital for the mentally retarded. In the complaint, the Attorney General alleged that officials of the 2,400-resident facility had failed to provide patients with a decent and humane environment, and that conditions at the hospital fell far below the minimal requirements of the Constitution. A similar suit, *United States* v. *Mattson*, was filed against Montana's Boulder River Hospital for the mentally retarded.[46] The defendants in both suits moved to dismiss the complaints on the ground that the Attorney General lacked statutory authority to initiate such actions.[47] Justice Department attorneys argued that the Attorney

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[43] See, *e.g.*, *Williams* v. *Edwards*, 547 F. 2d 1206 (5th Cir. 1977); *Gates* v. *Collier*, 349 F. Supp. 881 (M.D. Miss. 1972), *aff'd*, 501 F. 2d 1291 (5th Cir. 1974); *Battle* v. *Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), —— F. Supp. —— (June 14, 1977).

[44] See, for example, the complaint filed by the United States in *United States* v. *Elrod*, C.A. No 76C4768 (N.D. Ill. filed December 29, 1976), challenging conditions in Cook County, Ill., jail. Defendants' motion to dismiss for lack of standing is pending.

[45] 519 F. Supp. 358 (D. Md. 1976).

[46] C.A. No. 74–138–BU (D. Mont., September 29, 1976), *appeal docketed*, No. 76–3568 (9th Cir. October 19, 1976).

[47] Similar challenges have been made to the Attorney General's motions to intervene in pending litigation. While such challenges have proven unsuccessful so far, at least three justices of the Supreme Court have expressed doubt as to the legality of the Attorney General's intervention in such suits, absent explicit authority. *In re Estelle*, 426 U.S. 925, 928 (1976) (Rehnquist, J. with whom the Chief Justice and Mr. Justice Powell joined, dissenting).

General had inherent authority to represent the interests of the United States in litigation to protect the constitutional rights of its institutionalized citizens. Rejecting this argument, the district court in *Solomon* granted the defendants' motion to dismiss. The district court in Montana followed the lead of the Maryland court and dismissed the Attorney General's complaint in *Mattson*. In October 1977, the Fourth Circuit Court of Appeals affirmed the district court decision in *Solomon*, and in July of 1979 the Ninth Circuit Court of Appeals approved the decision in Mattson.[48]

The impact of the *Solomon* and *Mattson* decisions cannot be overstated. Not only do the two decisions pose effective bars to the Attorney General's initiation of litigation in the Fourth and Ninth Circuits, but they threaten to paralyze the Department's efforts throughout the Nation. The decisions promise to affect the Attorney General's litigation program in several important respects.

First, any new suit filed by the Department outside the circuits where *Solomon* and *Mattson* were decided will be subjected to defendants' motions to dismiss, thus causing delay and, in all likelihood, an eventual decision adverse to the United States. Second, suits in which the United States is currently participating as *amicus* or plaintiff-intervenor will be disrupted by defendant's motions to dismiss the United States as a party, based on the *Solomon* and *Mattson* decisions. The Fourth Circuit's affirmance in *Solomon* and the Ninth Circuit's *Mattson* strengthens those arguments. Third, defendants who were previously instituting voluntary changes to avoid suit by the Attorney General will have little incentive to continue, in the absence of any real threat of litigation. Finally, those institutions currently under investigation by the Justice Department will intensify their resistance to Department-initiated inspections, confident that the Attorney General is powerless to compel cooperation with investigators or compliance with the Constitution. Justice Department attorneys have already experienced such recalcitrance by some State officials.[49]

It is clear that without express statutory authority to secure judicial enforcement of constitutional and Federal statutory rights of the institutionalized, the Attorney General's litigation program cannot survive. By clarifying the Attorney General's authority to both intervene and initiate such suits, S. 10 allows the Nation's chief law enforcement officer to address the problems of institutional abuse in a systematic fashion, engaging in a program of selective litigation against those institutions where the most egregious constitutional deprivations affect the largest number of people. In this manner, S. 10 permits

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[48] *United States* v. *Solomon*, C.A. No. 76–2184 (4th Cir., October 12, 1977). *United States* v. *Mattson*, 600 F. 2d 1295 (9th Cir. 1979).

[49] In at least two States where the Attorney General had filed or authorized suit, the attitude of State officials altered radically following the Fourth Circuit's affirmance in *Solomon*. One such suit is *United States* v. *Elrod*, an action against officials in charge of the Cook County, Ill., jail. C.A. No. 76C476S (N.D. Ill.) Before *Solomon*, the defendants were actively engaged in negotiating a settlement with Justice Department attorneys; after the Fourth Circuit's affirmance in *Solomon*, defendants terminated settlement negotiations and secured a protective order halting further discovery by the Attorney General.

Similar behavior was shown by Indiana officials in a suit authorized against that State's prison system. State officials initially indicated a willingness to negotiate with Justice Department lawyers, provided the latter supplied them with a detailed list of the allegedly unconstitutional conditions. Assistant Attorney General Days did so in a seven-page letter. State officials delayed responding to the letter until after the *Solomon* decision, when they replied with a one-page letter, summarily dismissing the Justice Department's allegations as unsubstantiated.

the Attorney General to utilize the resources of the Justice Department in the most effective manner possible.

VI. Need for Legislation

A. The National Commitment of the Congress to the Institutionalized

Over 1 million persons reside in institutions throughout the Nation.[50] In recognition of the need to protect this large but quiescent minority, Congress has, articulated in a variety of contexts, a national commitment to the adequate care of institutionalized citizens, While recognizing that State and local governments bear primary responsibility for administering the day-to-day operations of their institutions, Congress has not hesitated to enact legislation to protect institutionalized persons through Federal aid and advocacy. Thus in such laws as the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6010 et. seq. (Public Law 94–103), the Rehabilitation Act of 1973, 29 U.S.C. 794 (Public Law 93–112), the Education of All Handicapped Children Act of 1975 (Public Law 94–142), the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601 et. seq. (Public Law 93–415), the Omnibus Crime and Safe Streets Act, 42 U.S.C. 3701 (Public Law 90–351), and the Parole Commission and Reorganization Act of 1976, 18 U.S.C. 4201 et seq. (Pub Law 94–233), Congress has passed legislation directly affecting or serving as models for the operation of State institutions. Congress also has committed billions of dollars in Federal funds to provide adequate care for the institutionalized.[51]

Notwithstanding this clear national commitment, both moral and fiscal, there is uniform agreement among those familiar with institutional environments that thousands of individuals continue to be subjected to conditions and practices flagrantly violative of their most basic human rights. In the words of Assistant Attorney General Drew S. Days III:

> The experience of the Department of Justice through its involvement in this litigation has shown that the basic con-

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[50] A survey by the National Association of Superintendents of Public Residential Facilities showed that in 1975, 190,000 persons resided in public institutions for the mentally retarded. National Association of Superintendents, "Current Trends and Status of Public Residential Services for the Mentally Retarded." 10 (1975). A National Science Foundation committee reported that in 1976, approximately 363,000 children and adolescents resided in facilities for the emotionally disturbed, institutions for dependent and neglected children, training schools for delinquents, and institutions for the physically handicapped. Advisory Committeee on Child Development of the National Science Foundation, "Toward a National Policy for Children and Families" (1976). According to a National Institute of Mental Health statistical analysis of 1975, at any one time, 200,000 persons are confined in State and county facilities for the mentally ill. (A Justice Department census of 1970 revealed that 113,000 of those in facilities for the mentally ill are 65 or older.) In December 1976, approximately 250,000 persons were housed in State prisons. These statistics do no more than confirm the acknowledged fact that a staggering number of persons, at some time in their lives, are wholly dependent on an institutional environment.

[51] Some $7.5 billion in Federal funds are devoted to long-term care annually. S. 1393 hearings, 901, 906. A Government Accounting Office study of the Aid to Families with Dependent Children program revealed that 25 percent of foster children under the program are in institutions. Rosewood State Hospital for the mentally retarded, the subject of the recently dismissed *Solomon* suit, received $14 million in Federal funds during fiscal year 1974–75. S. 1393 hearings, 802. The United States has a 3-year grant to the Indiana Department of Corrections to provide medical services for its prison inmates. In suits brought against prisons and correctional facilities, LEAA funds have been made available to implement the terms of court decrees *e.g.*, *Gates* v. *Collier* 501 F. 2d 1291, 1320 (5th Cir. 1974). Recently, $3.5 million in Federal funds were made available to 16 States to begin community support programs for their previously institutional citizens. "Community Support Program Set To Aid Ex-Mental Patients," Washington Post, November 16, 1977, A28, col. 3.

stitutional and Federal statutory rights of institutionalized persons are being violated on such a systematic and widespread basis to warrant the attention of the Federal Government.[52]

The dozens of reported cases [53] graphically document the need for active Federal involvement is especially crucial in light of the demonstrated inability of State and local governments to insure adequate protection of their institutionalized citizens. State attorneys general, bound by law to defend the very agencies responsible for maintaining such conditions, are neither willing nor able to serve as advocates for the institutionalized.[54]

In the words of one mental health expert, "100 years of bad institutional practices is long enough to wait for the State to have sorted out the problems for themselves." [55] The demonstrated failure of numerous states to fulfill their constitutional obligations to their institutionalized citizens, and the moral and financial commitment of the Federal Government to ensure a decent and humane environment for those citizens, makes Federal enforcement of such obligations both appropriate and necessary.

B. UNIQUE INABILITY OF INSTITUTIONALIZED PERSONS TO ASSERT THEIR OWN RIGHTS

The proliferation of Federal law and constitutional doctrine guaranteeing certain basic rights to institutionalized persons has done nothing to overcome their inherent inability to secure enforcement of those rights. For a variety of reasons examined below, the institutionalized are uniquely unable to protect their constitutional and Federal statutory rights without outside assistance.

First, many institutionalized persons are wholly unaware of their rights. Some are intellectually and emotionally incapable of understanding the concept of legal rights, while others are conditioned to accept their institutional environments without question. Many are inarticulate, and most are uneducated. Still others are deemed by law to lack the capacity to sue.

This ignorance of legal rights, or inability to articulate them, is compounded by the physical isolation in which most institutionalized persons live. Historically, mental and penal institutions have been located far from urban centers, inaccessible to friends, relatives, lawyers, and others who might assist in ensuring protection of institutionalized persons' rights. Few lawyers can afford the time and expense

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[52] S. 1393 hearings 27.

[53] See cases cited note 25 *supra*.

[54] Only one State in the Nation, New Jersey, has a State-based independent advocacy unit empowered to sue other departments of the State to secure the rights of its institutionalized citizens. It is significant, however, that the head of New Jersey's Office of Public Advocacy publicly endorsed S. 1393 and its companion bill in the House. Statement of Stanley C. Van Ness, S. 1393 hearings, 970.

Only minor assistance can be expected from State advocacy programs authorized under the Developmentally Disabled Assistance and Bill of Rights Act. The inadequate funding for such programs leaves some States with no more than $20,000 per year to fund their advocacy projects. Conversation with Joe E. Vargyas, Director, A.B.A. Mental Disability Resource Center, November 29, 1977. Furthermore, programs instituted under the Act cannot provide help to institutionalized, but nondevelopmentally disabled, juveniles, prisoners, the elderly, or mentally ill. The inescapable conclusion is that in the foreseeable future, institutionalized individuals will continue to depend on the U.S. Justice Department as the primary enforcer of their constitutional and Federal statutory rights.

[55] Testimony of Harry J. Rubin, chairman, Litigation Panel, Mental Health Association, S. 1393 hearings, 453–54.

of traveling long distances to interview institutionalized clients; for obvious reasons, the institutionalized themselves are unable to seek outside help.

A third factor impairing the ability of the institutionalized to secure protection of their rights is a lack of money. Most institutionalized persons are poor; many are indigent; none possesses the resources necessary to finance litigation challenging systematic, institution-wide abuse. The cost of hiring experts to investigate, document, evaluate, and present testimony on the adequacy of institutional conditions is beyond the means of the most affluent institutionalized individuals.[56]

In light of the enormous resources required to mount and sustain protracted litigation necessary to secure institution-wide relief, it is not surprising that virtually every suit dealing with the rights of the mentally disabled has been brought with the assistance of the Justice Department.[57] It is equally noteworthy that despite the demonstrated ability of prisoners to file petitions challenging the constitutionality of their confinement, few, if any, suits securing widespread relief from unconstitutional prison conditions have been brought without the assistance of outside sources, most notably the Justice Department.[58]

Finally, a less obvious but not less powerful force tending to inhibit institutionalized persons from asserting their legal rights is their fear of retaliation. Completely dependent on their institutional environments, residents are particularly susceptible to intimidation and frequently afraid to voice their grievances. Parents and caring relatives of institutionalized individuals may be equally inhibited. Drew Days, Assistant U.S. Attorney General, testifying during hearings on S. 10 noted:

> It has been our experience that individuals are not often capable of initiating litigation on their own. They don't have the full sense of the protections that are afforded them.
>
> In the case of the mentally ill, the retarded, or juveniles, certainly they, by definition, lack competence to make certain decisions.
>
> This litigation is extremely expensive, if indeed it gets to the litigation stage. Experts are required. Investigations are required.
>
> It assumes an enormous cost, not only in money, but in human resources. It is our feeling that where these systematic problems have been identified, the Federal Government is the most effective tool for dealing with these problems and we cannot, as the Senator said, as a just society, a society interested in protecting the rights of all people, simply leave the remedying of these gross deprivations to individual complainants.

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[56] The cost of mounting litigation challenging institutional practices is enormous. In *Newman* v. *Alabama*, 503 F. 2d 1320 (5th Cir. 1974), the Justice Department assisted suit successfully challenging the constitutionality of conditions in the Alabama State prison system, the court received 1,000 stipulations of fact, 5 volumes of photographs, 39 documentary exhibits, 15 depositions, and the testimony of eight nationally recognized experts in penology, psychology, and public health. The National Prison Project, which assisted in that suit, incurred $25,000 in out-of-pocket costs, not including salaries of the project's staff or local attorneys. S. 1393 hearings, 637. Approximating $50,000 has been spent to date in the *Willowbrook* suit, exclusive of attorney's fees. S. 1393 hearings, 809.

[57] S. 1393 hearings, 187. And see cases cited note 26 *supra*.

[58] *E.g.*, *Gates* v. *Collier*, 501 F. 2d 1291 (5th Cir. 1974); *Newman* v. *Alabama*, 503 F. 2d 1320 (5th Cir. 1974); *Williams* v. *Edwards*, 547 F. 2d 1206 (5th Cir. 1977); *Battle* v. *Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974); *Costello* v. *Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F. 2d 1239 (5th Cir. 1976).

These four factors compel the conclusion that institutionalized persons cannot be expected to redress systematic deprivations of their basic rights without assistance. Of the three possible sources of such assistance—the legal services bar, private advocacy groups, and the Justice Department, only the last-mentioned offers any realistic hope for improving the plight of the institutionalized.

C. INADEQUACY OF LEGAL SERVICES AND PRIVATELY FUNDED PUBLIC INTEREST ADVOCACY GROUPS

The resources of the legal services and privately funded public interest bars are woefully inadequate to represent the needs of the Nation's institutionalized population. By its own estimate, the Legal Services Corporation's funding is insufficient to permit its attorneys to provide minimally adequate legal representation to the nearly 29 million people with incomes below the poverty line.[59] The difficulties involved in communicating with the mentally ill and retarded, the hardships associated with commuting long distances to confer with clients in remote locations, and the disproportionately large costs of bringing any suit challenging the adequacy of institutional care, make residents of institutions even less likely than other eligible recipients to receive the assistance of legal services attorneys.

The resources of nonprofit privately funded public interest groups are equally scant.[60] The Mental Health Law Project, the Nation's major public interest group in the field of mental health law, employs only six attorneys in the entire country.[61] The National Prison Project, the largest organization engaged in prisoners' rights litigation, has a staff of seven attorneys.[62] Of the 92 public interest law centers listed in a recent national study, only 6 had practices devoted principally to children's issues, and only a small portion of the resources of those 6 were devoted to institutionalized children. Of the 57 private firms or lawyers identified as specializing in public interest work, only 6 spent more than 10 percent of their time on issues affecting the mentally impaired.[63]

Even when the public interest law firms attempt to represent the institutionalized, they are hampered by shortages of money and manpower. Many public interest projects are funded on a yearly basis, thus inhibiting managing attorneys from taking on litigation destined to extend over a considerable period of time. In addition, the turnover rate among public interest lawyers is high; most change employment within two or three years, further hindering efforts to sustain protracted litigation.

These limitations of resources, manpower, and continuity among publicly funded legal services and privately funded public interest advocacy groups, leave no doubt that institutionalized persons must look elsewhere for legal representation. In the absence of a massive and unlikely infusion of funds to provide legal services to the institutionalized, the vindication of their rights will continue to depend on the participation and resources of the Justice Department.

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[59] S. 1393 hearings, 813.
[60] *Id.*
[61] *Id.* at 804.
[62] *Id.* at 637.
[63] *Id.* at 813.

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D. APPROPRIATENESS OF JUSTICE DEPARTMENT ADVOCACY TO ENFORCE FEDERAL RIGHTS OF THE INSTITUTIONALIZED

In the past, Congress has not hesitated to give the Attorney General statutory authority to engage in litigation to secure citizens' basic constitutional rights where evidence has tended to show a widespread denial of such rights. Thus, in the context of discrimination in voting, education, employment, housing, and public services, Congress has enacted legislation similar to S. 10, authorizing the Attorney General to redress "patterns or practices" of widespread abuse.[64] The authority proposed in S. 10, therefore, is neither novel in concept or unprecedented in use. Moreover, the results of the Attorney General's litigative efforts on behalf of the institutionalized confirm both the need for and efficacy of such efforts.[65]

A number or factors make the contribution of the Attorney General a unique and invaluable one. First, as noted above, private litigants, even with the assistance of legal services and public interest groups, cannot marshal the resources necessary to mount a full-scale attack on system-wide institutional abuse.[66] The Justice Department, however, does possess such resources. The Department can call upon the FBI to conduct thorough investigations of institutions, taking photographs and collecting relevant data on institutional conditions. It has ready access to the expertise of other Federal agencies, including the Department of Health, Education, and Welfare, the Bureau of Prisons, and the Law Enforcement Assistance Administration, whose experts can evaluate the data collected by the FBI or make independent inspections. Indeed, the committee would expect the Department of Justice normally to consult with HEW and other relevent agencies in order to determine whether to bring suit and what relief is appropriate. From its past experience in the field, the Justice Department is familiar with and has access to nationally recognized experts in mental health, mental retardation, penology, and public health, and can rely upon such experts for accurate and responsible assessments of the adequacy of institutional conditions. All of these factors contribute to the Department's unique ability to develop a full and fair factual record for the court.[67]

A second important contribution of the Justice Department to litigation on behalf of the institutionalized is its staff of highly skilled attorneys. Their familiarity with the substantive and procedural issues involved in such litigation gives them an expertise unmatched by

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[64] *E.g.*, title VI of the Civil Rights Act of 1960, 42 U.S.C. 1971(c) (voting); title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6(a) (education); title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6(a) (employment); title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a–5(a) (public accommodation); title III of the Civil Rights Act of 1964, 42 U.S.C. 2000b(a) (public facilities); title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3613 (housing). For additional statutes, see the Opinion of the Congressional Research Service of the Library of Congress, reprinted in Appendix B.

[65] See II.B.2 *supra*.

[66] See note 50 *supra*.

[67] Stephen Herzon, commenting upon the Justice Department's role in the *Gary W.* suit, noted:

"We had very little idea what was going on behind those closed fences and institutional walls. The Justice Department was able to hire panels of experts and through the discovery process to have those experts visit the institutions."

S. 1393 hearings, 789.

The Honorable Nicholas J. Walinski, who adjudicated *Davis* v. *Watkins*, noted of the Justice Department attorneys:

"They * * * managed to get the FBI [into the institution] when we were having problems. That was resisted all the way along by the institution. They had access to experts who were well versed in the field of what should be done in a mental institution. They were able to produce those for us, which [neither] the State [nor] local attorneys could * * * have * * * done * * *. They were very helpful."

S. 1393 hearings, 548.

less experienced counsel. Judges, litigants, and other attorneys who have observed the efforts of Justice Department lawyers have been unstinting in their praise. One judge, The Honorable Nicholas J. Walinski, made the following observations regarding the performance of Justice Department attorneys in *Davis* v. *Watkins*: [68]

> They brought with them the underlying technical expertise necessary to structure this action for trial. They were familiar with and had access to expert witnesses with experience in the treatment and care of mental patients institutionalized in large State facilities. They could draw upon a bank of information maintained by the Department through its involvement in a number of other cases around the country. They had access to in-house personnel necessary for the laborious job of culling through reams of material secured in the process of discovery. With their assistance the parties were able to enter into approximately 132 pages of stipulations which had the effect of cutting the trial to five (5) calendar days. (Without the assistance of such litigators experienced in a highly technical field, I could otherwise anticipate such an action stretching over months of testimony.) [69]

In addition to its superior resources and skill, the Justice Department brings credibility to the proceedings. The mere presence of the Department alerts a court that conditions in a given institution are sufficiently serious and pervasive to warrant the attention of the Attorney General. The selective procedures used to choose cases worthy of Justice Department involvement, and the limitation of such involvement to patterns or practices of abuse, ensure that the Department's resources will be directed to cases designed to secure relief for large numbers of individuals. The relief thus secured serves as a national precedent, alerting States across the Nation to minimum constitutional standards, and enabling them to take prophylactic measures to ensure compliance with such standards, thereby avoiding similar suits against their own institutions. In sum, the presence and participation of the Justice Department serves to highlight the important cases, not only for courts adjudicating them but for State and local officials who will ultimately be held accountable for the conditions and practices in their institutions.

The Department's ability to streamline complex litigation results in a notable conservation of judicial resources. By ensuring a well prepared, tightly structured case, the Department can speed the litigation process and facilitate settlement, thus saving weeks or months of discovery and trial. Additionally, in suits alleging a pattern or practice of institutional violations, the court can consolidate numerous individual complaints into a single action, to be tried and disposed of in one proceeding. This, in fact, is what courts have done.[70] Thus, the participation of the Justice Department in such "pattern or practice"

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[68] 384 F. Supp. 1196 (N.D. Ohio 1974).
[69] S. 1393 hearings, 552.
[70] In a recent suit challenging conditions in Rhode Island's prison system, the court consolidated 150 *pro se* petitions, disposing of them in a single action. *Ross* v. *Noel*, C. A. No. 75-032 (D.R.I.). In a Texas case, eight separate complaints have been consolidated for trial in a single suit *Ruiz* v. *Estelle*, C. A. No. 5523 (E.D. Tex.). Similar consolidation was possible in *Pugh* v. *Locke*, 406 F. Supp. 318 (M.D. Ala. 1976) (Alabama prison suit).

suits both accelerates the litigation and avoids piece-meal disposition of individual complaints, thereby guaranteeing the most effective use of limited judicial resources.

A fifth and final contribution of the Justice Department to litigation on behalf of the institutionalized is the stability and continuity it brings to the litigation process. Defendants who would otherwise engage in dilatory tactics, in an effort to stall resolution of a case until plaintiffs' resources were exhausted or their public interest attorneys had moved on to other employment, are less inclined to employ such practices against the Justice Department. This disincentive for prolonging litigation can facilitate early settlement. Moreover, once relief is secured, the Justice Department has the staying power to ensure that a court's decree will be implemented. Since the relief ordered frequently takes months and sometimes years to achieve, it is imperative that the court be able to rely on the continuing presence of the Department to monitor implementation of the decree and secure compliance with constitutional mandates.

VII. Constitutionality

The committee clearly believes that no convincing argument has been offered to challenge the constitutionality of S. 10. Since several constitutional questions have been raised, however, their discussion may be appropriate.[71]

Section 5 of the 14th amendment specifically authorizes Congress to "enforce, by appropriate legislation, the provisions of this article." As noted earlier, in other contexts Congress has repeatedly acted under the power conferred in Section 5 to grant the Attorney General statutory authority to redress patterns or practices of unconstitutional activity.[72] Similarly, in authorizing the Attorney General to enforce rights, privileges or immunities secured or protected by the Constitution or laws of the United States, this bill is not intended to expand the present Congressional authority over State action arising from section 5 of the 14th amendment. The authority granted to the Attorney General is limited to enforcement against the State of those laws governing State conduct that Congress has constitutional authority to prescribe. No successful challenge has ever been made to the constitutionality of such grants.

The challenge occasionally raised to the constitutionality of S. 10 is grounded in the 10th amendment. The amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." Because the institutions subject to suit under S. 10 will be under the control the States or their political subdivisions, some have argued that the bill constitutes an unconstitutional delegation of power to the Federal Government to administer State and local institutions.

This argument misconstrues both the Constitution and the authority granted by S. 10. First, the 10th amendment's reservation of powers to the States does not imply a reserved right to violate the Federal

[71] For further discussion and confirmation of the constiutionality of the bill, see the opinion prepared by the America Law Division of the Congressional Research Service of the Library of Congress, reproduced in Appendix B.

[72] See note 64 *supra*.

Constitution; nor does it relieve any State of a single obligation imposed by the Constitution and Federal laws. On the contrary, article VI of the Constitution expressly states that the Constitution and laws of the United States shall be "the supreme law of the land . . . any thing in the constitution or laws of any State to the contrary notwithstanding." It is clear, therefore, that the obligation of every State and local government to comply with the Constitution is in no way affected by the 10th amendment.

Nor is the grant of authority to the Attorney General to enforce compliance with the Constitution through litigation an inappropriate delegation of power to the Federal Government. Contrary to the assertions of those unfamiliar with such litigation, Federal courts called upon to adjudicate claims of unconstitutional institutional conditions have resisted involvement in the day-to-day operations of State and local institutions beyond that which has been necessary to ensure constitutionally adequate conditions.[73] In fact, Federal courts have punctiliously avoided precipitous intervention in State affairs, allowing defendants the greatest possible leeway in devising methods to bring their institutions up to constitutionally acceptable standards.[74] Only when State officials have failed to comply with constitutionally mandated judicial orders have Federal courts imposed specific requirements for institutional operations. Even these, however, have been no more than what the expert testimony at trial, previous cases, and nationally recognized standards have indicated to be minimally acceptable conditions under the provisions of the Constitution. It is clear, therefore, that both the primacy of the Federal Constitution, and the authority of Congress to implement its provisions by legislation such as S. 10 is beyond dispute.

VIII. Standards

A. STANDARDS FOR FILING SUIT

A letter reproduced in Appendix A of this report from Drew S. Days III, Assistant Attorney General in charge of Civil Rights, outlines the standards used by the Attorney General in the past to determine when participation by the Justice Department is appropriate in suits alleging a pattern or practice of unconstitutional institutional conduct. As noted in the letter, the Attorney General's participation

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[73] It bears emphasizing that the relief ordered by Federal courts, though extensive, has sought not to transform the institutions in question into ideal places of habilitation, but only to ensure that conditions therein met minimum standards of decency required by the Constitution. As stated by Judge Wisdom in *Wyatt* v. *Aderholt*:

"The patients here do not seek to *guarantee* that all patients will receive all the treatment they need or that may be appropriate to them. They seek only to insure that conditions in the State institutions will be such that the patients confined there will have a *chance* to receive adequate treatment." [Emphasis in original.] 503 F. 2d at 1316.

In the context of prison conditions, courts have similarly limited relief under the 8th amendment to measures designed to remedy conditions which "present a grave and immediate threat to health or physical well being," "shock the conscience," or "offend contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess." *Gates* v. *Collier, quoting Campbell* v. *Beto*, 460 F. 2d 765, 768 (5th Cir. 1972); *Jackson* v. *Bishop*, 404 F. 2d 571, 579 (8th Cir. 1968).

[74] In *Wyatt*, for example, the court did not take immediate steps to compel State officials to improve existing conditions at Partlow State Hopsital for the mentally retarded. Instead, it directed the Alabama Department of Mental Health to design its own plan for upgrading conditions to meet constitutional standards. 325 F. Supp. 781, 785–86 (M.D. Ala. 1971). Only after two deadlines had passed without any signs of progress did the court itself, relying on proposals of counsel for all parties and amici, define the minimal constitutional standards to which defendants would be held.

in such suits has been limited to cases in which he has found: (1) significant numbers of institutionalized individuals, being subjected to (2) broadly applicable policies or practices, which (3) result in severe deprivations of fundamental constitutional and Federal statutory rights, and (4) there is no realistic prospect of relief for such individuals without the assistance of the United States.

B. STANDARDS FOR RELIEF

As noted in Assistant Attorney General Days' letter, there is no dearth of precedent for judges to follow in fashioning equitable relief for constitutional violations; they have been doing so for years and will continue to do so in any suit brought to redress unconstitutional institutional conditions.[75] Nor are courts ignorant of nationally recognized standards on which to base relief. Groups such as the American Public Health Association, the American Correctional Association, the National Sheriffs' Association, the American Association on Mental Deficiency, and others, publish standards outlining minimally acceptable environmental conditions in correctional and mental health facilities;[76] courts have used such standards regularly as guidelines in determining constitutionally adequate conditions. The ability of the Attorney General to make available to courts both the testimony of expert witnesses familiar with institutions across the Nation and the published standards of nationally recognized organizations ensures that judicial determinations of constitutionally acceptable minima will be based on authoritative and nationally acknowledged norms.

The Committee wishes to make clear that S. 10 is not intended in any way to empower the Attorney General to determine medical policy. The courts will continue to determine if constitutional minima are being ignored to such a degree that medical care and other professional services must be addressed, and in making that judgment the Committee believes the courts should continue to seek the expert medical and professional advice from organizations such as the American Psychiatric Association, the Mental Health Association, the National Association for Retarded Citizens, and other individuals mentioned above who will guide the courts in fashioning appropriate equitable relief.

IX. Federal Prison System

The committee is quite concerned that the Federal prison system, which is in fact under the supervision of the Attorney General, is not without its shortcomings. While this legislation gives the Attorney General pattern and practice authority to proceed against State prision systems alleged to be in violation of the Constitution, the Attorney General must take positive and forceful action to assure that the Federal prison system itself is in compliance with the Constitution.

The Attorney General should consider the problem of bringing the Federal prison system into compliance with the Constitution as high if not a higher priority than compliance by State and local govern-

[75] The Supreme Court has repeatedly emphasized the flexibility of such concepts as "due process" and "cruel and unusual punishment". In *Trop* v. *Dulles*, for example, the Court noted that the 8th amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 100–01 (1958). The fact that the amendment's prohibition against cruel and unusual punishment must be flexible enough to reflect these evolving standards of decency does not relieve courts of the obligation to construe it, nor states of the obligation to comply with the amendment as construed.

[76] See S. 1393 hearings, 37. It is noteworthy that in every case in which the Attorney General has participated, the challenged institutional conditions have failed to meet *any* nationally recognized standard.

ments. The committee believes that the Federal Prison Service Policy Statements and the Draft Federal Standards for Corrections would, if properly enforced, make significant progress toward this end. Although the Bureau of Prisons has the internal mechanism to provide for the proper implementation of these standards and policies, the committee believes that attorneys in the Civil Rights Division should be supervising implementation of those standards to insure that the Federal prison system is held to the same standards as they seek for State and local systems. The committee will consider, if necessary, amending the Department of Justice authorization bill in future years based on the information supplied in the Attorney General's report to Congress to require that there be an equal allocation of Civil Rights Division resources on the Federal prisons as well as State and local facilities.

X. Conclusion

Neither the Attorney General nor the committee suggest that litigation by the Justice Department is an ideal method for eradicating widespread institutional abuse. It is costly, time consuming, and disruptive of the operation of State and local governments. Experience has shown, however, that it is also the single most effective method for redressing systematic deprivations of institutionalized persons' constitutional and Federal statutory rights. Until such time as every State and political subdivision assumes full responsibility for protecting the fundamental right of its institutionalized citizens, the need for Federal enforcement of those rights will continue.[77]

Congress has repeatedly authorized litigation by the Attorney General to redress patterns or practices of unconstitutional activity directed against groups ill-equipped to enforce their own rights. The special disabilities of the institutionalized make them a prime candidate for advocacy by the Attorney General. Poor, isolated, usually inarticulate, frequently incompetent, and wholly dependent on their institutional environments, they lack both the knowledge of their legal rights and the means to enforce them. Legal services and public interest attorneys lack the financial resources and personnel needed to sustain the protracted litigation required to redress system-wide abuse. In the absence of other available assistance, the only realistic source of hope for the institutionalized lies with the U.S. Attorney General.

The litigative efforts of the Attorney General to date, undertaken without express statutory authority, provide conclusive proof of the efficacy of Justice Department involvement in litigation on behalf of the institutionalized. The significant visible improvements in correctional and mental health facilities throughout the Nation, the heightened sensitivity of the citizenry to the plight of institutionalized persons, and the efforts of some State and local officials to achieve voluntary compliance with minimum constitutional standards are directly attributable to the Attorney General's litigation program.

The resources and skill which the Attorney General brings to such litigation cannot be matched by private counsel. The Justice Department's access to the investigative resources of the FBI, the technical

[77] In the words of the Honorable Richard T. Rives, former chief judge of the U.S. Court of Appeals for the Fifth Circuit:

"I look forward to the day when the State and its political subdivisions will again take up their mantle of responsibility, treating all of their citizens equally, and thereby relieve the Federal Government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must lie with those who through their ineptitude and public disservice have forced it.

Dent v. *Duncan*, 306 F. 2d 333, 337–38 (5th Cir. 1966).

advice of other Federal agencies, and the professional assistance of nationally recognized experts in the field of institutional care, enable it to develop a comprehensive record for adjudicating courts. The experience and expertise of Justice Department attorneys guarantees that the litigation will be handled professionally, with a minimal expenditure of judicial time and resources. The presence of the Attorney General lends credibility to the proceedings and alerts courts, litigants, and the public to the seriousness of the charges. Finally, the Department provides the stability and continuity necessary to see litigation to its conclusion and to monitor implementation of court decrees. These factors combine to make the Attorney General an invaluable aid to the judiciary and an indispensable advocate for the institutionalized.

In hundreds of institutions across the Nation, there is no discernible evidence of Congress' professed commitment to the adequate care of its institutionalized citizens. In the back wards of State mental hospitals and the crowded cells of State prisons and county jails, the constitutionally guaranteed right to a decent and humane environment has yet to be given practical effect. The demonstrated inability of institutionalized persons to redress systematic deprivations of their fundamental rights, and the proven ability of the Attorney General to act as an effective advocate on their behalf, convinces the committee that the litigation program undertaken by the Justice Department to date should be encouraged and continued. By codifying the authority of the Attorney General to initiate and to intervene in litigation designed to redress widespread deprivations of institutionalized persons' fundamental Federal rights, S. 10 constitutes a modest but necessary step toward fulfilling that national commitment.

XI. Section-by-Section Analysis

A. SECTION 1: AUTHORITY TO INITIATE SUIT

Section 1 grants the Attorney General authority to initiate litigation in Federal district court when he has reason to believe that a State or political subdivision, or an agent thereof, is engaged in a pattern or practice of depriving persons residing in institutions (as defined in section 8) of rights secured by the Constitution and Federal laws, subject to the limitation below concerning correctional facilities.[78] This grant

[78] No attempt has been made to distinguish between voluntarily and involuntarily institutionalized individuals. The committee believes that several consideratons make such a distinction inadvisable.

First, Congress' professed national commitment to the adequate care of the institutionalized has never been limited to protecting those involuntarily confined, but has extended to securing decent and humane living conditions for all institutionalized citizens.

Second, in the case of mentally retarded individuals and children, concepts of voluntariness have no practical meaning. Placed "voluntarily" by their parents or guardians, most exercise no independent choice in the decision; many are incapable of contemplating such a choice, and most have no alternative shelter. See *Halderman* v. *Pennhurst,* C.A. No. 74–1345 (E.D. Pa. December 23, 1977, unpublished opinions at 38).

Third, persons who voluntarily enter institutions to receive treatment for mental or emotional disorders often are subsequently committed as involuntary patients. Most States provide that even voluntary patients must observe a waiting period before leaving an institution. S. 1393 hearings, 112–15.

Finally, most institutions do not segregate voluntarily and involuntary residents. *See Halderman* v. *Pennhurst, supra* at 17; *NYSARC* v. *Rockefeller,* 357 F. Supp. 752, 756 (E.D. N.Y. 1973). All share the same living areas, sanitation facilities, and sleeping quarters, eat the same food, receive similar medication, and are subject to the same institutional conditions and practices. Thus, considerations of both policy and practicality militate against differentiating between voluntary and involuntary residents.

It is significant that courts have not made such a distinction in ordering relief for institutionalized plaintiffs. Although the distinction has occasionally affected the constitutional theory under which relief has been granted, it has rarely, if ever, affected the scope of such relief. More important, it has no bearing whatsoever on the efforts of the Attorney General to secure for all institutionalized individuals the full measure of *whatever rights they may have* under the Constitution and Federal laws.

is similar to that given the Attorney General under title VI of the Civil Rights Act of 1960 (voting discrimination), titles II and VII of the Civil Rights Act of 1964 (public accommodations and employment discrimination), title III of the Civil Rights Act of 1964 (segregation in jails), title VIII of the Civil Rights Act of 1968 (housing discrimination), and section 122(c) of the State and Local Fiscal Assistance Act of 1972 (discrimination in programs receiving Federal assistance). Under these provisions, courts have consistently held that the decision of the Attorney General to initiate such pattern or practice litigation is not a proper subject for judicial inquiry.[79] The committee intends that under the grant of authority in section 1, the decision of the Attorney General to file suit shall be similarly unreviewable.

Before initiating litigation with respect to a particular institution, the Attorney General must, of course, thoroughly investigate such institution. Such an investigation can be most costly, time consuming, and disruptive of the operation of such institutions. Consequently, the committee expects that the Attorney General would not initiate any investigation of an institution unless he has received from a source outside the Justice Department—either a published report or a person claiming personal knowledge—an allegation that persons residing in such institution are being deprived of rights secured by the Constitution and Federal laws. The committee believes that if conditions in an institution are so bad that Federal litigation may be appropriate, this fact would be made available to Justice by institution employees, neighbors, relatives, reporters, and other Federal agencies.

The Attorney General's authority to litigate is limited to situations in which he has reasonable cause to suspect a "pattern or practice" of institutional abuse in violation of the constitution or Federal laws. This "pattern or practice" authority has been interpreted by the courts in other contexts, and the committee intends the language here to be construed in conformity with established precedent.[80] Thus, the Attorney General does not have authority under this bill to redress isolated instances of abuse or repeated violations against an individual. Rather, the Attorney General's authority is limited to cases where unconstitutional or illegal practices are widespread, pervasive, and systematic, and adversely affect significant numbers of institutionalized individuals. It is clearly the intent of the committee that minor or isolated acts or injuries are not intended to be the subject of litigation under this bill. The bill authorizes action only where persons residing in an institution are subjected to "egregious or flagrant conditions (conditions which are willful or wanton or conditions of gross neglect) . . . causing them to suffer grievous harm." These descriptive terms are intended to parallel the limitations that have been applied to actions brought under 42 U.S.C. 1983 and similar rights enforcement statutes.[81]

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[79] See, e.g., *United States* v. *Greenwood Municipal Separate School District*, 406 F. 2d 1086 (5th Cir. 1967) (title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6); *United States* v. *Bob Lawrence Realty, Inc.* 474 F. 2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. (1973) (title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.*).

[80] *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (employment); *United States* v. *Hunter*, 459 F. 2d 205 (4th Cir.), *cert. denied* 409 U.S. 934 (1972) (housing).

[81] In a case brought under 42 U.S.C. 1983, for example, Judge Stevens, prior to his appointment to the Supreme Court, noted the problems of reading section 1983 expansively and stressed the importance of restricting suits brought under that section to those involving significant Federal questions:

"The Federal interest in conserving Federal judicial resources for litigation in which significant Federal questions are at stake favors a construction of the Civil Rights Act which will not enlarge it to provide an alternative means of processing ordinary Federal common law tort claims." *Kimbrough* v. *O'Neil*, 523 F. 2d 1057, 1066 (7th Cir. 1975).

Many institutions that will be subject to the provisions of this Act receive Federal funds administered through agencies such as HEW. Such agencies have the responsibility to see that Federal funds are utilized in a manner consistent with congressional intent. They have authority to cut off funds if institutions are not conforming to Federal policy. This is seldom done because residents of such institutions would often be worse off if no Federal funds were available and because of bureaucratic backlog. The agencies are sometimes able, however, to negotiate with institutions for improved conditions to the extent available resources permit.

The committee expects that the Attorney General will consult with such agencies to insure that the relief he seeks and the litigation process itself are consistent with Federal policy—as expressed in statutes, regulations, and administrative practice—and with the most effective method to secure the rights of persons residing in institutions. The Attorney General should determine that his actions would not impede the efforts of such agencies to bring about the securing of such rights by diverting resources and attention of the institution and the State to the litigation process and by proposing relief that would be inconsistent with that sought by the agency.

The legislation further limits actions to enforce the rights of persons residing in "any jail, prison, or other correctional facility, or any pretrial detention facility," as defined in section 8(a)(2)(B). Relief will be available to such persons through actions brought under this bill's authority only if the persons are subjected to conditions which deprive them of "rights, privileges, or immunities secured or protected by the Constitution of the United States"; relief in such actions will not be available on the basis of the broader term "Constitution *or laws* of the United States" which applies to persons residing in the other institutions. The purpose of this amendment is to preclude suits under this bill on behalf of persons in jails, prisons, correctional facilities or pretrial detention facilities arising solely from Federal statutory violations rather than Constitutional violations.

In order to initiate litigation under section 1, the Attorney General must have reason to believe that a State or political subdivision, or an agent thereof, is engaged in the illegal pattern or practice of activity. While this does not eliminate the possibility of actions by the Attorney General that affect private institutions performing a public function [82] or under contract to the State, it is intended to preclude suits against small private operations. This intention is made explicit in section 8(b).

This section authorizes the Attorney General to seek "such equitable relief as may be appropriate" to ensure the full enjoyment of any rights, privileges or immunities secured by the Constitution and Federal laws. Similar language is contained in other civil rights statutes authorizing actions by the Attorney General.[83] and has been inter-

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[82] For example, in the *Gary W.* case, more than 40 private institutions were named as defendants, along with the State of Louisiana. Some of the facilities housed fewer than 25 children. All, however, received children from the State agency responsible for placing such youngsters, and it was the *State's* practice of sending children to such substandard, inadequate facilities that constituted a pattern of unconstitutional conduct.

[83] See, e.g., 42 U.S.C. 2000a–5 (discrimination in public accommodations); 42 U.S.C. 2000b (discrimination in public facilities); 42 U.S.C. 2000c–6 (desegregation of public schools); 42 U.S.C. 2000e–6 (discrimination in employment); 42 U.S.C. 3613 (fair housing).

preted by the courts to permit the fashioning of appropriate equitable relief. In the past, such relief has included injunctions against the continuance of unconstitutionally cruel practices, affirmative orders requiring the upgrading of physical facilities necessary to meet constitutionally minimal standards, orders mandating the establishment of minimum nutritional programs, and the hiring of additional staff in sufficient numbers to provide adequate supervision of residents.[84] In light of existing precedent for this authority, the Attorney General's demonstrated ability to exercise it, and the desirability of allowing courts some flexibility in fashioning equitable relief, the committee believes this grant is an appropriate one.[85]

However, the committee does not believe that such relief sought by the Attorney General should include money damages. While it is not the intention of the committee that the Court be precluded from applying any equitable remedy deemed appropriate by a Court, it is nevertheless the hope of the committee that the Courts will choose to use the injunctive remedy, if appropriate, to other equitable remedies imposing affirmative burdens upon the defendants.

An amendment was accepted to S. 10 during subcommittee consideration which would allow the prevailing party other than the United States a reasonable Attorney's fee at the discretion of the court.[86]

The requirement that the Attorney General personally sign the complaint is intended to ensure that any decision to initiate suit shall be made by the Attorney General himself but is not intended to preclude an Acting Attorney General from signing the complaint. This provision is also modeled after existing legislation and is included in recognition of the important issues inherent in litigation by the Federal Government against State and local officials.

Finally, it should be emphasized that under section 1, the Attorney General's authority extends to initiating suit "for or in the name of the United States," in order to represent the national interest in securing constitutionally adequate care for institutionalized citizens. As a representative of the United States, the Attorney General does not directly represent any institutionalized plaintiffs, and the authority granted him is in no way intended to preclude, delay or prejudice private litigants from enforcing any cause of action they may have under existing or future law.

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[84] In many instances, the relief ordered has required the expenditure of State funds. Courts have repeatedly held that such relief is not barred by the 11th amendment. As stated by Judge Wisdom in *Wyatt* v. *Aderholt:*

"It goes without saying that state legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide social service in a manner which will result in the denial of individuals' constitutional rights." 503 F. 2d at 1314–15.

See also *NYSARC* v. *Rockefeller*, 357 F. Supp. 753, 765 (E.D. N.Y. 1973); *Morales* v. *Turman*, 383 F. Supp. 53, 60 (E.D. Tex. 1974).

For cases sanctioning mandatory expenditures of State funds to upgrade penal facilities, *see, e.g., Cruz* v. *Beto*, 405 U.S. 319 (1972); *Johnson* v. *Avery*, 393 U.S. 483 (1968); *Campbell* v. *Beto*, 460 F. 2d 760 (5th Cir. 1972); *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F. 2d 304 (8th Cir. 1971).

For similar cases in the context of juvenile detention facilities, *see e.g., Nelson* v. *Heyne*, 491 F. 2d 352 (7th Cir. 1974); *Martarella* v. *Kelley*, 359 F. Supp. 479 (S.D. N.Y. 1972); *Inmates of Boys' Training School* v. *Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Morales* v *Turman*, 364 F. Supp. 166 (E.D. Tex. 1973).

[85] For further discussion of the scope of relief sought by the Attorney General and granted by courts in past litigation on behalf of the institutionalized, see the letter from Assistant Attorney General Drew S. Days III to Senator Birch Bayh, reprinted in Appendix A.

[86] This provision is similar to that found in Title VII of the Civil Rights Act of 1964. See *Christiansburg Garment Co.* v. *EEOC*, 434 (U.S.) 412.

B. SECTION 2: PRE-SUIT NOTIFICATION AND NEGOTIATION

The broad purpose of section 2 is to ensure that before litigation is undertaken by the Attorney General pursuant to section 1, State and local officials will be adequately apprised of the Attorney General's concerns and will have an opportunity to consult with him or his designee before any complaint is filed.

Under this section, the Attorney General must at least 56 days before filing suit notify in writing not only the institution director but the governor and attorney general of the State or local officials in analogous positions. Such notification must include both the legal bases for the alleged deprivations of Federal rights and the facts underlying those claims. The notification must also include the minimum measures believed necessary to remedy the deprivations. The committee realizes that before a complaint is filed and discovery conducted, it may be impossible for the Attorney General to specify the precise measures required to correct the alleged abuses. Further, the committee believes it is advisable to give States the primary responsibility for correcting unconstitutional conditions in their own institutions and to attempt to reach an agreement on the necessary remedies to correct the alleged conditions through informal and voluntary methods. Where the Attorney General recognizes that there are alternatives courses of remedy by which the institution could correct the alleged conditions, it is the intention that the course generally be followed which is preferred by the institution itself. In the face of good-faith efforts by appropriate State and local officials to comply with constitutionally required minima, the committee deems it preferable to give such officials the opportunity to fashion their own specific solutions.

In addition to notifying officials of the alleged deprivations, the Attorney General or his designee is required under section 2 to notify the appropriate State officials in writing of his intention to commence an investigation and to make reasonable efforts to consult with such officials regarding appropriate action. The committee intends that unless State officials prove unwilling to consult with the Attorney General or his designee, such consultations will be routine procedure in every suit filed under the bill. The content of such consultation should include, but not be limited to, apprising appropriate officials of financial, technical, or other assistance which may be available from the Federal Government. It has been the experience of the Justice Department in past litigation that many States which could qualify for Federal funds have not been receiving any at the time suit was filed.[87] Where the receipt of such funds can significantly aid States in implementing constitutionally mandated reforms, it is imperative that appropriate officials be made aware of the availability of such assistance. In addition, it is anticipated that the Attorney General shall make available to States desirous of using them, the consultation services and technical guidance of other Federal agencies, including the Department of Health, Education, and Welfare, the Bureau of Prisons, and the Law Enforcement Assistance Administration.

[87] See, *e.g.*, *Wyatt* v. *Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1971–72), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Gates* v. *Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F. 2d 1291 (5th Cir. 1974).

The Attorney General must also certify, when filing suit under section 1, that he is satisfied that appropriate officials have had a reasonable time to correct the alleged deprivations and have not adequately done so. This provision is not intended to require the Attorney General to wait months or years between the initial notification of commencement of an investigation and the filing of suit. The Attorney General need only be satisfied that the unconstitutional or otherwise illegal conditions have existed for a sufficient period of time from such notification that State and local officials could have and should have taken measures to remedy such violations and have failed to do so. The committee does not intend, however, that the Attorney General shall initiate litigation against a State or local government which is fully aware of the challenged conditions or practices in its institutions, and is presently engaged in active remedial measures which eliminate the need for litigation by the Attorney General.[88]

Finally the Attorney General must certify that such an action is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. As in section 1, the requirements that the Attorney General sign the certification is designed to ensure that such decisions receive the personal attention of the highest acting officials of the Justice Department, however it is the intention of the committee that an Acting Attorney General be permitted to sign the complaint.

C. SECTION 3: AUTHORITY TO INTERVENE IN PENDING LITIGATION

Section 3 grants the Attorney General authority to intervenue in pending suits which he would have been authorized to initiate under section 1. This section merely codifies the authority which the Attorney General has been exercising since 1971 under rule 24 of the Federal Rules of Civil Procedure.[89]

An amendment to this section which was voted upon favorably by the full committee by a vote of 13 to 2 ensures that the States will have proper notification of the Justice Departments intervention. At the time of the motion to intervene the Attorney General must certify to the court that at least 15 days previously he has notified the appropriate State officials of his intention to intervene and of the supporting facts giving rise to his intention as well as the fact that the case is of general public importance.

D. SECTION 4: WHISTLE BLOWER

The Committee wishes, to the extent possible, to protect those who have knowledge of systemic abuse of Constitutional rights in institutions and who report such abuse to the Attorney General or other appropriate officials or interested parties.

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[88] Attorney General Griffin Bell has stated publicly that under the authority granted by S. 1393 no litigation will be undertaken "until all efforts at voluntary compliance have failed." Address by the Hon. Griffin B. Bell, before the National Association of Attorneys General, Indianapolis, Ind., June 1977. The Department has estimated, in fact, that no more than 7 to 10 suits per year will be initiated under the authority granted by S. 1393. intervene in pending litigation, absent express authorization from Congress. See motions

[89] As noted above, there is growing doubt as to the Attorney General's authority even to to dismiss the United States as plaintiff-intervenor in *Horacek and United States* v. *Exon* C.A. No. 72–L299 (D. Neb. 1976); *Alexander and United States* v. *Hall, C.A.* No. 72–209 (D.S.C. 1976); *Rone and United States* v *Fireman,* C.A. No. 75–35A (N.D. Ohio). See also note 47 *supra.*

E. SECTION 5 : EXHAUSTION OF GRIEVANCE PROCEDURES

This section provides, in certain cases, for exhaustion of correctional grievance procedures prior to consideration of a prisoner suit in Federal court filed under 42 U.S.C. 1983. The exhaustion of grievance procedures will be required in those cases where the State or local agencies have voluntarily adopted systems which are in substantial compliance with model minimum standards established by the Attorney General. The bill directs the Attorney General to develop a procedure to review the correctional grievance resolution systems of the various State and local agencies in order to certify as acceptable those systems which are in substantial compliance with the model minimum standards. The State and local agencies are not required to seek such certification, and submission for certification under the minimum standards promulgated pursuant to this section is entirely voluntary.

This provision will give recognition to the many States and localities which have developed high quality grievance resolution systems. While adoption of minimum standards is entirely voluntary, in States which do meet those conditions, it will encourage resolution of problems by the persons involved in prison administration. This should help to develop a sensitivity that may have been otherwise lacking.

In addition, this provision will make an important contribution toward reducing court backlog in many districts. The almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. Many of these complaints are pro se and often poorly drafted in terms of presenting the problem in a legal context. Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issues in the remaining cases so as to make them ready for expeditious court consideration.

Subsection (a) of section 5 authorizes a Federal court in which an adult prisoner's suit filed under 42 U.S.C. 1983 is pending, to continue that action for a period not to exceed 90 days if the prisoner has access to a grievance resolution system which is in substantial compliance with the minimum standards promulgated pursuant to this section. Such limited continuance would be for the purpose of requiring exhaustion of the approved grievance resolution system. In order to order such a continuance, the court must find that it would be "appropriate and in the interest of justice."

It is the intent of the committee that the court not find such a requirement appropriate in those situations in which the action brought pursuant to 42 U.S.C. 1983 raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system.

It is the intent of the committee that the phrase "in substantial compliance with" means that there be no omission of any essential part from compliance, that any omisson from compliance consists only of unimportant defects or omissions, and that there has been a firm effort to fully comply with the standards.

Subsection (b) requires that the Attorney General promulgate such standards "no later than 180 days after the date of enactment of this act." Further, the section requires that the Attorney General consult with "State and local agencies and persons and organizations having a background and expertise in the area of corrections" prior to promulgating such standards. Subsection (b) also indicates five (5) elements in the minimum standards.

Subsection (c) of section 5 requires the Attorney General to develop a procedure for the prompt review of grievance resolution systems and certify as acceptable those systems which are in substantial compliance with the standards promulgated pursuant to this section. It is the intent of the committee that the various jurisdictions which elect to do so, shall submit to the Attorney General detailed written descriptions of the proposed grievance resolution system together with such supporting information, regulations, and inmate and staff instruction materials as may be required by the Attorney General in order to determine if such system is in substantial compliance with the minimum standards. Such determinations and resulting certifications shall be made in writing.

This subsection also provides that the Attorney General may suspend or withdraw such certification at any time if he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards. It is the intent of the committee that the Attorney General promptly review such material or information which may come to his attention which suggests that such suspension or withdrawal is in order, and that, from time to time, a review be conducted to insure that no unwarranted certifications are in effect.

Subsection (d) was added by the committee to stress the voluntary aspect of the decision by a State or local agency to adopt a grievance procedure in substantial compliance with the model minimum standards. That decision will only affect whether the prisoners in that facility are required to exhaust the procedure prior to filing a Section 1983 suit. If a State or local agency does not seek to adopt a grievance procedure in accordance with the model standards, that choice will not be considered evidence of a "deprivation of rights, privileges, or immunities secured or protected by the Constitution."

F. SECTION 6: ANNUAL REPORT TO CONGRESS

The requirement of section 6 that the Attorney General annually report to Congress on the history, procedures, costs and other relevant information about actions brought under this act is designed to ensure that Congress shall have the opportunity to assess periodically the efficacy and impact of the Justice Department's litigation program. In addition, the Attorney General will be expected to report on the progress made in each Federal institution toward meeting the standards expected of the State institutions and he will be expected to report on the financial, technical and other assistance which has been offered to the States to correct the conditions giving rise to suit. Even in the absence of statutory authority granted by this bill, the Attorney General traditionally has included in his report to Congress

information describing the activities of the Department in institutional litigation.[90] Similar requirements are imposed by other statutes.

G. SECTION 7 : GAO REPORT ON EXISTING FEDERAL ASSISTANCE TO STATE INSTITUTIONS

The committee has requested that GAO prepare a report listing all of financal, technical and other types of Federal assistance programs which are available to States for the correction of unconstitutional conditions in their institutions. It is the feeling of the committee that such a report would be a useful tool in providing much needed information in convenient form for the States when they are attempting to improve conditions for their institutionalized citizens and that such a report should be completed expeditiously.

H. SECTION 8 : INSTITUTIONS DEFINED

The definitions of institutions in section 8 are intended to encompass any facility where persons residing therein are dependent for their basic living needs on the services provided by such facility. Specifically noted are facilities housing the mentally ill, retarded, disabled, chronically ill or handicapped, as well as prisons, training schools, jails, and other pretrial detention facilities. Specifically excluded from this legislation are schools which exist for the sole purpose of providing educational programs for students who are not physically or mentally handicapped and who do not require special supervision in a residential program.

As noted above, section 1 requires that the Attorney General find that a State or political subdivision, or an agent thereof, is engaged in a pattern or practice of illegal activity. In most cases, the institutions in question will be under the direct control of State or local governments. However, where the State contracts with private facilities or otherwise arranges for such facilities to fulfill functions traditionally performed by the State, there is no reason to exclude residents of such institutions from the protections of the Constitution and the coverage of this bill.[91]

However, it is the intention of the committee that institutions covered by this act partake in some significant respect of the qualities of a State or public institution. Subsection 8(b) clarifies tat it is not the intent of the committee that licensure plus the receipt of monies under Title XVI, Title XVIII or Title XIX, in and of itself, be considered sufficient to permit a private institution to be covered by this act. It is also not the intent of the committee that an institution, within which there are a de minimus number of institutionalized persons who reside in such facility as a result of State action, shall be covered by this act.

I. SECTION 9 : SENSE OF THE SENATE RESOLUTION ON FEDERAL FUNDING PROGRAMS

The committee agreed to include a Sense of the Congress resolution which expresses the desire of the committee that, where possible

[90] See Annual Report of the Attorney General for 1974, at 73–74 ; Annual Report for 1975, at 85–86.
[91] See note 81 *supra*.

and without redirecting funds from one program to another or one State to another and without in any way creating hardship for citizens in an institution who may not be affected by existing unconstitutional conditions in another part of the institution, appropriate program funds be directed to correct unconstitutional conditions as a priority before other corrections or improvements are made in the institution. The committee understands that this section is in no way binding.

J. SECTION 10: STANDARDS OF CARE

This section ensures that this legislation will not lead to federally promulgated standards of care for institutions.

XII. Cost Estimate

In accordance with section 252(a) of the Legislative Reorganization Act of 1970 (Public Law 91-510), the committee estimates that there will be no appreciable increase in the existing administrative costs of the Justice Department in order to administer this act.

Department of Justice,
Assistant Attorney General,
Legislative Affairs,
Washington, D.C., November 13, 1979.

XIII. Regulatory Impact Statement

Hon. Birch Bayh,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Senator Bayh: This is in response to your request for the Department of Justice's evaluation of the regulatory impact of S. 10, Civil Rights of Institutionalized Persons, as it was reported by the Senate Judiciary Committee on November 2, 1979.

Section 5(b)(1) of S. 10 requires the Attorney General to promulgate minimum standards for the development and implementation of grievance resolution systems for adults confined in penal institutions. Section 5(c) requires that he develop a procedure to review any such systems that are voluntarily submitted by States and political subdivisions and certify those that are in compliance with the minimum standards. Although section 5(b)(2) specifies certain statutory minimum features of the grievance resolution standards, we anticipate that compliance with section 5 will require a modest amount of regulatory development by this Department.

It is impracticable to estimate the number of persons who would be regulated, the economic impact of such regulation or the amount of additional paperwork that will result from the regulations. Because the submission of grievance resolution procedures will be voluntary on the part of States and political subdivisions, we have no basis for predicting which ones will choose to make such submissions, and therefore no knowledge of the number, size, or budgetary features of the governmental entities that will be affected by the section 5 procedures.

We anticipate no impact on the personal privacy of the individuals affected.

We do not expect the enactment of S. 10 to have any regulatory impact beyond that necessitated by section 5.

Sincerely yours,

ALAN A. PARKER,
Assistant Attorney General,
Office of Legislative Affairs.

APPENDIX

[EXHIBIT A]

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., July 28, 1977.

Hon. BIRCH BAYH,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN BAYH: During my testimony before the subcommittee on June 17, 1977, concerning S. 1393, I was asked what guidelines might be followed by the Attorney General in our litigation program concerning the constitutional rights of institutionalized persons in determining whether to institute a suit and, if so, what relief might be obtained.

1. Standards for filing suits

As I stated in my testimony, the participation by the United States in suits such as contemplated by S. 1393 has been largely at the invitation of courts to appear as *amicus curiae* or through intervention in pending litigation instituted by private individuals. However, the Department has initiated a small number of suits where no private action was pending, based upon the theory that the Attorney General has inherent authority to bring suit to protect the interests of the United States, a theory which has long been accepted by the courts in other contexts. We have determined that the interests of the United States required the initiation of a suit where the following factors are present:

1. A significant number of individuals are being subjected to deprivations of rights secured to them by the Federal constitution or Federal statutes;

2. Such deprivations are pursuant to broadly applicable policies, procedures of practices;

3. Such deprivations are of an extremely serious nature, so as to include, but not be limited to, at least one of the following:

(*a*) Individuals are confined under conditions which amount to "cruel and unusual punishment," within the meaning of the 8th amendment,

(*b*) Individuals are subjected to confinement or to other severe restrictions of liberty without lawful justification, *e.g.*, failure to provide treatment to persons committed for the purpose of being treated,

(*c*) Individuals are denied basic freedoms, *e.g.*, freedom of speech, freedom of religion, freedom to petition the government (including reasonable access to the courts); and

4. There is no realistic prospect of an effective, timely remedy without the involvement of the United States.

We would expect to follow similar guidelines if a bill such as S. 1393 becomes law. I do not believe that it is necessary to incorporate such guidelines in the legislation itself. As I stated in my testimony, the Attorney General has had "pattern or practice" authority for some time in other areas of civil rights enforcement and the Department of Justice has therefore had extensive experience in operating under that standard. I believe that the guidelines which I have outlined would meet the "pattern or practice" standard. The subcommittee could, however, include in its report on the bill language indicating its understanding of this term.

2. Relief

During my testimony, concern was expressed about the scope of the language of section 1 of S. 1393 which authorizes the Attorney General to institute a civil action for such relief as he deems necessary to insure the full enjoyment of any rights, privileges, or immunities secured by the Constitution or laws of the United States by persons confined in an institution. This language is quite similar to that of many other civil rights statutes which authorize civil actions by the Attorney General, *e.g.*, 42 U.S.C. 2000a–5 (discrimination in public accommodations); 42 U.S.C. 2000b (discrimination in public facilities); 42 U.S.C. 2000c–6 (desegration of public education); 42 U.S.C. 2000e–6 (discrimination in employment); and 42 U.S.C. 3613 (fair housing). This language would, therefore, have established meaning and its use would serve to insure that, in an appropriate case, the Attorney General would not be limited in his authority to seek full relief for any violation which is within the terms of the statute.

It is, of course, the court in which suit is brought which would determine the extent of relief which would be granted to remedy a violation of constitutional or statutory rights. Thus, although the language of S. 1393 gives authority to the Attorney General to seek such relief as he deems necessary, the courts, under general equitable principles, would be required to fit the remedy to the violation which is proved. For example, in recent decisions involving conditions in prisons, courts have ordered relief which corrected unconstitutional lack of medical care, required internal due process for imposition of disciplinary measures and placed population ceilings on institutions which were so overcrowded as to amount to cruel and unusual punishment. Where conditions exist which violate the constitution, an injunctive order must be entered which would cause the conditions to be brought within constitutional limits.

The constitutional standards as interpreted by the courts are, of course, the measure of violations of constitutional rights. Frequently, however, the trial courts have been guided in determining what constitutes unconstitutional conditions by evidence of acceptable norms for institutions published in the form of "standards." The expert witnesses who have testified in our litigation concerning correctional facilities have referred primarily to the following published standards as measures of the minimum conditions which should exist in those institutions: the American Public Health Association's Standards for Health Services in Correctional Institutions (1979), the American Medical Association's Standards for the Acceditation of Medical Care and Health Services in Prisons and Jails (1977), and

the American Correctional Association's Manual of Correctional Standards (1973).

In the area of non-correctional institutions, the Department of Health, Education, and Welfare, which grants substantial financial assistance to such institutions, has prescribed, pursuant to the authority conferred in 42 U.S.C. 1302. "Standards for Intermediate Care Facilities," 45 C.F.R. 249.13. Those "standards" are a useful and frequently applicable measure of minimal requirements for facilities in which mentally retarded, mentally ill, and aged persons are confined.

Thank you for the opportunity of appearing before your subcommittee. If I can be of further assistance, pleased feel free to contact me.

Sincerely,

DREW S. DAYS III,
Assistant Attorney General,
Civil Rights Division.

[EXHIBIT B]

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., June 29, 1977.

To: Senate Subcommittee on Constitutional Rights (Attention: Nora Manella).
From: American Law Division.
Subject: Authority of the Attorney General to intervene in or initiate action to redress deprivations of constitutional and Federal statutory rights.

Pursuant to your request for a list of statutes giving the Attorney General the authority to initiate actions to redress deprivations of constitutional and Federal statutory rights, we have prepared the attached list.

As we discussed, your concern arises from language in S. 1393 which gives the Attorney General authority to redress constitutional or statutory deprivations "pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities * * *". Similar legislation has been introduced in the House. (H.R. 2439, H.R. 5791.) Hearings have been held concerning H.R. 2439 and we have enclosed for your reference the statement of Mr. Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice.

Currently, the Attorney General is entrusted with similar "pattern or practice" authority under title VI of the Civil Rights Act of 1960 (voting), titles II and VII of the Civil Rights Act of 1964 (public accommodations and employment, title VII of the Civil Rights Act of 1968 (housing), sec. 518(c)(3) of the Crime Control Act of 1973, and sec. 122(c) of the State and Local Fiscal Assistance Act of 1972 (discrimination in programs receiving Federal assistance).

Some of these statutes give the Attorney General authority to both initiate suit and intervene in a private action. Some also require a "pattern or practice" of violations, meaning a repeated routine denial of rights, rather than an isolated instance. *U.S.* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (employment). Others, however, require only that there exist reasonable

grounds for belief that a person's federally protected rights have been or are about to be violated in order for the Attorney General to take legal action.

It is well settled that Congress does have the power under section 5 of the 14th amendment, to entrust enforcement of constitutional and Federal statutory rights to the Attorney General. The authority of the Attorney General under the Civil Rights Act of 1960 was explicitly upheld in *United States* v. *Mississippi*, 380 U.S. 128 (1965). The Court's holding was premised on the congressional power under section 5 of the 15th amendment to protect the federally guaranteed right to vote:

> Section 1971 [42 U.S.C. 1971] was passed by Congress under the authority of the Fifteenth Amendment to enforce the Amendment's guarantee, which protects against any discrimination by a State, its laws, its customs, or its officials in any way. We reject the argument that the Attorney General was without power to institute these proceedings in order to protect the federally guaranteed right to vote without discrimination on account of color.

The same reasoning certainly applies to protection of the guarantees of the 14th amendment. We are unaware of any constitutional challenges to the grant of authority to the Attorney General to enforce and protect those Federal rights.

We hope the enclosed list will be useful to you. Should you need additional information, please feel free to call on us.

DONNA C. PARRATT,
Legislative Attorney.

[EXHIBIT C]

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., November 15, 1979.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office has reviewed S. 10, a bill to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States, as ordered reported by the Senate Committee on the Judiciary, November 5, 1979.

The only significant costs directly attributable to this bill will result from additional staffing requirements at the Department of Justice to develop minimum standards for grievance resolution within institutions covered by the bill. These same positions would also be used to develop a procedure for prompt review and certification of systems for resolution of grievances, to compile statistics, and to write a section of the Attorney General's report to Congress. It is estimated that these tasks will require two additional attorneys and one additional clerical position, at a cost of about $54,000 in fiscal year 1980. Based on CBO projections of Federal payraises, this cost is estimated to increase to

$90,000 in fiscal year 1981, $98,000 in fiscal year 1982, $106,000 in fiscal year 1983, and $114,000 in fiscal year 1984.

Should the committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ROBERT D. REISCHAUER,
(For Alice M. Rivlin, Director).

[EXHIBIT D]

A BRIEF DESCRIPTION OF AND VOTES FOR AMENDMENTS WHICH FAILED IN THE FULL COMMITTEE

1. An amendment to require the joining of all cases pending in Federal court or which may at some future date be filed in Federal court against the institution(s) which are the subject of suit by the Justice Department to the Justice Department suit. Failed 11 to 4.

2. An amendment to require the court to order only such relief as is indicated in the Attorney General's certification at the time of the filing of a motion. Failed 9 to 6.

3. An amendment to require that compliance actions be filed by appropriate agencies before any action is commenced or intervention is sought, and to requires that such compliance actions be exhausted unless the Attorney General certifies that exhaustion would be inappropriate. Failed 11 to 4.

4. An amendment enjoining the Attorney General from filing any actions which would challenge the validity of any State law or State court decision relating to the procedures or the standards for confinement in an institution. Failed 11 to 4.

5. An amendment which would require the Attorney General to list in the certification all violations of Federal statutes or regulations pursuant to which the institution receives Federal funds whether or not such violations relate to the reasons for bringing suit and which would require certain other information in such certification. Failed 11 to 4.

6. An amendment to change the certification in intervention to more closely conform with all of the requirements for the certification in initiation. Failed 11 to 4.

7. An amendment to delete jails and correctional facilities from the coverage of S. 10. Failed 11 to 4.

8. An amendment to make the certification by the Attorney General jurisdictional. Failed 10 to 5.

9. An amendment to require that information which would be contained in the Attorney General's certification be established by "clear and convincing evidence" before the filing of a motion. Failed 11 to 4.

10. An amendment which would require that the certification in intervention more closely conform with the certification in initiation at the discretion of the court. Failed 11 to 3 with one abstention.

XV. MINORITY VIEWS OF SENATORS THURMOND, LAXALT, COCHRAN AND SIMPSON

We strongly oppose this bill. S. 10 would grant the Attorney General the standing to initiate suits on behalf of persons in the state institutions. Under present law, all persons in these institutions can seek judicial relief from unconstitutional conditions in private civil actions, and the Attorney General can intervene to assist. In fact, all of the decisions, cited by the supporters of this bill as doing much to correct institutional conditions, were initiated without the Justice Department. This bill creates no new rights for institutionalized persons, but merely increases the power of the Justice Department.

While there are many reasons to oppose S. 10, our primary opposition is based on three factors:

1. The basic premises underlying this bill are wrong.
2. Action by the Justice Department under present law has been excessively intrusive.
3. The negative impact of S. 10 makes it unacceptable.

I. The Basic Premises of the Bill Are Incorrect

S. 10 is based on two assumptions: (1) that states are unwilling and incapable of protecting their institutionalized citizens and (2) that the Attorney General is in the best position to protect these citizens. Both assumptions are incorrect.

As to the first assumption, the rather bold assertion that State officials are incapable and unwilling [1] is heartily endorsed by the supporters of this bill. The committee report on S. 10 concludes:

> (Reported information documents) the need for active Federal involvement which is especially crucial in light of the demonstrated inability of State and local governments to insure adequate protection of their institutionalized citizens.[2]

Not only is this statement directly contradicted by various officials who testified to the great strides being made by the States in the area of institutionalized treatment,[3] but it is a patent example of the arrogance which has all too often been reflected in the actions of the Justice Department in this area. At a time when most Americans feel that the Federal bureaucracy is already too powerful, it is difficult to believe that the Congress would increase the power of one of the

[1] "In sum, state systems frequently are *not capable* of voluntarily correcting violations of Constitutional and statutory rights of institutionalized people because either they deny that there are violations, or, sometimes in addition they *lack* the resources or *the will* to correct violations." (Emphasis added.) Prepared statement of Assistant Attorney General Drew Days III, S. 10 hearings at p. 36.

[2] S. 10 Committee Report at p. 17.

[3] See S. 10 hearings, testimony of Senator Exon at p. 238; New Hampshire Attorney General Rath at p. 302; Dr. William S. Hall, South Carolina Commissioner of Mental Health, at p. 317.

most criticized bureaucracies, the Justice Department, to interfere with State efforts in this area.

The second assumption underlying this bill—that the Attorney General should serve as the bureaucratic watchdog over State institutions—is also unwarranted. Currently, Federal correctional institutions are under the control of the Attorney General. Yet there are problem conditions in these very Federal institutions.[4] Before Congress grants the Justice Department this new power over State institutions, it would be a good idea to have the Attorney General prove that he adequately handles his current responsibilities.

2. Action by the Justice Department Under Present Law Has Been Excessively Intrusive

While the supporters of S. 10 portray the record of the Justice Department action in this area as totally effective, that is neither the truth or the full story. Our Committee was in a unique situation during hearings on this bill. Two of our colleagues, who have experienced the Justice Department's approach, testified. Senator Danforth, who served as Attorney General for the State of Missouri, and Senator Exon, a former Governor of the State of Nebraska, recounted their experiences for the Committee. Both Senators were highly critical of the tactics and attitude of the Justice Department. In Senator Danforth's words, tactics included "deception, circumvention of (State officials), lack of candor, ludicrous demands for detailed information and the threatened dispatch of teams of FBI agents into our State. . . ." [5]

Perhaps the best documented example of unacceptable conduct by the Justice Department occurred in the State of South Carolina. As background, it is necessary to comment on the tremendous achievements in the area of mental health which have been accomplished by South Carolina. For an objective evaluation of South Carolina's commitment to its institutionalized citizens, we simply quote from Judge Frank Johnson, one of the universally-acknowledged leaders in the area of the rights of institutionalized persons.[6]

> This State has taken seriously its Constitutional obligations to the mentally ill. When in the late sixties and early seventies the plight of those in our mental institutions was brought to the national attention, South Carolina did not turn its back, as did so many others. A "new direction" was plotted. Bold and innovative programs were developed. A financial commitment was made on the part of State government to insure that these programs could become a reality.
>
> Today we are assembled to celebrate the fruits of this courageous and human effort—the opening of the G. Werber Bryan Psychiatric Hospital. This hospital truly is as Commissioner Hall has remarked, a brick and mortar definition of the principles of *Wyatt* v. *Stickney*. With the concern which you in South Carolina have demonstrated for the

[4] S. 10 Committee Report at p. 23.

[5] Letter from then-Missouri Attorney General Danforth to then-Attorney General William Saxbe, dated Jan. 30, 1975, Exhibit submitted for the record, S. 10 hearings at p. 230.

[6] Judge Johnson was the judge in *Wyatt* v. *Stickney* and his actions in that landmark case established him as the judicial leader in pressing for the rights of the institutionalized

> problems of the mentally ill, and for the great achievement which the G. Werber Bryan Psychiatric Hospital represents, I applaud you.[7]

Yet despite the forward-looking attitude and commitment of the State of South Carolina, the Justice Department decided to involve itself in South Carolina institutions. The Justice Department did this in 1974 by intervening in a suit filed by several patients at the State hospital. With full knowledge that the State institution was represented by the State Attorney General's office, the Justice Department, without notice to the State Department of Mental Health or to the State Attorney General, sent the FBI directly to the State hospital with a demand for access to all patient records. When the court was notified of this action, Federal Judge Robert Hemphill stated:

> This action was taken without notice to defendants' attorneys and this court hastens to *condemn* such conduct by the *Department of Justice* as *highly improper* and *patently unethical.* (Emphasis added.) [8]

However, the story does not end here. For four years, the Justice Department subjected the State of South Carolina to tremendous expense, harassment, and intimidation. Including the $56,000 spent just to answer the first set of interrogatories from the Justice Department, the total legal costs of the State exceeded $100,000. While these expenses were certainly detrimental to the State, the full real costs were much more devastating. An exchange between Dr. William S. Hall and Senator Birch Bayh emphasized the real cost of this experience.

> Dr. HALL. . . . During this period of time in which the Justice Department was involved in litigation, the morale of our employees was at an all-time low. Some key employees left, and our recruiting efforts for new and qualified professionals were seriously compromised. It is a very uncomfortable feeling to be under attack of your own Government when you are trying to do a job, and to feel the power and pressure of the Justice Department and the Federal Bureau of Investigation. The fact that an FBI employee knocks on the door of one of our employees, that is intimidating. As for the reaction of that individual employee is concerned, he considers it intimidation.
>
> Senator BAYH. It is intimidating to me. It is sort of like the IRS. I may be a U.S. Senator, but when the FBI knocks on the door, I am concerned.
>
> Dr. HALL. We are in 100 percent accord with that. Their resources and influences are overwhelming.[9]

After all of these costs had been incurred, the case was dismissed. The sad commentary is that the patients, not the Justice Department, were the real losers. Dr. Hall stated:

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[7] These remarks were delivered in February of 1978 when South Carolina dedicated its newest psychiatric hospital. Quoted in testimony of Dr. William S. Hall, South Carolina Commissioner of Mental Health, S. 10 hearings at p. 321.

[8] Quoted in testimony of Dr. William S. Hall, S. 10 hearings at p. 319.

[9] S. 10 hearings at p. 320.

> As a result of these unavoidable demands, the care and treatment of patients suffered greatly—I underscore that—the care and treatment of the patients suffered greatly.[10]

Unfortunately this type of counterproductive action is still occurring [11] and in all likelihood will grow under S. 10.

3. The Negative Impact of S. 10 Makes it Unacceptable

While we have outlined two major problems with this bill, we have several other areas of concern. We are concerned that this bill will allow the Justice Department, through a system of selective litigation, to establish Federal policy for the institutionalized persons in this Country. The need for broad, national policy decisions in this area is questionable, but in any event, this decision should be left to the elected representatives in Congress, and not the Judiciary.

In two areas, the language of this bill is misleading. First, while the bill purports to allow Federal intervention only where there are flagrant conditions existing in State institutions, the Justice Department will use this authority to attack State commitment procedures and statutes.[12] Second, while the Committee has attempted to narrowly define the term "state action" in this bill, in an effort to exempt small, basically private health-care institutions, this is no guarantee that these institutions will remain exempt from scrutiny by the Justice Department. "State action" is a flexible, growing concept and the Attorney General, in policing State institutions, will use its expanding meaning.[13] Past actions of the Justice Department in States which have made strong commitments to improving institutional conditions, combined with an expanding concept of State action, could lead to ramifications far beyond the expectations of any Member of the Committee.

We must also comment on the impact of S. 10 on Federalism. The shift from cooperation to conflict leads to a glaring objection to this legislation, which is the further erosion of our Federal system of government. We do not need to repeat arguments made many times in the past that our governmental system operates on a concept of division of powers between the National Government and the States. The right to control its institutions, especially prisons, is a power logically held by each State. Under present law, when constitutional violations are asserted, the aggrieved party can present his case to the courts. This bill would permit the Justice Department to seek its own cases and initiate suit without a complaining party. In fact, under S. 10, the sole basis for a Justice Department suit could be a complaint from within the Justice Department. In effect, all State institutions for care or confinement would be policed by the Justice Department.

The confrontations which will occur from this Federal intrusion into State affairs will not create an atmosphere conducive to providing funds for services needed by institutionalized persons. Face to face encounters in a court of law will neither serve to increase the sensi-

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[10] Testimony of Dr. William S. Hall, S. 10 hearings at p. 319.
[11] See testimony of New Hampshire Attorney General Rath, S. 10 hearings beginning on p. 270.
[12] Testimony of Assistant Attorney General Drew Days III, S. 10 hearings on p. 19.
[13] Testimony of Assistant Attorney General Drew Days III, S. 10 hearings at p. 22.

tivity of State officials, nor will those encounters foster better Federal-State relationships. On the contrary, this legislation may encourage reluctant State officials to refrain from making the hard decisions on questions of funding for institutions, passing that responsibility to the Department of Justice and ultimately to a Federal district court judge.[14] Similarly, voter attitudes on bond issues for institutions will be adversely affected by this legislation. Without public support there will be no constituency for improvement, which in the long run should be our objective. The intrustion into State matters authorized by this bill constitutes a serious attack on the principle of Federalism which is a cornerstone of our system of government.

In summary, this bill affords no new rights to our institutionalized citizens. Instead, it increases the power of a Federal bureaucracy whose attitude and efforts will probably be counterproductive to the interests of such citizens. That is all S. 10 does. If we really want to help these citizens we should encourage more cooperation and less conflict between State and Federal officials. S. 10 is not the way to achieve that needed cooperation.

STROM THURMOND.
PAUL LAXALT.
THAD COCHRAN.
ALAN K. SIMPSON.

APPENDIX—SOME OF THE LETTERS TO SENATOR STROM THURMOND FROM STATE OFFICIALS EXPRESSING OPPOSITION TO S. 10

STATE OF ARKANSAS,
OFFICE OF THE GOVERNOR,
Little Rock, May 31, 1979.

Re S. 10.

Hon. STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: This Office has reviewed the referenced bill and agrees with your observation that it may well strain federal-state relationships in the absence of any federal funding to permit states to comply with equitable affirmative relief ordered by federal courts. In addition, since individual plaintiffs may bring actions under present law imposing a lesser burden of proof, the need for this legislation is dubious.

Thank you for giving this Office the opportunity to review and comment upon this measure.

Yours truly,

FRANK B. NEWELL,
Administrative Assistant.

[14] See testimony of John Murphy, California Attorney General's office, S. 10 hearings at p. 287.

WASHINGTON OFFICE,
STATE OF CONNECTICUT,
Washington, D.C., October 3, 1979.

Hon. STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: I am writing concerning S. 10 which proposes to authorize the Attorney General to institute legal action on behalf of institutionalized persons in cases where such persons are purportedly deprived to rights, privileges or immunities provided by the Constitution or Laws of the United States.

It is important to note that the Justice Department already has adequate authority to act in those cases where it is deemed necessary, and that existing controls and regulations administered by other Federal agencies, vis a vis the Developmental Disabilities Act, Medicaid and Medicare regulations, Education of all Handicapped Children's Act (94–194) provide sufficient protection for residents of state-run institutions.

Furthermore, Connecticut, through its protective services, and advocacy laws, and other statutes protecting the handicapped already has sufficient authority to protect the rights of the institutionalized and it is currently exercising it, as evidenced by recent federal court action initiated by Connecticut's Office of Protection and Advocacy of the Handicapped and Developmentally Disabled Persons in a case concerning the care of mentally retarded persons within this State.

Should the bill be approved by the Committee, I would urge you to consider these existing remedies prior to making a decision on the bill.

With best wishes,
Cordially,

ELLA GRASSO,
Governor.

DEPARTMENT OF LEGAL AFFAIRS,
OFFICE OF THE ATTORNEY GENERAL,
Tallahassee, Fla., May 14, 1979.

Re S. 10 (H.R. 10 in the House of Representatives).

HON. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you very much for your letter of May 1, 1979, regarding S. 10 (H.R. 10 in the House of Representatives), which would permit the United States Attorney General to bring suit directly against state prisons and mental institutions to assert violation of federal constitutional rights.

I share your concern for this legislation and am strongly opposed to this proposal. I have previously contacted Florida's senators and

governor on this matter and urged their opposition to this bill. For your information, I am enclosing my correspondence to Senator Chiles.

Should you need additional assistance or information, please feel free to call on me.

Sincerely,

JIM SMITH,
Attorney General.

OFFICE OF THE GOVERNOR,
Atlanta, Ga., June 14, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your recent letter sharing with me your concerns regarding S. 10, which addresses the rights of institutionalized persons. It is my understanding that a similar bill has already passed the House.

I am in agreement that the mentally disabled must be assisted in obtaining legal services, and I am confident that Georgia's current statutes make adequate provision to provide these services. In 1977, I appointed a committee to rewrite our statutes regarding rights of the mentally ill, mentally retarded, alcoholics and drug abusers who may need involuntary commitment and treatment in order to protect themselves as well as others. This committee included attorney advocates for the mentally ill and mentally retarded, citizen interest groups, members of the General Assembly and others. The resulting amendments were enacted in 1978 and received additional "fine tuning" in the 1979 session of the Georgia General Assembly.

In regard to state correctional facilities, I am strongly opposed to giving the United States Department of Justice opportunities for direct intervention into the state correctional system without a formal process addressing specific complaints, and I am opposed to federally established minimum standards for state correctional facilities without input from the states and without benefit of state legislative action.

A national policy to define and protect the constitutional rights of inmates of state and local institutions should only be established in formal consultation with state government.

With kindest regards, I am

Sincerely,

GEORGE BUSBEE.

STATE OF HAWAII,
DEPARTMENT OF THE ATTORNEY GENERAL,
Honolulu, Hawaii, May 18, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: This letter is to acknowledge receipt of your letter of May 1, 1979 relating to bill S. 10 which grants standing for the United States Attorney General to initiate suits against the

states on behalf of institutionalized persons. I appreciate your forwarding me your informative comments on the bill.

After an initial review of S. 10, I agree with you that the individual states should have the authority to regulate the operation of its institutions with minimum federal infringement. The State of Hawaii is capable of effectively operating its own institutions. It appears that allowing the United States Attorney General to initiate suits against state institutions may not be the appropriate means of remedying problems that exist in such institutions. Furthermore, there are presently sufficient avenues of relief for an institutionalized person who has any complaints, including filing suit in federal court under 42 USC 1983.

I will keep in mind your comments on S. 10 when I consult with Governor George R. Ariyoshi on this matter. Again, thank you for your sincere efforts in providing me information on this matter.

Very truly yours,

WAYNE MINAMI,
Attorney General.

STATE OF IDAHO,
OFFICE OF THE ATTORNEY GENERAL,
Boise, May 24, 1979.

Senator STROM THURMOND,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your correspondence concerning Senate Bill 10, sponsored by Senator Birch Bayh of Indiana. This office has already corresponded with the National Association of Attorneys General, indicating our opposition to the bill. However, we feel obliged to personally advise your office that we are in opposition to Senate Bill 10.

A copy of your correspondence with its enclosure, has been forwarded on to the Idaho Governor's Office.

Very truly yours,

MICHAEL B. KENNEDY,
Deputy Attorney General,
Chief, Criminal Justice Division.

OFFICE OF THE GOVERNOR,
Indianapolis, Ind., May 22, 1979.

Hon. STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: Having reviewed S. 10, it is my opinion that the bill would permit unnecessary federal control over institutional care at the state level. While it may be true that 10 or 15 years ago, many states were not meeting their obligations to those confined in state institutions, fortunately, that is no longer true.

In the past several years, Indiana, like many other states, has moved affirmatively in this area. Examination of Indiana's mental and correctional institutions would show that significant progress has been made in the provision of care and protection to inmates, as well as in

respect for human rights. Where Indiana and other states have fallen short in meeting their responsibilities in the institutional area, advocacy organizations for the various persons confined have shown they can be very effective in their use of the judicial system.

In view of the states' progress in the provision of institutional care and judicial remedies which assure additional progress, S. 10 would be an unnecessary layer of federal intervention in an area already being handled effectively at the state level.

Kindest personal regards,

OTIS R. BOWEN,
Governor.

WILLIAM J. SCOTT,
ATTORNEY GENERAL,
STATE OF ILLINOIS,
Chicago, September 26, 1979.

HON. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: I am responding to your letter of September 14, 1979 to William J. Scott, Attorney General of the State of Illinois. Mr. Scott recently underwent coronary bypass surgery or he would have answered your letter personally. He sends his regrets and has asked me to respond for him.

I agree with your conclusion that S. 10 would give the United States Department of Justice too much oversight authority with respect to the operations of state institutions. Section 1 of the Act gives the Attorney General of the United States almost unlimited discretion to decide when to inject the United States government into the operations of State facilities. That is not to say that some involvement at some time might not be required because there are instances where the rights, privileges, and immunities secured by the Constitution are being violated, but the Bill as it now stands would give the Attorney General of the United States the independent discretion to make that type of finding. Further, Section 2 of the Act gives the Attorney General of the United States the authority to virtually mandate and require sovereign states to do those actions which the Attorney General of the United States, in his opinion, feels are required when they may not actually be required.

It is difficult for state and local governments to operate institutions in a manner which best serves not only the residents of its institutions but also the taxpayers who are required to support those institutions. Adding yet another federal bureaucratic taskmaster is not the answer and unless S. 10 is modified it would seem to be a poor Bill in its current posture.

Again, Mr. Scott had desired to answer your inquiry personally but that was impossible and if there is anything more that can be done by this office please contact me at the above address or call me at (312) 793-3117.

Very truly yours,

FRANK M. GRENARD,
Executive Assistant.

STATE OF KANSAS,
OFFICE OF THE ATTORNEY GENERAL,
Topeka, May 9, 1979.

HON. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of May 1, 1979, concerning S. 10. At this point I am opposed to passage of such legislation as it appears to pose another bureaucratic problem where there are already legal remedies available. I know of no instance when the Office of Attorney General of Kansas was unwilling to cooperate in fulfilling the duty of caring for the mentally ill. Until a need is shown in this state I cannot support S. 10.

Very truly yours,

ROBERT T. STEPHAN,
Attorney General of Kansas.

STATE OF LOUISIANA,
EXECUTIVE DEPARTMENT,
Baton Rouge, May 25, 1979.

HON. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of May 1, 1979, informing me of S. 10 which would allow the United States Justice Department to initiate suits against the states on behalf of institutionalized persons. As you have noted, this bill raises many questions concerning federal interference in state affairs and promotes conflict rather than cooperation.

I will be contacting the Louisiana Congressional Delegation concerning this legislation and have shared your letter with other state officials. I appreciate your calling this matter to my attention.

Sincerely,

EDWIN EDWARDS.

STATE OF MAINE,
DEPARTMENT OF THE ATTORNEY GENERAL,
Augusta, Maine, June 15, 1979.

HON. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: This is in response to your letter of May 1, 1979, expressing concern over S. 10, a bill to authorize the Justice Department to bring a civil action to enforce the rights of persons residing in state institutions and prisons. My office has followed the course of S. 10 and its companion H.R. 10 and shares your concern with the possible impact of this legislation on the operation of state government.

In 1975 a class action was filed against the State of Maine on behalf of persons residing at Pineland Center, Maine's institution for the mentally retarded. The class as certified by the U.S. District Court in-

cluded not only current and future residents of Pineland, but also residents who had been released from Pineland Center years ago. The suit was brought initially by Pine Tree Legal Assistance, Inc., of Portland, Maine, but control of the suit was quickly taken over by the Mental Health Law Project, Washington, D.C.

The dual nature of the certified class and dual representation of the class made defense of that suit very difficult. The suit was settled by consent in July 1978, but only after two years of negotiation, and at a cost of several million dollars, including $90,000 in attorney's fees. The negotiations were so protracted and so costly because of dual representation. Pine Tree Legal Assistance and the Mental Health Law Project frequently disagreed on the goals of the lawsuit and on the terms on which the goals could be achieved.

The State of Maine is sensitive to the needs and rights of persons residing in her institutions and prisons. This office believes, however, that persons in institutions and prisons are adequately represented at this time. In fact, Maine's experience as related above suggests the interjection of the Justice Department in institutional litigation may significantly impede the resolution of the issues raised in such litigation by inserting yet another party with a potentially different point of view. That will only aggravate the rather ironic predicament confronting the states, which compels them to expend money to meet litigation costs when that money might otherwise be used to remedy problems in state institutions and prisons.

Thank you for your personal invitation to comment on S. 10 and please be assured of Maine's support for your position.

Very truly yours,

RICHARD S. COHEN,
Attorney General.

STATE OF MICHIGAN,
OFFICE OF THE GOVERNOR,
Lansing, July 23, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter expressing concern regarding the possible enactment of S. 10. I agree with you that we should move toward increasing state-federal cooperation rather than establishing mechanisms that will result in adversary confrontations.

Michigan joins the National Association of Mental Health Program Directors in the position that there is no need for S. 10 and that such legislation will place further burdens on state legal activities, overload already heavy court calendars, and duplicate ongoing legal remedies.

The State of Michigan has established an extensive network of recipient rights offices at all state hospitals and centers for the developmentally disabled for the purpose of ensuring and protecting the rights of recipients of mental health services.

In addition, a specific protection and advocacy system outside the Department of Mental Health has been established for the developmentally disabled with legal expertise available, free of charge, to all developmentally disabled citizens.

I assure you there are sufficient numbers of qualified legal experts available within the state to pursue appropriate legal redress for violations of rights of recipients of mental health services and further involvement by the Justice Department would be redundant.

Legal intrusion by the U.S. Department of Justice will polarize agencies and reduce state and federal agency cooperation compounding the problem of creating better interagency relationships and promoting cooperation.

Warm personal regards.

Sincerely,

WILLIAM G. MILLIKEN,
Governor.

THE CAPITOL,
Jackson, Miss., June 19, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your recent letter concerning S. 10.

I have studied this bill carefully and believe this area of State and local concern may best be regulated through State legislation along with the regulations and standards adopted by the various agencies within a State.

The passage of this bill would infringe upon a States rights of self government. The ability of the State to govern its internal affairs should not be carved away any further than has been done in the past. We are willing to work with federal agencies in this area, however, the enactment of S. 10 would surely create friction and confrontations between States and federal agencies at a time when cooperation is most needed.

Again, thank you for writing and if I may be of any further assistance, please do not hesitate to contact me.

With kindest personal regards and best wishes, I am

Sincerely your friend,

CLIFF FINCH, *Governor.*

ATTORNEY GENERAL OF MISSOURI,
Jefferson City, May 21, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter regarding the institutions legislation proposed by Senator Birch Bayh. I am deeply alarmed about this incursion of the federal government into the internal administration of state institutions.

I appeared before a House Committee last year regarding this matter and stated my clear objection to this unwarranted infringement of the U.S. Department of Justice.

It should be noted that these matters are all being litigated very frequently in the federal courts and there is no need to have the Justice Department bring additional suits.

I am currently defending a significant number of suits relating to the conditions in virtually every institution in my state that have been brought by legal aid societies, private parties and others. Additional funding for the Justice Department would be a senseless duplication of federal involvement in an area which is already made difficult by the costly litigation which impairs the ability of the states to correct problems which do exist.

Thank you for your concern and your support in this matter.

Most sincerely,

JOHN ASHCROFT,
Attorney General.

DEPARTMENT OF JUSTICE,
STATE OF NEBRASKA,
Lincoln, Nebr., May 24, 1979.

Re: S. 10.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: We received your letter and materials concerning S. 10 and appreciate your interest in this matter.

This office has presented oral and written testimony in opposition to this bill and its predecessor. We have also joined with the Honorable Senator Exon of Nebraska in his opposition to this bill. We have learned through a long bitter struggle that litigation is not the answer to this problem.

If we can be of any assistance in further opposition to this or similar legislation, please let us know.

Very truly yours,

PAUL L. DOUGLAS,
Attorney General.
MEL KAMMERLOHR,
Assistant Attorney General.

STATE OF NEBRASKA,
Lincoln, May 24, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter and information regarding S. 10.

As you may know, the State of Nebraska is currently involved in litigation concerning a State institution for the mentally retarded. The Department of Justice has intervened in the lawsuit. After their intervention, the case changed from one involving patient rights to one challenging the philosophy behind the structure of the state institutions.

Although I do not feel it would be appropriate to comment on the specifics of the case, the case has made me aware of problems which enactment of legislation such as S. 10 could cause. Such legislation tends to disrupt cooperation between levels of government and

delays solutions to the problems. I oppose S. 10 and heartily support your efforts to defeat it.

With kind regards,

Sincerely,

CHARLES THONE,
Governor.

STATE OF NEVADA,
OFFICE OF THE ATTORNEY GENERAL,
Carson City, October 30, 1979.

Hon. STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND. I agree with your position on S–10 and support efforts made to defeat the bill.

The initiation of court action by the United States Department of Justice against the states is not an expeditious or appropriate method to assure the rights of persons confined to mental institutions, nursing homes, prisons and facilities for juveniles and the handicapped.

The State of Nevada can provide quality services to its citizens without the necessity for Department of Justice intervention. Such judicial intervention will divert time, money and energy to legal defense. State resources can better be used to provide direct care to institutionalized persons.

Thank you for your concern regarding S–10. I will forward copies of this letter to Nevada Senators Howard Cannon and Paul Laxalt and Congressman James Santini.

Sincerely,

RICHARD H. BRYAN,
Attorney General.

THE STATE OF NEW HAMPSHIRE,
THE ATTORNEY GENERAL,
Concord, N.H., May 9, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of May 1, 1979 concerning legislation now pending in Congress which would allow the United States to sue states over conditions in state institutions and/or to intervene in pending suits concerning institutional issues.

My office has recently been made painfully aware of many of the problems that may be raised by intervention by the United States. A suit involving the state institution for the retarded is now pending in the United States District Court for the District of New Hampshire, and the Justice Department has moved, and been allowed, to intervene in that case.

On March 28, 1979, I testified against S. 10 before the Subcommittee on the Constitution of the Senate Judiciary Committee concerning

our involvement in this case. Although I am certain you have already received one, I am enclosing a copy of my testimony.

My office certainly opposes the legislation in its current form. Please letme know if there is anything I can do to assist you in your opposition to this bill.

Sincerely yours,

THOMAS D. RATH,
Attorney General.

STATE OF NEW MEXICO,
OFFICE OF THE GOVERNOR,
Santa Fe, May 25, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: I agree that S. 10 constitutes an erroneous approach to securing the rights of persons residing in state institutions.

We, in New Mexico, have made tremendous strides in the last few years in insuring that the rights of our institutionalized citizens are protected. Advocacy groups have established a viable rapport with the Attorney General's office, with other state agencies, and with the judicial system to react quickly when any shortcomings in our institutions are identified. Legal representation is also readily available in any type of commitment to our state facilities. Our State has at least as well-defined an understanding of the needs of its institutionalized citizens as does Washington and our officials are more interested than would be Washington lawyers in meeting the needs of these citizens.

Cooperation between the States and Washington is bound to have demonstrably better results than the confrontation approach which S. 10 would seem to foster.

A copy of this letter is being sent to New Mexico Attorney General, Jeff Bingaman, for his consideration and review.

If I can be of further assistance, please let be know.

Sincerely,

BRUCE KING,
Governor.

STATE OF NORTH CAROLINA,
DEPARTMENT OF JUSTICE,
Raleigh, May 14, 1979.

Re: Senate Bill 10.

Hon. STROM THURMOND,
United States Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Last year one of the attorneys in my office researched Senate Bill 1393 which as amended is exactly the same as Senate Bill 10 which was reintroduced by Senator Bayh. It is my opinion that Senate Bill 10 is an unwarranted intrusion into the affairs of the states and was written in the belief that states are incapable of or unconcerned with providing proper care for institu-

tionalized persons in their custody. I think this is a blatant affront to the dignity of the states and directly contrary to the principles of federalism, which is a part of the foundation principles of federalism, which is a part of the foundation of our constitutional form of government.

I should think the United States Attorney General would be busy enough in assuring that the constitutional rights of persons in federal custody are not violated and does not need the additional responsibility of overseeing the fifty states. Moreover, in a time when the citizens are demanding a reduction in the size of the bureaucracy, this bill runs counter to the wishes of the taxpayer.

I am enclosing a copy of a letter to Senator Morgan on Senate Bill 1393. This letter was written at my direction and I fully concur with its contents. I am also enclosing a copy of my remarks to the Senate Committee on the Judiciary on the "Civil Rights Improvement Act," which I understand either will be or has already been reintroduced. The comments I made on that bill are in many respects equally applicable to S. 10.

Thank you for giving me this opportunity to comment on this bill. If I can be of further assistance to you in this or any other matter, please do not hesitate to call upon me.

With highest regards, I remain

Yours truly,

RUFUS L. EDMISTEN,
Attorney General of North Carolina.

STATE OF NORTH DAKOTA,
Bismarck, N. Dak., September 21, 1979.

Hon. STROM THURMOND,
Russell Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: This is in response to your letter of September 14, 1979, in which you alert me to the provisions of S. 10, a Senate bill now pending before the full Judiciary Committee.

As you noted, this bill would interject the United States Department of Justice as an overseer in the operation of state institutions for the mentally ill, retarded or elderly and in the operation of state prisons, including local jails.

The bill sets forth a procedure by which the United States Attorney General may institute civil actions on behalf of persons residing in state institutions, seeking equitable relief when institutionalized persons are allegedly deprived of constitutionally secured rights and the alleged deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of constitutionally protected rights. Such a procedure is an unnecessary and unwarranted extension of federal involvement in the administration of state institutions.

Current federal law authorizes civil actions for redress of deprivation of constitutionally protected rights under color of state law, and awards of attorneys fees to successful litigants. Current federal law also authorizes criminal prosecution in certain cases of deprivation of constitutionally protected rights under color of state law.

I am especially concerned about Subsections 2 (1) and (2) of the bill which requires that upon commencing an action, the United States Attorney General must certify that the governor and the state attorney general of a state have been notified by the United States Attorney General or his designee of the measures which he believes may remedy the alleged conditions which deprive rights, privileges or immunities secured or protected by the Constitution or laws of the United States; and that the governor and state attorney general have been made aware of federal financial or technical assistance available to assist in the correction of such conditions. Apparently if a state, for whatever reason, fails to seek all available federal assistance for state institutions, that state is subject to a lawsuit. The judgment of the Justice Department will thus be imposed on the qualified specialists who are administrators of state institutions.

S. 10 would not provide any greater protection to institutionalized persons than what is currently available. It would simply create another level of federal bureaucracy not nearly as sensitive to the rights of North Dakota citizens who are institutionalized nor as well-equipped to protect those rights as those agencies, officials and individuals now working institutionalized persons.

North Dakota legislators and state officials are acutely aware of their responsibilities to institutionalized persons. The North Dakota Legislature has enacted jail standards legislation which directs the Attorney General to promulgate jail rules and regulations and to enforce those rules and regulations. A legislative interim committee is developing a corrections masterplan and another is studying the special needs of North Dakota's institutions for the mentally retarded. There is no necessity of federal supervision of such efforts.

I oppose S. 10 for all the above reasons.

Sincerely,

ALLEN I. OLSON,
Attorney General.

OFFICE OF THE GOVERNOR,
Salem Oreg., June 4, 1979.

Hon. STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: I agree with your opposition to S. 10 relating to the constitutional rights of persons in public institutions.

Court action initiated by the United States Department of Justice is not an effective or appropriate way to assure that citizens in public institutions receive proper care and treatment. There are not sufficient deficiencies in the institutions to warrant intrusion of the Federal Government in an adversarial role into the state's management of its facilities.

Thank you for bringing this bill to my attention. I will let the Oregon Congressional Delegation know that I see no need for S. 10 or H.R. 10, and I will urge them to oppose enactment of this legislation.

Sincerely,

VICTOR ATIYEH,
Governor.

[This is copy of original telegram sent to Senator Birch Bayh, Washington, D.C.]

COLUMBIA, S.C., *April 4, 1979.*

DEAR MR. CHAIRMAN: I have concluded a review of bill S. 10 pending before your subcommittee, which would authorize the U.S. Attorney General to institute or intervene in actions alleging deprivation of constitutional rights of institutionalized persons. We have a functionally effective ombudsman system in the State of South Carolina, independent State advocacy units, and constantly seek to upgrade facilities and conditions in State institutions. The answer to all problems is not always found in the courts. I strongly urge you and your subcommittee to consider more desirable alternatives to achieving necessary protections for citizens who are institutionalized. I consider S. 10 both unnecessary and undesirable.

RICHARD W. RILEY,
Governor,
State of South Carolina.

THE STATE OF SOUTH CAROLINA,
ATTORNEY GENERAL,
Columbia, March 26, 1979.

Re S. 10.

Hon. BIRCH BAYH,
Chairman, Senate Judiciary Subcommittee on the Constitution, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This Office has experienced the conduct of litigation by the U.S. Department of Justice from 1972 until 1978 in the case of *Alexander* v. *Hall*, Civil Action No. 72–209. This was a suit alleging the unconstitutionality of the South Carolina Mental Health commitment laws and also raised issues as to adequacy of treatment for those patients residing at South Carolina State Hospital. The purpose of this letter is to inform you of our opposition to the enactment of S. 10 and H.R. 10 based upon the experiences of this Office in defending *Alexander* v. *Hall*. I recommend that this Subcommittee pay great heed to the April 4, 1978, letter of the National Association of Attorneys General, a position with which this Office wholeheartedly concurs.

The South Carolina experience in the defense of *Alexander* v. *Hall* proved to be extremely costly and time consuming, both for attorneys in this Office and for individuals invloved in the treatment of the mentally ill at South Carolina State Hospital. This suit was ultimately dismissed but only after four years of litigation with the Department of Justice.

I feel compelled to add one further alternative to that mentioned by the National Association of Attorneys General in its letter of April 4, 1978. There presently exists in the Department of Health, Education and Welfare extensive regulations governing the appropriate care of individuals in State mental institutions in order for those institutions to receive Medicare and Medicaid funds. A goal of improving the conditions of the mentally ill can be much better served through enforcement of existing regulations by HEW personnel trained in the field rather than through the adversary approach of pitting federal lawyers against state lawyers.

I sincerely hope that this Subcommittee can achieve its goal of the protection of citizens who are less able to protect their own rights without authorizing the indiscriminate initiation of litigation by the Department of Justice. I use the word "indiscriminate" advisedly because, throughout the conduct of this litigation in South Carolina, the Justice Department repeatedly refused to advise this Office or the Court of the standards that were allegedly not being provided to the citizens of this State. Furthermore, the Justice Department refused to acknowledge the existence of detailed standards of adequate treatment set forth in HEW regulations with which all South Carolina State Institutions comply.

Thank you very much for your consideration and interest in this matter.

Very truly yours,

DANIEL R. MCLEOD,
Attorney General.

STATE OF SOUTH DAKOTA,
OFFICE OF ATTORNEY GENERAL,
Pierre, S. Dak., May 18, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: I will be succinct. I am opposed to Senate Bill 10 and hope that it will die in Senate committee. I have informed our senior Senator McGovern of my opposition and have informed, as you requested, the Governor and certain legislators.

You might inform the sponsors of the bill for me that we presently have a board of charities and corrections, a legislature, a governer, a warden, superintendents of various remedial schools, and a host of other people trying to do the very best they can for our institutionalized citizens. I would hope that the committee would remember that those people institutionalized are the sons and daughters, mothers and fathers of people who live in our state and vote for the people responsible for these institutions.

I may point out, Senator Thurmond, with a note of bitter humor, that there are many of us who would like to institutionalize some of the Justice Department lawyers who fly out from Washington to solve all of our problems and then go back home to fight the Civil Service Reform Bill. It may be good for tourism in our state, but it certainly is not good for government.

Respectfully submitted,

MARK V. MEIERHENRY,
Attorney General.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE GOVERNOR,
Richmond, May 7, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR STROM: Thank you for your letter of May 1, and the copy of Senate Bill 10.

I am enclosing a copy of a letter I have written Virginia's Congressional Delegation on this legislation for your information.

I do appreciate your bringing this to my attention however.

With all good wishes, I am

Very truly yours,

JOHN N. DALTON.

Enclosure.

APRIL 19, 1979.

Hon. JOSEPH L. FISHER,
Cannon House Office Building,
Washington, D.C.

DEAR JOE: I have been advised that House Bill 10 concerning the rights of the institutionalized has cleared the House Judiciary Committee and is tentatively scheduled to be heard on the floor on April 26, 1979. A similar bill, S. 10, has been introduced in the Senate.

I continue in my opposition to the bills as being unnecessary and redundant. I am concerned that the Attorney General may require a large bureaucratic organization to attempt a good faith effort to comply with their provisions, and such an expensive bureaucracy is unnecessary. I also feel that there is now ample provision to ensure a full and fair consideration of alleged violations of an individual's civil rights and that the bills would interpose the Attorney General as some sort of official lawyer for those confined. In brief, I feel there is an ample body of case law already existing to resolve disputes in the courts, and the scales of justice are not unduly tipped in favor of the states. Therefore, the system proposed by these bills are unnecessary, redundant and unduly expensive. I further feel they represent an intrusion into State perogatives.

A copy of a position paper setting forth Virginia's position on the two bills is attached for your use. I hope you seriously consider our position.

With all good wishes, I am

Very truly yours,

JOHN N. DALTON.

OFFICE OF THE ATTORNEY GENERAL,
Olympia, Wash., May 9, 1979.

Hon. STROM THURMOND,
U.S. Senate, Committee on Armed Services,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you very much for your thoughtful letter of May 1, 1979 on S. 10. I am delighted in your understanding of, and opposition to, that proposal.

Both the National Association of Attorneys General and I, as Attorney General of the State of Washington, have opposed the bill and its predecessors as an outrageous violation of the basic precepts of federalism. Our experience in the State of Washington with the Department of Justice has been almost entirely negative. It's interferences with the appropriate determination of state policies of the state itself are simply too numerous to mention.

You have already put your finger on the most important objection to S. 10: The separation of the enforcement authority of such policies as the department may determine to be appropriate from the responsibility of coming up with the money to implement them. I hope that you can persuade your colleagues of the justice of your position and I will continue to oppose the proposal with my own congressional delegation.

Sincerely,

SLADE GORTON,
Attorney General.

THE STATE OF WYOMING,
ATTORNEY GENERAL,
Cheyenne, Wyo., July 13, 1979.

Re S. 10, H.R. 10.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: The State of Wyoming, while supporting the objectives of the "Institutions Bill" with regard to fully protecting the rights of institutionalized persons, vehemently objects to the procedure for correction envisioned by the bill. In line with the position announced by the National Association of Attorneys General and the National Association of State Mental Health Program Directors, we believe that there exist far more reasonable alternatives to the litigious solution suggested by this legislation.

The practical problems which the bill raises are overwhelming. It seems possible, for instance, that the Justice Department might prevail in litigation against a political subdivision, resulting in an order that the subdivision take corrective action far beyond its means to accomplish. I am advised that Congressman Kastenmeier's amendment to allow federal financial assistance to the defendant state or subdivision failed to pass, indicating that while the federal government is granted the right to make the initial determination that an egregious condition exists, there is no concommitant duty to lend assistance in any meaningful way.

How the elected representatives of the states can support a bill which suggests a procedure which has cost one state $56,000 to answer one set of interrogatories, when that same amount would probably have corrected the egregious condition, appears to be a sterling example of an exercise in counterproductivity.

This is, after all, a nation of states. It seems as though some of our congressmen forget that they are elected to represent the people of those states, and not to bludgeon them with needless lawsuits.

I sincerely hope that the United States Congress will recognize the pitfalls inherent in this legislation and take proper steps to enact law which puts the federal government and the states on the road to a cooperative solution. The disagreements which this state has had with the federal government are well known to all. I believe that these differences are, to a large degree, the result of precipitous action taken

by our lawmakers without due regard for the legitimate interests of the several states, and the special conditions which exist in each.

Why not spend the tax dollars of the people of this state to help them, rather than to sue them.

Sincerely yours,

JOHN D. TROUGHTON,
Attorney General.

XVI. ADDITIONAL VIEWS OF SENATOR PAUL LAXALT ON S. 10

I agree with the minority views and I concur in them. I believe there is an additional issue, however, which is extremely important and which should not be forgotten.

It is my opinion that there is no need for this bill. I have consistently opposed legislation since coming to Congress which, in my view, is not needed and which simply gives an agency of the Federal government more authority than it now has. I believe that this bill falls into that category, and thus believe that the bill is unsound.

There have indeed been many, many cases of outrageous treatment of the inmates of both Federal and State institutions throughout the country. I have no quarrel with that fact, and believe that the hearing record speaks for itself. However, few of the cases of recent years cited in the hearing record as examples of deprivations of constitutional and legal rights and privileges do not indicate a pattern or practice of wanton or willful neglect, but are only incidents.

This bill, however, requires that as a condition precedent to bringing suit the Department of Justice must have reasonable cause to believe that institutionalized persons have been subjected to egregious and flagrant conditions pursuant to a pattern or practice of resistance, on the part of State or local officials, to allowing them enjoyment of their constitutional and legal rights. Incidents, in themselves, are not enough.

This bill gives the Department of Justice much broader authority to enter the judicial arena against State and local officials than it has had in the past, and gives it far broader authority than it should be granted without compelling evidence of a severe need requiring correction. In a situation such as this where a government agency is given such broad authority, particularly authority which directly intrudes into what has traditionally been the domain of State governments, there must be a showing that there is an unquestioned need for that authority to be granted. Without a showing of such need, there is, in my view, no justification for the bill.

Thus the questions must be asked: what is the need for this bill? What is the evidence of patterns and practices of such behavior which warrants the intrusion of the Federal government into this area? Are there instances where a court has made a finding, based on evidence submitted to it, of a pattern or practice of such conduct? Or are there even instances where there might be a reasonable inference of a pattern or practice of such violations? There are not. No court has made a finding of a pattern or practice of such violations, and we find few situations where a reasonable inference might be drawn that such a pattern or practice existed.

The incidents of abusive conduct cited by the proponents of the bill are not the sort of behavior which constitute willful and wanton

conditions, or conditions of gross neglect pursuant to a pattern or practice of resistance. They are incidents and only incidents. To strictly adhere to the terms used in the bill, it would be necessary that State officials, including governors and state attorneys general not only knew about such conduct, but in fact approved of it. As a former Governor myself, I don't believe that's the case. The cases in which the Justice Department has heretofore intervened, and which have been cited as the sort of cases which this bill would authorize the Justice Department to commence, involve, for the most part, issues such as whether inmates of institutions will be provided 30 instead of 20 hours of rehabilitative training per week, or involve the amount of money spent on recreational facilities per inmate. Those are not, we believe, questions in which the Justice Department should involve itself.

Therefore, until a showing has been made that there exist situations where there appears to be a pattern or practice of deprivation of rights, as defined in the bill, there is little justification for this bill, and its passage unnecessarily grants the Federal government and the Department of Justice power which they do not need.

PAUL LAXALT.

XVII. ADDITIONAL VIEWS OF SENATOR ALAN K. SIMPSON ON S. 10

In my years of legislating and practicing law I have learned to become most wary when examining issues which are presented while enmeshed in "horror stories" obviously intended to touch every fine human emotion. I trust my colleagues might agree with me in observing that we have seen enough bad legislation passed for the best of motives. I trust they might also agree that actions taken based on narrow perspectives often have a very harmful long run effect.

We are urged by the proponents of this legislation to believe that the states are absolutely immobilized to correct deficiencies in this area and that state institutions seem to make a practice of utilizing clubs, boiling water, electric shock and other bizarre methods of "treatment." Certainly there may be abuses. There have been carefully highlighted—and rightly so. But I do not believe that plain barbarism is common in state institutions in America.

When abuses do occur, I believe they are usually brought swiftly to light by neighbors, relatives, reporters, and sympathetic institutional employees and public officials, including employees of the federal agencies—such as HEW—which provide federal funds. Governors and legislators then have a clear history of doing the very best they can to respond and improve conditions, usually with quite limited resources. I served in a state legislature for 14 years. As others who have served in such bodies know, the state legislatures consist of responsible, conscientious persons doing the hard jobs they were selected to perform—and often in "citizen legislatures."

I do not believe that interference by the Justice Department into areas of state sovereignty—especially in the absence of additional resources being provided—is likely to result in any significant improvement in the condition of persons residing in state institutions. In fact, the initiation of Justice Department investigatons and litigation would likely divert away considerable attention, time, and resources of our state institutions and officials. Consequently, S. 10's grant of new power to the Justice Department at the expense of the states is surely not justified.

ALAN K. SIMPSON.

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END