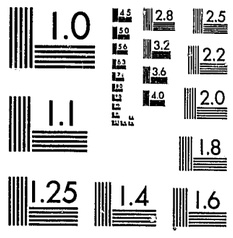

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Department of Justice

REMARKS OF WM. BRADFORD REYNOLDS

ASSISTANT ATTORNEY GENERAL

CIVIL RIGHTS DIVISION

Before

the

Association of State Correctional
Administrators at the F.B.I. Academy
Quantico, Virginia

on

Tuesday, April 6, 1982

Distinguished members of the Association of State Correctional Administrators. I am pleased to have this opportunity to meet with you this afternoon about a matter of mutual concern - the future direction of correctional services for adult offenders.

As in many other aspects of American life, I suspect there is a dream shared by all of us who daily toil at the often thankless task of correctional services administration. It is a dream of an ideal correctional world where adult offenders are exposed to a cohesive, comprehensive system that results in a substantial change in their anti-social, criminal behavior. It's a system where individualized needs are met, mutual respect is given, support -- both moral and monetary -- is received from elected officials, and the public applauds the positive results.

There are, of course, no lawsuits in this dream. There is no need for lawsuits. The facilities are well maintained; inmates receive medical and sociological attention constantly; there are abundant numbers and types of staff; full legal services are provided; health and safety standards are religiously pursued; and religious beliefs are respected by all.

The list could go on, and it does. But just as other dreams are plagued by pressing realities and failing expectations, the dream of an ideal correctional system is also elusive. Together we struggle with the elements of our elusive dream, buoyed by successes in some areas, but then

wondering what the purpose is when the facilities continue to overflow, particularly with 2nd, 3rd and 4th - time offenders.

Today I want to talk to you about the role the Department of Justice will play in the pursuit of that dream. While lawsuits are the general stock and trade of the Department of Justice - and hardly the stuff that dreams are made of - the message I wish to bring to you today is the willingness of the Department to pursue the dream with a minimum of federal intrusiveness, with maximum emphasis on conciliation, and with a full understanding of the practical difficulties facing the States and their localities.

While some may consider the Chapman v. Rhodes case the most significant recent legal development in corrections law, I want to first talk to you about a more important development, at least as far as the Department of Justice is concerned.

In May, 1980 Congress enacted, and the President signed, the "Civil Rights of Institutionalized Persons Act" (P.L. 96-247); 42 U.S.C. 1997, et seq.). The significance of this Act cannot be underemphasized. Not only does it provide the necessary implementing legislation for the Departments' activities in corrections law, it carefully spells out the standards, time-frames, and conditions that must be met prior to the initiation of any litigation. These standards and conditions will dictate the policies of the Department of Justice currently and in future years. Since the Department participates in a number of legal actions -- and will

certainly not ignore its enforcement responsibilities under the Act -- the impact of those standards will certainly be felt at the state and local levels.

Facilities covered by the Act include jails, prisons or other correctional facilities, pretrial detention facilities for adults and juveniles, and certain other residential facilities for juveniles.

There seems to be little disagreement as to the nature of the correctional facility that is involved. The Conference Report to the Act indicates Congress recognized that facilities can be named or labelled as something other than a penal institution. Consequently, the Act also covers work farms, camps, schools and correctional centers which may not carry the name, but certainly have the purpose, of a correctional facility. The Department of Justice has no plans to develop policies that would emphasize one type of correctional facility over another, as far as utilizing Department resources are concerned.

The Act authorizes the Attorney General to institute original actions or to intervene in existing actions. Before the Department of Justice can institute an action, or intervene in an existing action, it must satisfy itself as to several particulars.

First, the Government must have "reasonable cause" to believe that the persons in the facility in question are being subjected to "egregious or flagrant conditions."

"Reasonable cause" means "sufficient evidentiary basis," which will depend on an accumulation of information about the facility, its population, reported difficulties, its history, legislative and administrative responses to the facility's problems, and general conditions of confinement.

"Egregious or flagrant conditions" is certainly a term which has a dictionary meaning, although that is not always dispositive in a legal context. "Egregious" is defined as "outstandingly bad" or "outrageous"; and "flagrant" is defined as "extremely or deliberately conspicuous" or "shocking".

According to the Conference Report to the Act, the adoption of the "egregious or flagrant" standard reflects "Congressional sensitivity to the fact that a high degree of care must be taken when one level of sovereign government sues another in our Federal system." The Justice Department understands and shares that sensitivity. The standard for initiating an investigation is thus higher for the Government than that required of private plaintiffs who can bring similar suits on the merest allegation of unconstitutional conditions.

Second, the conditions in question must cause persons in the facility to suffer "grievous harm" - not just "harm", but "grievous harm". Our experience indicates "egregious or flagrant conditions" invariably go hand in

hand with "grievous harm". Particular emphasis may be given to information about inmate violence, riots or other disturbances, injuries and deaths. No less attention will be given to information concerning "grievous harm" of a more psychological nature. Information indicating overcrowded conditions, a lack of access to recreational needs, and long periods of confinement in cells may also be relevant under such circumstances.

Third, having achieved a certain amount of information about the facility, the Department of Justice must also be able to conclude that the deprivation of rights in the facility is the result of a "pattern or practice" of denial, rather than an isolated or accidental incident. According to the Conference Report on the Act, to comply with the "pattern or practice" standard, the Department must believe that the unlawful act by the defendant (usually institutional directors and other government officials) was not an isolated or particularized departure from an otherwise lawful practice. However, there is no requirement that a conspiracy be alleged or found in order to comply with the "pattern or practice" requirement.

In short, the Act leaves no room for esoteric legal explorations of constitutional rights in otherwise unobjectionable facilities. Instead, basic and fundamental deprivations are involved - deprivations which, even though not necessarily

physically barbarous in the judgment of some individuals, are nonetheless within the Eighth Amendment's prohibition against "cruel and unusual punishment" in the minds of many.

In acquiring information about a particular facility, the Department may, and in the past has, used the resources of the Federal Bureau of Investigation (in addition to tours by Civil Rights Division personnel and consultants). Prior to initiating the investigation, however, we must -- once satisfied that the prison conditions signal a possible constitutional violation -- first notify the Governor and Attorney General of the State in which the facility is located, the facility director, and other appropriate official of our intention to take such a step. The notice is to be mailed at least seven days prior to the commencement of the investigation.

The Conference Report expresses some apprehension that State and Federal officials might not cooperate in the investigatory process. While our experience under the Act is limited so far, we have, for the most part, happily not found any lack of cooperation.

The investigatory process typically does not involve a single, one-shot visit by several officials and investigators, but a series of visits by our attorneys, agents, and experts. Often during this phase, institutional officials make some efforts to rectify the problems that led to involvement of

the Justice Department in the first place. We welcome and encourage such efforts. I should caution, however, that a quick and complete resolution of the matter has, to date, rarely developed during the investigatory period.

Assuming such an impass, and further assuming that the Department acquires sufficient information to support commencement of litigation, the Act requires several official procedures to be followed prior to commencement of a lawsuit. First, the Department must make a "good faith" effort to consult with the Governor, State Attorney General, and/or others, on the availability of Federal resources that may aid the facility in correcting problems. Second, the Department must encourage appropriate officials to correct problems by "informal methods of conference, conciliation and persuasion". A certification must be filed with the court affirming that these steps have been taken, and that appropriate officials have had "reasonable time" to take action to correct the described problems.

The Department must also provide - and certify to the court that it has provided - a 49-day written notice to the Governor, State Attorney General and other appropriate authorities, advising of the following:

(1) the conditions which are causing the problems, and the alleged pattern or practice of resistance;

(2) the supporting facts giving rise to the alleged conditions and pattern or practice -- including dates and

time periods, names of people allegedly involved (where feasible), and the date when the conditions and pattern or practice came to the attention of the Attorney General; and

(3) the minimal measures believed necessary to correct the conditions and the pattern or practice.

Only at the end of this notice period may the United States actually institute an action. The Attorney General must personally sign the complaint, and the certifications I have been discussing must bear the personal signature of the Attorney General as well.

Such procedures and requirements are intended to recognize one thing - the importance of harmonious Federal - State relations. The Conference Report states that "Congress 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."

This Administration fully supports that policy, and will continue to pursue all non-confrontational avenues available to correcting problems. Litigation is deemed the least desirable option, and is the alternative of last resort.

The procedures and requirements I have described apply to the initiation of original actions by the United States. The United State may also intervene in existing actions, and

many of the requirements for original actions also apply to interventions. Generally, the United States must wait at least 90 days after the action has been filed before intervening, and it must provide a 15-day notice to the Governor, State Attorney General, and/or others of the conditions, supporting facts and minimal measures necessary to correct the problems and pattern or practice of resistence. Again, the petition to intervene and certification must be personally signed by the Attorney General.

We feel that the Act provides a flexible and meaningful approach to a significant and highly complex problem. While the Department will not ignore its enforcement responsibilities under the Act, it will carry out its responsibilities in a manner fully sensitive to the practical difficulties facing the States and their localities.

A. Chapman v. Rhodes

The most recent Supreme Court pronouncement on corrections law occurred in June, 1981, with Chapman v. Rhodes, 49 U.S.L.W. 4677 (U.S. June 15, 1981). In Chapman, the Court ruled that confining two inmates in a cell does not alone constitute "cruel and unusual punishment." Chapman provides a useful perspective for the future course of litigation in the corrections area.

One cannot discuss Chapman without discussing the problem of overcrowding in correctional facilities. While overcrowding

is indeed an important factor in alleged violations of the Eighth Amendment -- and certainly remains significant after Chapman -- it would be erroneous to attach undue weight to overcrowding per se in a constitutional context. In Chapman, the Court upheld double-celling in 63-square feet cells. Institutional authorities would, however, be mistaken, in my view, to read the case as confined solely to the discrete question of constitutionally permissible limits on housing inmates. For the Chapman Court concluded -- and I believe correctly -- that the "totality" of prison life at the unit in question neither caused "the wanton and unnecessary infliction of pain" on inmates, nor subjected them to punishment "disproportionate to the severity of the crime" for which they were imprisoned (id at 4697).

Thus, the appropriate inquiry in prison cases addresses a host of interrelated factors in an effort to ascertain whether collectively they demonstrate that inmates at a certain facility are being subjected to "cruel and unusual punishment" in violation of the Eighth Amendment. This "totality of the circumstances" approach has several distinct facets: for example, health and safety characteristics at the facility; inmate classification systems; conditions in isolation cells; medical facilities and treatment; food service; personal hygiene and sanitation; incidence of

of inmate violence and assaults; number of assaults; number and training of personnel; training, vocational rehabilitation and recreational programs; and overcrowding.

The lesson to be learned from Chapman is that overcrowding suggests a reason for further scrutiny in a particular facility. The legal significance of overcrowding cannot be judged in a vacuum, but must be determined in an overall context measured by the "totality" standard. Consequently, the probing of constitutional conditions generally does not end with assurances that cell sizes meet or exceed perceived measurement requirements announced by the Supreme Court; nor do we view particular cell sizes to be dispositive the other way, that is, as conclusive benchmarks of absolutely unacceptable conditions in a particular facility. The square footage of prisoners' living quarters is but one among many variables, and, as such, it must take its place with the rest in the Eighth Amendment analysis.

The point is well illustrated by the facts in the Chapman case itself. While 38% of the inmate population was double-celled, the record did not show inaccessibility to adequate day rooms; a systematic failure to provide medical or dental care; greater violence; inadequate guard-to-inmate ratios, or inadequate food and sanitation.

A different result might well be expected in another case if double-celling were the practice under a different set

of circumstances -- for example, where over 65% of the inmate population is double-celled in less than 50-square-foot cells, with the balance of the population in extremely overcrowded dormitory areas; where, in addition, day room space is severely limited; where there is essentially no recreational space or activity; where the health care system showed deliberate indifference to serious medical needs; where there is a degree of inmate violence; where the guard-to-inmate ratio is sufficiently low to raise questions as to adequate security; and where inmates are being used to perform essential functions traditionally assigned to guards and other staff personnel.

These examples obviously suggest the extremes. Most cases will, of course, fall somewhere in between.

B. Remedies

Once liability is established, there remains the complex and often very perplexing question as to what is appropriate relief. We hear all too frequently -- and many times not without justification -- that the courts have transgressed jurisdictional bounds in the area of prison reform, and sought to impose their subjective views of "good" or "fair" incarceration conditions on correctional authorities with both the knowledge and expertise to know better. I am happy to report, however, that the pleas for judicial restraint have not gone unheeded by the Supreme Court.

Thus the Chapman court rightly recognized that "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system" (49 U.S.L.W. 4677, 4680). In addition, prison administrators are entitled to "wide-ranging deference in the adoption and execution of policies and practices." Bell v. Wolfish, 441 U.S. 520, 547 (1979). Finally, the Supreme Court has recognized that "Courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform". Procunier v. Martinez, 416 U.S. 396, 405 (1974). Nevertheless, when violations are discovered the courts must "discharge their duty to protect constitutional rights", Chapman, quoting Procunier, supra, at 405-406.

Remedies to overcrowded conditions typically involve orders directing construction of new facilities, release of inmates, increased use of work-release programs, increased use of "good time", and other administrative tools to hasten release times.

The United States will not follow an inflexible policy on remedies; in some cases courts have been overly intrusive in ordering relief by mandating requirements to be followed by the State. Other courts have properly left the day-to-day details of administration to State officials. As an example

of the United States position, the Department of Justice might view modest adjustments to space requirements as appropriate -- even if double-celling results -- if improvements are made in other areas, such as inmate classification, security system, and guard-to-inmate ratios, to name a few.

Consistent with this policy, we consider a court order that requires reduction in a specific facility's population to be proper -- provided that such an order is appropriately cognizant of the need for careful advance planning by the State in order realistically to meet imposed population limits over a manageable period of time. However, if the order specifies that the reduction is to be performed, for instance, by placing inmates on work release or temporary furloughs, the Department feels such an order unduly interferes with the operation of the State's prison system. Also, should a court attempt to order an expanded corrections role (community corrections, minimum security facilities, honor farms or units, half-way houses, and treatment and release centers), the Department feels such orders unnecessarily intrude on the right of the State to formulate its own policy on corrections. Setting a population ceiling should be sufficient.

The Department has similar feelings about orders that may seek to limit the size, structure and location of prison units. The size and managerial organization of state prison

systems are matters that, at least in the first instance, are best left to those charged with the responsibility for running the system. Where no specific constitutional right is implicated, judicial restrictions on the State's ability to increase prison facilities, of whatever size and at whichever sites it deems appropriate, transgresses the permissible bounds of a court's remedial authority.

In another area of potential excessiveness in remedial orders, we feel that special masters appointed to monitor implementation of court decrees are in some cases proper. However, mindful of the high risk of improper federal intrusiveness that may accompany such appointments, we feel there should always be a return as early as possible of the master's responsibility under the court order to the appropriate state or local officials.

In conclusion, I hope that I have successfully conveyed to you the attitude and approach of the Department of Justice to corrections litigation. The area has proved to be a very sensitive one -- one where we have witnessed evidence of human abuse, and one that has tested the limits of Federal-State relations. The Department will thus carefully chart its course in observing its responsibilities under the "Civil Rights of Institutionalized Persons act". As much attention as has been given to the conditions under which inmates function

will also be given to the potential damage to Federal-State relations that may result from excessive Federal intrusion.

Litigation will remain the avenue of last resort, and every reasonable effort at negotiation will be made. Nonetheless, for prisoners, the last resort is the Constitution. The provisions of the Constitution do not stop at the prison gate, and litigation concerning the applicability of its provisions must remain an available option, albeit an undesirable one.

I appreciate this opportunity to share my views with you.

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