

JUSTICE DEPARTMENT STANDING TO SUE ON BEHALF OF INSTITUTIONALIZED PERSONS: THE BAYH AND KASTENMEIER PROPOSALS

INTRODUCTION

On January 15, 1979, Senator Birch Bayh and Representative Robert M. Kastenmeier reintroduced bills (S. 10 and H.R. 10, respectively) authorizing the Attorney General to sue on behalf of institutionalized persons whose constitutionalized rights¹ are being violated.² During the 95th Congress a similar bill was approved by the House of Representatives, but the proposed legislation subsequently died in the Senate.³

S. 10 and H.R. 10 are legislative responses to federal court decisions in *United States v. Solomon*⁴ and *United States v. Mattson*.⁵ In *Solomon* the United States Court of Appeals for the Fourth Circuit held that the Attorney General of the United States has no standing, absent specific statutory authorization, to enjoin certain practices and policies of state mental health officials that were allegedly in violation of the constitutional rights of mentally retarded citizens.⁶ In the *Mattson* case, a similar suit, filed against Montana's Boulder River Hospital on behalf of mentally retarded individuals, was dismissed by the district court in Montana. This decision was affirmed by the Ninth Circuit Court of Appeals, which reasoned that Congress had neither expressly nor implicitly authorized the Attorney General to bring suit on behalf of the institutionalized.⁷

This note will consider the detrimental impact these cases have on those institutionalized persons who are unable to protect themselves against infringements of their most basic constitutional rights. In addition, the note will examine both the need for legislation clearly authorizing the Attorney General to initiate actions on behalf of institutionalized persons and the adequacy of the specific remedies provided by S. 10 and H.R. 10.

1. See text accompanying notes 108 and 109 *infra*. See also note 2 *infra*.
2. S. 10, 96th Cong., 1st Sess., Senate Comm. on the Judiciary, *Civil Rights of the Institutionalized*, S. Rep. No. 96-416, 96th Cong., 1st Sess. 3-9 (1979) [hereinafter cited as S. 10], and H.R. 10, 96th Cong., 1st Sess., 125 Cong. Rec. H3645-46 (daily ed. May 23, 1979) [hereinafter cited as H.R. 10]. Under these two bills, the Attorney General may bring an action on behalf of prisoners, if such persons are subjected to conditions depriving them of "rights, privileges, or immunities secured or protected by the Constitution of the United States." All other institutionalized persons' rights could be protected by means of Justice Department actions brought under the broader term "Constitution or laws of the United States (emphasis added)."
3. Senator Birch Bayh (D. Ind.) stated on October 11, 1978:
[T]here is a most important piece of legislation which we have not taken up.
. . . [A] bill to authorize actions by the Attorney General to redress deprivations of constitutional and other federally protected rights of institutionalized persons, which has been on the Senate calendar since late July, will not be considered in this session of the 95th Congress by the Senate despite its strong bipartisan support—support reflected clearly by the 254-to-69 vote on the House companion bill and the 11-to-6 vote in the Senate Judiciary Committee.
. . . 124 Cong. Rec. S18251-52 (daily ed. Oct. 11, 1978) (remarks of Sen. Bayh).
4. 563 F. 2d 1121 (4th Cir. 1977), *aff'g* 419 F. Supp. 358 (D. Md. 1976).
5. 600 F. 2d 1295 (9th Cir. 1979).
6. 563 F. 2d at 1123.
7. 600 F. 2d at 1299-1300.

BACKGROUND OF S. 10 AND H.R. 10

Minimal Rights of the Institutionalized

In recent decisions, the federal courts have acknowledged that institutionalized persons placed in state facilities have certain constitutional rights to which they are entitled under the fourteenth amendment.⁸ Individuals placed in state institutions may not be deprived of liberty without due process of law.⁹

All institutionalized persons have a right to food, a right not to be subject to physical abuse and a right not to be placed in grossly insanitary facilities.¹⁰ These minimal rights are part of a broader right to a decent and humane living environment which is guaranteed to such persons under the United States Constitution.¹¹ In the landmark case of *Wyatt v. Aderholt*,¹² which affirmed, in part, the district court decision in *Wyatt v. Stickney*,¹³ the Fifth Circuit stated that the Constitution guarantees certain basic rights to persons civilly committed to state mental institutions.¹⁴ *Stickney* marked the beginning of a series of lawsuits brought to secure basic rights for the institutionalized. It was also in *Stickney* that Chief Judge Frank M. Johnson, Jr. first ordered the Department of Justice to appear in the suit as amicus curiae and to assist the court in enforcing federal standards.¹⁵ Thereafter, the Office of Special Litigation and the Office of Public Accommodations and Facilities of the Civil Rights Division of the Justice Department (acting as both plaintiff-intervenor and initiator in various other suits) have continued to challenge both inhumane conditions of confinement in state institutions and the constitutionality of certain state commitment statutes.¹⁶

8. *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971); *Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974), *rev'g in part and aff'g in part* 344 F. Supp. 373 (M.D. Ala. 1972) and 344 F. Supp. 387 (M.D. Ala. 1972).
9. *Stickney* stated:
When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense." . . . The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions
. . . . To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.
325 F. Supp. at 784-85.
10. *Cunningham v. Jones*, 567 F.2d 653 (6th Cir. 1977)(right to food); *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968)(right not to be subject to physical abuse); *Shapley v. Wolff*, 568 F.2d 1310 (9th Cir. 1978) and *Wyatt v. Stickney*, 334 F. Supp. 1341, 1342-43 (M.D. Ala. 1971) (right not to be placed in grossly insanitary facilities).
11. *Holt v. Sarver*, 442 F.2d 304, 307-08 (8th Cir. 1971), *aff'g* 309 F. Supp. 362. *See also* *Battle v. Anderson*, 594 F.2d 786 (10th Cir. 1979), in which the court expressed an interest in ascertaining whether the state of Oklahoma had remedied substandard and inhumane conditions (in penal institutions) resulting in unconstitutional deprivations of rights.
12. 503 F.2d 1305 (5th Cir. 1974).
13. 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 387 (M.D. Ala. 1971-72), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).
14. 503 F.2d at 1310-13.
15. 325 F. Supp. at 786.
16. *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) *aff'g* 419 F. Supp. 358 (D. Md. 1976); *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).

The Fifth Circuit emphasized, in *Gates v. Collier*,¹⁷ that prisoners are entitled to decent living conditions when they are incarcerated in State institutions. *Collier* stated:

The prohibition against cruel and unusual punishment contained in the Eighth Amendment, applicable to the State of Mississippi through the Due Process Clause of the Fourteenth Amendment . . . is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison.¹⁸

Subsequent cases have insisted that those in correctional institutions have a right to be assigned to sanitary facilities. Unsafe and insanitary prison conditions at the Louisiana State Penitentiary at Angola, the Fifth Circuit concluded, violated the eighth amendment.¹⁹

Aderholt and *Stickney* also indicate that where mentally ill or retarded persons are civilly committed against their wishes to facilities for a specific constitutionally permitted purpose, due process prohibits mere custodial care in lieu of actual treatment.²⁰ A distinction must be made between the minimal rights of those in state prisons and the minimal rights of those in special state facilities for the treatment and care of such persons as the mentally ill, the mentally retarded, or the elderly. Prisoners do not necessarily have a right to treatment (unlike those individuals who are involuntarily committed for reasons other than subjection to criminal penalties).²¹

Certain rights, then, are afforded the institutionalized by the Constitution itself. Significantly, the courts have maintained that to the extent that such rights are of constitutional dimension, suits against officials are not barred by the eleventh amendment.²²

17. 501 F.2d 1291 (5th Cir. 1974).

18. *Id.* at 1300-01.

19. *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977).

20. 503 F.2d at 1312; 325 F. Supp. at 784-85. Although the Supreme Court has not definitely expressed its view as to whether institutionalized persons in state mental hospitals or other non-penal institutions have a "right to treatment" under the due process clause of the fourteenth amendment. Chief Justice Burger, in his concurring opinion in *O'Connor v. Donaldson*, 422 U.S. 563,587-89 (1975) insisted:

In sum, I cannot accept the reasoning of the Court of Appeals and can discern no basis for equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without due process of law with a constitutional right to *treatment*. Given the present state of medical knowledge regarding abnormal human behaviour and its treatment, few things would be more fraught with peril than to irrevocably condition a State's power to protect the mentally ill upon the providing of "such treatment as will give [them] a realistic opportunity to be cured." Nor can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a "trade-off."

Chief Justice Burger, then, is the only Supreme Court Justice who has explicitly rejected the concept of a right to treatment. Nonetheless, three members of the Supreme Court, Justice Brennan, Justice Marshall, and Justice Stevens, have expressed approval for *Aderholt* and *Stickney*. *Parham v. J.R.*, 61 L.Ed.2d 101, 135 (1979). The holding of *Aderholt* concerning right to treatment has not been overruled, despite differing views among the circuit. The First Circuit, for example, acknowledged the holding of *Aderholt* but distinguished it on the facts in *Harper v. Cserr*, 544 F.2d 1121 (1st Cir. 1976).

21. 334 F. Supp. at 1342-43. *See also* 503 F.2d at 1308-09. With respect to prison conditions, the courts have limited relief under the eighth and fourteenth amendments to conditions which offend contemporary notions of decency and human dignity, shock the conscience, or are a grave and immediate threat to health or physical well being. *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974); *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972); *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

22. 503 F.2d at 1314; 357 F. Supp. at 765.

Extent of Deprivations

Violations of institutionalized persons' rights have occurred throughout the country and have not been restricted to any one area. In *Morales v. Turman*²³ the district court pointed to abuses, including confinement in homosexual dormitories and widespread beatings inflicted in a wholly arbitrary fashion, at a Texas prison for juveniles.²⁴ The *Aderholt* court noted that Bryce Hospital, a state mental hospital in Alabama, did not even provide its patients with an adequate diet. As explained by the Court, "Malnutrition was a problem: the United States described the food as 'com[ing] closer to "punishment" by starvation' than nutrition. At Bryce, the food distribution and preparation systems were unsanitary, and less than fifty cents per day per patient was spent on food."²⁵ Other abuses were summarized by the court as follows:

There were severe health and safety problems: patients with open wounds and inadequately treated skin diseases were in imminent danger of infection because of the unsanitary conditions existing in the wards, such as permitting urine and feces to remain on the floor Aides frequently put patients in seclusion or under physical restraints without physicians' orders. One resident had been regularly confined in a straightjacket for more than nine years Seclusion rooms were large enough for one bed and a coffee can, which served as a toilet. The patients suffered brutality, both at the hands of the aides and at the hands of their fellow patients; testimony established that four Partlow residents died due to under-staffing, lack of supervision, and brutality.²⁶

A federal district court in New York²⁷ grappled with abuses at New York's Willowbrook State School for the Mentally Retarded where the evidence revealed massive overdrugging of children, the loss of eyes, ears, and teeth by children subjected to physical abuse by other students and the confinement of a cerebral palsy victim at Willowbrook for sixteen years as the result of a misdiagnosis of mental retardation.²⁸

Among the inhumane living conditions at the Louisiana State Penitentiary at Angola were tremendously over-crowded facilities, serious fire and safety hazards, twenty violent deaths within three years, 270 stabbings during the same period of time, numerous "forcible rapes," inadequate medical care and insanitary conditions in the main kitchen (as exemplified by the accumulation of sewage and a serious rodent problem).²⁹

23. 364 F. Supp. 166 (E.D. Tex. 1973), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

24. *Id.* at 170-74.

25. 503 F.2d at 1310.

26. *Id.* at 1310-11.

27. *New York State Association 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).

28. *Id.* at 756. *See also* 125 Cong. Rec. S106 (daily ed. Jan. 15, 1979) (remarks of Sen. Bentsen).

29. 547 F.2d at 1211. *See also* *Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977), where the Fifth Circuit ruled that the conditions at Duval County Jail in Jacksonville, Florida were such as to violate its prisoners' constitutional right to due process.

Impact of Justice Department Involvement in Suits

Participation by the Justice Department in suits on behalf of the institutionalized has resulted in significant improvements at state institutions. For example, Mr. Stanley Brodsky of the American Psychological Association testified before the Subcommittee on the Constitution of the Senate Committee on the Judiciary and noted:

In *Wyatt v. Stickney* in 1972, the Justice Department joined two other groups in a successful suit against the Alabama Department of Mental Health. Among other dramatic consequences of this action, living conditions for the patients have greatly improved, staff-to-patient ratios have risen, and, perhaps most important, a deinstitutionalization program has resulted in many patients being released to their home communities. Now, 1,800 patients are in residence at the State hospital, whereas 5 years ago 5,800 patients were confined. Per patient expenditures have risen sixfold and a court-created human rights committee monitors the continued efforts to meet minimum treatment and living standards for the patients.³⁰

Thus, as a result of federal intervention, mental patients at Alabama's Bryce Hospital are receiving much improved care. At Mississippi's Parchman State Prison, dilapidated and severely overcrowded camps have also been replaced with modern facilities meeting recognized standards as a result of litigation assisted by the Justice Department.³¹ The Justice Department's involvement in litigation concerning the Willowbrook State School³² produced positive results as well. Mentally retarded persons at Willowbrook now receive more training in a cleaner and less crowded environment.³³

A report on the civil rights of the institutionalized, prepared in 1979 by the Senate's Committee on the Judiciary, comments further:

[T]he Justice Department has also been involved in suits challenging the constitutionality of several States' civil commitment statutes 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

Barriers to Future Involvement of Justice Department

The Justice Department's authority to protect the rights of the institutionalized has been severely eroded by the holdings in *Solomon* and *Mattson* that the United States Attorney General has no standing to sue on behalf of the

30. *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 445 (1977) (statement of Stanley Brodsky).

31. *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). See, Senate Comm. on the Judiciary, *Civil Rights of the Institutionalized*, S. Rep. No. 96-416, 96th Cong., 1st Sess. 15 (1979) [hereinafter cited as *Senate Report*].

32. *New York State Ass'n v. Rockefeller supra* note 27.

33. *Senate Report, supra* note 31, at 11.

34. *Id.* at 13-14.

institutionalized absent specific statutory authorization. Although the Attorney General may intervene under Federal Rule of Civil Procedure 24(a) and (b) in suits brought by individual institutionalized persons to vindicate their civil rights, the Department of Justice may not institute new suits.³⁵ In addition, there is a danger that defendants may cause needless delay by objecting to the United States' participation in suits as a plaintiff-intervenor.³⁶ Congress has already granted the Attorney General power to intervene pursuant to Federal Rule of Civil Procedure 24, but some litigants have attempted to interpret the *Solomon* and *Mattson* decisions as precluding any participation by the Justice Department in suits on behalf of the institutionalized.³⁷

Solomon and *Mattson* narrowly construe past cases in which the Supreme Court has upheld the standing of the United States to initiate various civil suits without express statutory authorization. In one line of cases, beginning with the 1895 decision of *In re Debs*³⁸ and culminating in the 1967 decision of *Wyandotte Transportation Co. v. United States*,³⁹ the Supreme Court permitted the Attorney General to sue for injunctive relief when obstructions to commerce greatly inconvenienced citizens. Although criminal sanctions were provided by the Rivers and Harbors Appropriation Act of 1899,⁴⁰ the statute did not provide for injunctive relief. In *Wyandotte*, therefore, the Court found an implied right of action. Congress did not intend, the Court concluded, that remedies provided by the Act be exclusive.⁴¹ The earlier decision of *In re Debs* influenced subsequent judicial receptivity to implied federal remedies.⁴² In the *Debs* case, the Supreme Court embraced the notion that the Constitution implicitly authorized the United States to bring suit in its courts to protect the public. Injunctive relief could be sought by the government, the Court explained, in circumstances threatening to cripple the transport of Chicago's mail.⁴³ Despite the absence of explicit statutory authorization of such injunctive relief, the Court found a duty on the part of the government to remove obstructions to commerce to the extent Congress had activated its commerce power by oversight of interstate railroads.⁴⁴ Representative Robert Drinan recently expressed the view that such precedents as *Debs* and *Wyandotte* "would appear applicable to civil actions brought by the Government involving deprivations of certain federal constitutional and statutory rights of institutionalized persons to the extent Congress has made such conduct arguably a criminal offense" ⁴⁵

35. An additional danger is pointed out *id.* at 17, where it is stated that "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."

36. *Id.* at 17, where it is stated that "suits in which the United States is currently participating as *amicus* or plaintiff-intervenor will be disrupted by defendants' motions to dismiss the United States as a party, based on the *Solomon* and *Mattson* decisions."

37. *Id.*

38. 158 U.S. 564 (1895).

39. 389 U.S. 191 (1967).

40. 33 U.S.C. §§ 401, 403-04, 406-09, 411-15, 418, 502, 549, 686, 687 (1970).

41. 389 U.S. at 200-01.

42. Note, *Implied Executive Authority to Bring Suit to Enforce the Rights of Institutionalized Citizens*, 26 Cath. U. L. Rev. 794, 799 (1977).

43. *Id.* at 797-98.

44. 158 U.S. at 582.

45. 125 Cong. Rec. H3,636 (daily ed. May 23, 1979) (remarks of Rep. Drinan).

This reasoning was not accepted in the *Solomon* or *Mattson* decisions, which were reluctant to accept a broad application of *Debs* for two separate reasons. The first and foremost worry of the appellate courts in *Solomon* and *Mattson* was that the doctrine of separation of powers, coupled with the failure of Congress to approve bills introduced for the purpose of granting the Attorney General standing to sue on behalf of the institutionalized, precluded any finding of an implied right of action. For instance, the *Solomon* opinion cited the famous "Steel Seizure Case," which held that without statutory or constitutional authority to seize the nation's steel mills any such seizure by the President was unconstitutional.⁴⁶ Since the Constitution assigned legislative powers to the Congress, *Solomon* reasoned, the executive branch may not initiate suits without explicit Congressional authorization by statute. *Solomon's* reliance on separation of powers doctrine in these situations has been criticized by the Third Circuit recently and may indicate a forthcoming split in the circuits on this issue.⁴⁷

The *Solomon* court indicated that it might have been more receptive to the Government's argument that, under *Debs*, an implied right of action could be found if the Congress had not specifically declined to authorize the Attorney General to sue on behalf of institutionalized persons. *Solomon* stated that "[i]n the instant case, if we were to read *Debs* to authorize this suit, we would . . . authorize the executive to do what Congress has repeatedly declined to authorize him to do [as indicated by Senate inaction on S. 10's predecessors]."⁴⁸ *Mattson* similarly cited the "Steel Seizure Case" for the proposition that the delicate equilibrium among the several branches of government would be disrupted by an attempt of the executive branch to encroach upon Congress' legislative realm.⁴⁹ The *Mattson* court explains:

Institution of the suit represents a laudable effort on the part of the United States to ensure that those needing special care and treatment receive it But we must also be concerned with . . . maintaining a viable separation of powers between the branches of government so that one does not intrude unnecessarily into the sphere of another.⁵⁰

It is ironic that these courts might have been more inclined to find an implied right of action and thus to reverse rather than affirm the district court opinions in *Solomon* and *Mattson* had the Congress not even considered S. 10, H.R. 10, and their predecessors. Inaction by the Senate has been construed by federal appellate courts as Congressional refusal to grant the Attorney General standing to sue on behalf of the institutionalized.

46. 563 F.2d at 1128-29.

47. *Halderman v. Pennhurst State School*, Nos. 75-1490, 78-1564, 78-1602 (3rd Cir. 1979).

48. *Id.* at 1129.

49. 600 F.2d at 1301, where it is stated:

The need to protect the individual branches of government from intrusion is a task not to be taken lightly. Just as any potential abuse of the judiciary must be curbed, any attempt by the executive branch to encroach in an area properly reserved for Congress "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952).

It is on these interwoven considerations of separation of powers and compliance with procedural requirements that we reluctantly make our decision.

50. *Id.* at 1297.

A second concern expressed by the courts in the *Solomon* and *Mattson* cases regards the impact of an implied right of action on federalism. It is significant that the appellate courts in these cases gave much less weight to this second consideration than did the district courts. For example, the federal district court in *Solomon* insisted:

Just as nonstatutory executive power to sue based on a broad notion of burdens on interstate commerce insinuates the federal legal bureaucracy into practically every conceivable affair of state policy-making, thereby destroying federalism, so too does a power to sue based on notions of deprivation of thirteenth and fourteenth amendment rights. Such a blow to federalism might arguably be justified if absolutely no other adequate protection for fourteenth amendment rights were available.⁵¹

The district court further concluded that there were alternative ways to protect the fourteenth amendment rights of the institutionalized, since theoretically such individuals themselves could bring suit.⁵² This court did not consider the possibility that many institutionalized persons are intellectually or emotionally incapable of recognizing their constitutional rights. In contrast, the appellate court in *Solomon* merely alludes to the issue of federalism by noting that the Developmentally Disabled Assistance and Bill of Rights Act⁵³ does not explicitly grant the United States the authority to enforce a state's compliance with federal standards for treatment of persons with developmental disabilities.⁵⁴ This court explained that the conference committee report explaining that Act explicitly refers to the use of state judicial forums rather than the federal judicial forum where the United States customarily brings suit.⁵⁵ Likewise, in *Mattson* the Ninth Circuit merely stated that with respect to 18 U.S.C. § 245,⁵⁶ which delineates the responsibilities of the state and federal government in enforcing certain civil rights matters, "the states have primary responsibility to enforce the prosecution of constitutional rights violations."⁵⁷

Since the federal courts have held that the Justice Department may not initiate suits on behalf of the institutionalized, only a federal statute explicitly granting the Attorney General standing in such cases will adequately protect persons residing in countless institutions from egregious constitutional deprivations.

51. 419 F. Supp. at 357.

52. *Id.*

53. 42 U.S.C. §§ 6010-12 (1976).

54. 563 F.2d at 1125.

55. *Id.*

56. 18 U.S.C. § 245 (1976).

57. 600 F.2d at 1297 & n.1.

PROPOSED LEGISLATION

Initial Proposals

During the first session of the Ninety-Fifth Congress, three bills were proposed in the House of Representatives for the purpose of granting explicit authority to the Attorney General to bring suit in federal court wherever there was reasonable cause to believe that constitutional rights of institutionalized persons were being violated.⁵⁸ A corresponding bill, S. 1393, was introduced in the Senate during the 95th Congress.⁵⁹ Despite passage of a House bill,⁶⁰ the legislation died due to inaction in the Senate.

Legislative Texts of H.R. 10 and S. 10

H.R. 10, a bill with similar text and objectives to that passed by the House during the 95th Congress, was approved on May 23, 1979. It is anticipated that S. 10, which is substantially the same as the Senate bill introduced in the 95th Congress, will reach the Senate floor this year.* The Subcommittee on the Constitution of the Senate Committee on the Judiciary has recommended passage of the bill, and the Judiciary Committee as a whole has approved the text of the proposed Legislation.⁶¹

A. Provisions Authorizing Attorney General to Initiate Suit

The key provision in H.R. 10⁶² is section 2, which grants the Attorney General statutory authority to initiate a suit pursuant to state action⁶³ resulting in conditions which cause institutionalized persons to "suffer grievous harm" and which result in deprivations of constitutionally guaranteed rights.⁶⁴ Such

* *EDITOR'S NOTE:* S. 10 was passed by the Senate on February 28, 1980, after the following three floor amendments were attached: First, Section 2(a)(2) now stipulates that notice of an investigation of a state institution must be delivered to state officials at least seven days prior to actual commencement of such investigation. Second, section 3(a)(2) is another floor amendment which was adopted and reads:

The Attorney General shall not file a motion to intervene [under the first portion of section 3] . . . before one hundred and eighty days after the commencement of the action, except that if the court determines it would be in the best interests of all parties to the litigation, the court may shorten or waive the time period.

Third, a new section of the bill provides that the provisions of the Senate bill are not to be given precedence over statutory authority previously granted the Department of Health, Education, and Welfare. This section is now section 10, and section 10 of the Senate bill as it was approved in committee is now section 11. (See footnote 102).

58. H.R. 2439, 95th Cong., 1st Sess. (1977); H.R. 5791, 95th Cong., 1st Sess., (1977); H.R. 9400, 95th Cong., 1st Sess. (1977). For the text of these bills, see *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 285-88 (1977).
59. S. 1393, 95th Cong., 1st Sess. (1977). For the text of this bill, see Senate Comm. on the Judiciary, *Civil Rights of Institutionalized Persons*, S. Rep. No. 95-1056, 95th Cong., 2nd Sess. 3-5 (1978).
60. On November 15, 1979 S. 10 was voted out of committee. See 125 Cong. Rec. D155 (daily ed. November 15, 1979).
61. H.R. 10, 96th Cong., 1st Sess. (1979).
62. In the recent case of *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), the Supreme Court held that state action must consist of active rather than passive authorization or encouragement by the state. A state's mere acquiescence in a private action does not constitute state action.
63. 125 Cong. Rec. H3,645 (daily ed. May 23, 1979).

deprivations, however, must also be "pursuant to a pattern or practice of resistance to the full enjoyment of such [constitutional] rights, privileges and immunities . . ."65 The House bill thus limits the circumstances in which suits may be brought to those where there have been repeated violations of constitutional rights rather than isolated deprivation of such rights.

The corresponding provision in the Senate bill,66 while substantially the same as section 2 of H.R. 10, requires in addition that the requisite state action result in "egregious or flagrant conditions (conditions which are willful or wanton or conditions of gross neglect) which deprive such [institutionalized] persons of any [constitutional] rights . . ."67 Thus, the Senate bill reflects a more cautious approach than does the House bill as to what conditions in an institution will justify a suit brought by the Justice Department. The Senate Committee on the Judiciary's 1979 report on the civil rights of the institutionalized adds, "These additional 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."68

B. Definitions of Institutions

Both the House and Senate bills include within their definitions of an institution a facility which houses or provides care for the mentally ill, disabled, retarded, chronically ill or handicapped.69 In addition, jails, prisons, correctional facilities, pretrial detention facilities and custodial facilities are considered institutions for purposes of H.R. 10 and S. 10.70 Further, both proposals specifically state that facilities in which juveniles are placed awaiting trial, in which juveniles reside for purposes of receiving care or treatment, or in which juveniles live for other State purposes are regarded as institutions.71 S. 10, however, stipulates that schools providing elementary or secondary education for juveniles who are not delinquent, handicapped, or neglected may not be considered institutions, despite any affiliation with a state.72

The definitions of institution provided by H.R. 10 and S. 10 include only a facility "which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State . . ."73 State action,

65. *Id.* This provision serves to limit actions to those cases in which there been repeated constitutional infractions and in which substantial numbers of institutionalized persons are being abused.

66. S. 10 *supra* note 2, at § 1.

67. 125 Cong. Rec. S105 (daily ed. Jan. 15, 1979).

68. *Senate Report, supra* note 31, at 29.

69. H.R. 10 *supra* note 2, at § 1 and S. 10 *supra* note 2, at § 8.

70. *Id.*

71. *Id.*

72. S. 10 *supra* note 2, at § 8.

73. H.R. 10 *supra* note 2, at § 1 and S. 10 *supra* note 2, at § 8.

therefore, is required before the Justice Department may participate in the suits contemplated by these bills. If a state contracts with a private facility "to fulfill functions traditionally performed by the State,"⁷⁴ residents of such an institution would be protected by the bills. Nonetheless, under the Senate bill, the mere licensing of private facilities by a state or the mere "licensure and receipt of monies under Title XVI, Title XVIII or Title XIX [of the Social Security Act]"⁷⁵ does not satisfy the requirement of state action. In this respect, the Senate bill is more restrictive than H.R. 10. It must be pointed out, of course, that neither the House nor Senate bills purport to do more than grant the Attorney General standing to sue pursuant to a cause of action already permitted under the fourteenth amendment,⁷⁶ which itself requires state action to become operative.

C. Provisions for Intervention of Attorney General

A third major difference between the two bills is that the House bill does not specifically provide for the intervention of the Justice Department in suits brought by others, in contrast to the explicit provision for intervention by the Attorney General in the Senate bill.⁷⁷ Section 3 of S. 10 states that the Attorney General may intervene in accordance with the Federal Rules of Civil Procedure when he has reasonable cause to believe that a state is depriving institutionalized persons of rights, secured by the Constitution or laws of the United States, pursuant to a "pattern or practice" of deprivation resulting in grievous harm.⁷⁸ Although H.R. 10 does not concern itself with the matter of intervention, it implicitly allows intervention pursuant to Federal Rule of Civil Procedure 24(a) and (b).⁷⁹ As a practical matter, the wording employed in the Senate bill may limit the Attorney General's intervention in suits vindicating rights of the institutionalized to those cases in which deprivations result in grievous harm.

74. 125 Cong. Rec. H3,647 where Representative Railback explains:

Supposing a State closes down a State institution such as a nursing home or an orphanage or some other facility, and places the residents in other facilities, pays for the residents, make referrals to those facilities and acts as a partner with the facility. It can be said that the institution is acting on behalf of the state.

75. S. 10 *supra* note 2, at § 8.

76. U.S. Const. amend. XIV, § 1 reads in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

77. S. 10 *supra* note 2, at § 3.

78. *Id.*

79. Fed. R. Civ. P. 24(a) and (b) reads:

(a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Accord, 125 Cong. Rec. H3643 (daily ed. May 23, 1979) (remarks of Rep. Gudger).

S. 10, moreover, requires the Attorney General to certify to the court, at least fifteen days prior to intervention, that he has provided written notification of the following to the chief executive and legal officers of the state and the director of the institution: (1) the alleged conditions violating constitutional standards, (2) supporting facts giving rise to the conditions, "including the dates and time periods during which the alleged conditions and pattern or practice of resistance occurred" and (3) the minimum corrective measures needed.⁸⁰

D. Certification Requirements for Initiation of Suits

Another area of contrast between the House and Senate bills concerns their respective sections requiring certification before initiation of suits. The Senate bill provides that the Attorney General must certify, prior to initiating suit on behalf of the institutionalized, "that he has endeavored to eliminate the alleged [unconstitutional] conditions and pattern of resistance [to full enjoyment of constitutional rights] by informal methods . . ." ⁸¹ This attempt at informal dispute resolution would not be required by the House bill. Both section 3(a)(2)⁸² of H.R. 10 and section 2(a)(2)⁸³ of S. 10 would require the Attorney General to certify that he had made a reasonable effort to consult with state officials, such as the governor and state attorney general, and the director of the offending institution "regarding assistance which may be available from the United States"⁸⁴ to help in correcting the problems. The Senate bill is more specific than H.R. 10 to the extent that only S. 10 stipulates that any federal assistance tendered must include any available financial or technical assistance.⁸⁵ H.R. 10 requires the Attorney General to certify that, at least thirty days previously, he has informed the state's chief executive and legal officers and the director of the institution of "the identity of all persons reasonably suspected of being involved in causing the alleged pattern or practice of deprivations . . ." ⁸⁶ Under the Senate bill, the Attorney General must certify the same to the court at least fifty-six days prior to initiation of the suit.⁸⁷ Both bills also require that the Attorney General certify to the court that he has previously notified (thirty days in advance under H.R. 10 and fifty-six days in advance under S. 10) the chief executive and legal officers of the state, as well as the director of the offending institution, of the alleged constitutional violations, the dates of such infringements, and the measures needed to remedy the situation.⁸⁸ The Senate bill only provides for notification concerning *minimum* measures needed to alleviate the egregious conditions.⁸⁹

80. S. 10 *supra* note 2, at § 3.

81. S. 10 *supra* note 2, at § 2.

82. H.R. 10 *supra* note 2, at § 3(a)(2).

83. S. 10 *supra* note 2, at § 2(a)(2).

84. H.R. 10 *supra* note 2, at § 3(a)(2) and S. 10 *supra* note 2, at § 2(a)(2)(B).

85. S. 10 *supra* note 2, at § 2(a)(2)(A).

86. H.R. 10 *supra* note 2, at § 3(a)(1)(B).

87. S. 10 *supra* note 2, at § 2(a)(1)(B).

88. H.R. 10 *supra* note 2, at § 3 and S. 10 *supra* note 2, at § 2.

89. S. 10 *supra* note 2, at § 2(a)(1)(c).

E. *Protection of Grievants from Reprisals*

The House and Senate bills differ as to the degree of protection they give to individuals who report suspected constitutional violations. Only S. 10 states, "No person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting."⁹⁰ This protects persons reporting the condition of any institution covered by the bill. Thus the Senate bill provides at least some protection to non-prisoners reporting violations, while the House bill provides none. On the other hand, provisions in both H.R. 10 and S. 10 protect those reporting conditions in penal institutions from such reprisals.⁹¹ These proposals require that the Attorney General, within 180 days of passage of the legislation, establish comprehensive "minimum standards" for state grievance systems and procedures used in state penal facilities.⁹² State compliance with these standards would, however, be voluntary under the Senate bill.⁹³ Section 4(c) of H.R. 10 and section 5(a)(1) and (2) of S. 10 encourage a prisoner's use of "administrative remedies" in substantial compliance with such minimum standards before actions brought pursuant to 42 U.S.C. § 1983 are litigated in the courts.⁹⁴

F. *Attorney General's Annual Report to Congress*

Provisions regarding the Attorney General's annual report to Congress have been incorporated into both bills. They provide that in his report to the Congress, the Attorney General must include "a statement of the number, variety, and outcome of all actions instituted pursuant to this Act . . ." ⁹⁵ Since the Senate bill explicitly provides for intervention as well as initiation of suit, S. 10 requires him to include in his report the "history of, precise reasons for, and procedures followed in [either] initiation or intervention in each case"⁹⁶ in which the Justice Department seeks to vindicate the rights of the institutionalized. H.R. 10 does not require a statement to the Congress concerning actions in which the Attorney General merely intervenes,⁹⁷ since that bill has no provision for intervention. Both the Senate and House bills also require a detailed explanation of the manner in which the Justice Department processes complaints from persons in penal institutions,⁹⁸ but only S. 10 requires such an explanation with regard to complaints regarding conditions in other institutions.⁹⁹ Only the House bill provides for a statement, in the report, regarding the impact of H.R. 10's provisions concerning grievance resolution of prisoner complaints, on the workload of federal courts and the quality of the grievance resolution process in penal institutions.¹⁰⁰ On the other hand, only the Senate proposal specifically requires statements, in

90. S. 10 *supra* note 2, at § 4.

91. H.R. 10 *supra* note 2, at § 4(a)(4) and S. 10 *supra* note 2, at § 5(b)(2)(D).

92. H.R. 10 *supra* note 2, at § 4(a) and S. 10 *supra* note 2, at § 5(b)(2)(B).

93. S. 10 *supra* note 2, at § 5(d). See *Senate Report*, *supra* note 31, at 35.

94. 42 U.S.C. § 1983 (1976) provides protection for individuals whose civil rights are violated under color of state law.

95. H.R. 10 *supra* note 2, at § 5 and S. 10 *supra* note 2, at § 6.

96. S. 10 *supra* note 2, at § 6.

97. H.R. 10 *supra* note 2, at § 5 does not require a statement concerning intervention in the Attorney General's annual report.

98. S. 10 *supra* note 2, at § 6(b) and H.R. 10 *supra* note 2, at § 5(2).

99. S. 10 *supra* note 2, at § 6(b).

100. H.R. 10 *supra* note 2, at § 5(3).

the report, concerning estimated costs incurred by the states as a result of the legislation, assistance made available by the federal government for purposes of correcting conditions in institutions, and "the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima."¹⁰¹

G. Provisions of Senate Bill Not Included in House Bill

There are several portions of the Senate bill which are not to be found in the House bill. For example, only S. 10 provides, "Provisions of this Act shall not authorize promulgation of regulations defining standards of care."¹⁰² This sentence is designed to prevent "right to treatment" regulations and reflects the relatively cautious attitudes of those senators fearful of granting any more authority to the Attorney General than is absolutely necessary to fulfill the purpose of the bill. In addition, the Senate bill stipulates that the Comptroller General of the United States must prepare a report of "the adequacy of programs of financial, technical, or other assistance"¹⁰³ currently available to the states from the federal government to assist in correcting conditions resulting in unconstitutional deprivations at institutions.¹⁰⁴ A "Sense of the Congress" resolution incorporated into the Senate bill would also express a desire that funds not be redirected from "one program to another or from one State to another."¹⁰⁵ This provision would, however, be in no way binding.¹⁰⁶ It should also be pointed out that S. 10 alone explicitly states that, in those suits contemplated by the proposed legislation, the prevailing party (other than the United States) may be permitted a reasonable attorney's fee at the discretion of the court.¹⁰⁷

H. Scope of Protection Granted Institutionalized Persons

S. 10 and H.R. 10 both restrict actions to protect the rights of prisoners to those cases in which an institution's conditions deprive them of "rights, privileges, or immunities secured or protected by the Constitution of the United States."¹⁰⁸ No relief will be available under the broader term "Constitution or laws of the United States (emphasis added)"¹⁰⁹ which covers all other institutionalized persons.¹¹⁰ Although those institutionalized persons who are not prisoners may, pursuant to the proposed legislation, have actions brought on their behalf by the Justice Department to vindicate federal statutory rights which are not explicitly grounded in the Constitution, such statutory rights would be enforced against the states through the fourteenth amendment. In a very real sense, therefore, these rights may be categorized as constitutional rights.

101. S. 10 *supra* note 2, at § 6.

102. S. 10 *supra* note 2, at § 10. *Editor's note:* As of Feb. 28, 1980 § 10 has become § 11.

103. S. 10 *supra* note 2, at § 7.

104. *Id.*

105. S. 10 *supra* note 2, at § 9.

106. *Senate Report, supra* note 31, at 37.

107. S. 10 *supra* note 2, at §§ 1 and 3(d).

108. S. 10 *supra* note 2, at §§ 1 and 8(a)(2)(B) and H.R. 10 *supra* note 2, at §§ 2 and 1(B)(ii). See also *Senate Report, supra* note 31, at 30 and House Comm. on the Judiciary, *Civil Rights of Institutionalized Persons*, H.R. Rep. No. 96-80, 96th Cong., 1st Sess. 20-21 (1979).

109. *Id.*

110. *Id.*

Arguments in Favor of Proposed Legislation

Proponents of the legislation have presented some compelling reasons why the bills would have a positive impact on the institutionalized. First, the Justice Department has exceptional legal resources available to aid institutionalized persons in vindication of their constitutional rights.¹¹¹ Since the proposed legislation is directed toward the alleviation of the most shocking and dehumanizing conditions in some of our country's institutions, the leading law enforcement agency of the country should play an active role in correcting these widespread abuses. As a report on the civil rights of the institutionalized prepared by the Senate Committee on the Judiciary points out, "The Justice Department's access to the investigative resources of the FBI, the technical 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."¹¹²

The proposed bills would also provide for more effective protection of institutionalized persons unable to protect their own rights. There are several reasons why many institutionalized persons are unable to secure their constitutional rights. First, many institutionalized individuals are simply not aware of their rights. When one considers the physical and social isolation experienced by many of the institutionalized, including residents at nursing homes and inmates in penal institutions, it is easier to understand that many such persons are not knowledgeable concerning legal alternatives available to them. In addition, mentally retarded juveniles in state-operated boarding schools and mentally or emotionally ill patients in hospitals may not be capable of instituting appropriate suits on their own behalf.

A second obstacle encountered by potential litigants residing in institutional facilities is a lack of funds. Given the enormous costs of litigation in our society, it is not reasonable to expect that most persons whose rights are being violated in the aforementioned facilities are able to pay legal expenses. According to the Senate Judiciary Committee's report on the civil rights of the institutionalized:

Most institutionalized persons are poor; many are indigent; none possess 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.

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.¹¹³

111. *Senate Report*, *supra* note 31, at 24-25

112. *Id.*

113. *Id.* at 20.

Not only will the continued participation of the Justice Department ease the financial burden for these individuals but it will also promote judicial economy and pave the way for consolidation of similar suits. Courts have already promoted consolidation of individual complaints in this fashion.¹¹⁴

Third, some persons are dependent for food and shelter on the very institutions which violate their civil liberties. It follows, then, that such individuals are not likely to bring suits on their own behalf for fear of retaliation by those on whom they are dependent. In fact, the House and Senate bills explicitly recognize this problem in that they make provisions for state grievance procedures to protect prisoners against reprisals.¹¹⁵ For similar reasons, S. 10 also forbids retaliation against those reporting conditions within any institution covered by the bill.¹¹⁶

A fourth consideration is that parents and relatives often fail to protect the rights of institutionalized persons because of embarrassment and fear of publicity. The fact that the institutionalized are residing in facilities away from their families points to the social isolation of many persons in custodial or penal facilities. It is imperative, therefore, that the Attorney General not only be able to intervene in suits brought by the institutionalized themselves but also that he be granted standing to initiate suits on behalf of the institutionalized.

Since the two bills only allow the Attorney General to bring suit when states have repeatedly denied the institutionalized their rights through a "pattern of practice" of deprivation, the Justice Department may only vindicate the rights of institutionalized persons when the states have repeatedly failed to act on behalf of the individuals involved. Nonetheless, it is important that the Justice Department be able to counteract state inertia preventing prompt handling of institutional abuses.

Arguments against Proposed Legislation

A chief concern of opponents of the proposed legislation is that it will lead to unwarranted federal intrusions into state matters. In short, they maintain that our concept of federalism will be further eroded.¹¹⁷ This concern seems to be unjustified in that H.R. 10 and S. 10 require extensive consultation between the United States Attorney General and key state officials.¹¹⁸ Senators Thurmond, Laxalt, Cochran and Simpson, opponents of the proposed legislation, argue, "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."¹¹⁹ While the states have the primary responsibility for maintaining high standards of care within state institutions, state action resulting in a

114. *Id.* at 23-24.

115. See text accompanying notes 91-94.

116. See text accompanying note 90.

117. *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 525-36 (1977). The state attorneys-general have almost unanimously opposed H.R. 10, S. 10, and their predecessors as an intrusion into areas of primarily state interest.

118. H.R. 10 *supra* note 2, § 3 and S. 10 *supra* note 2, § 2.

119. *Senate Report*, *supra* note 31, at 44.

“pattern or practice” of institutional deprivations of basic constitutional rights must not go unchecked. The vital role the states play in our federal system of government must always be respected. Compliance with the Constitution, however, does not conflict with reasonable state autonomy.

Opponents of the bills would apparently leave protection of the constitutional rights of the institutionalized to public interest lawyers alone. Due to the understaffing and lack of resources of many legal aid programs,¹²⁰ this alternative is unacceptable to those committed to providing more humane living environments for those in institutions. Similarly, public interest lawyers simply cannot match the resources available to state defendants.

During a 1977 hearing before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, Professor Alan Stone, a professor of law and psychiatry at Harvard University, insisted that states should be allowed to devise various solutions to problems facing institutionalized persons.¹²¹ In his view, the federal government should not impose one particular solution on institutions in various parts of the country.¹²² Although Professor Stone expressed his opposition to the legislation, he stated his belief that state attorneys general would not take an active part in eliminating institutional abuses.¹²³ In his opinion, public interest lawyers should continue to play the leading role in bringing suit on behalf of the institutionalized. As mentioned above, this is not a satisfactory answer in light of the limited resources of legal aid programs.

The most disturbing argument used by opponents of H.R. 10 and S. 10, however, is that prisoners who will benefit from the bills will be unfairly advantaged.¹²⁴ The insensitivity of this argument is born out by the documentation of the countless stabbings, homosexual rapes, and murders perpetrated on inmates of overstuffed and underfinanced correctional facilities.¹²⁵ Moreover, both H.R. 10 and S. 10 have been so drafted as to provide less protection for prisoners than for other institutionalized persons.¹²⁶

CONCLUSION

H.R. 10 and S. 10 are bills which would make available to abused residents of various institutions the legal protection afforded by the active participation of the Justice Department in suits vindicating the civil rights of such persons. That such protection is necessary is made clear by both the inhumane living

120. *Id.* at 21.

121. *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess.* 397 (1978).

122. *Id.* at 402.

123. *Id.* at 400.

124. Senate Comm. on the Judiciary, *Civil Rights of Institutionalized Persons*, S. Rep. No. 95-1056, 95th Cong., 2nd Sess. 38 (1978), where Senators Strom Thurmond, William L. Scott, and Paul Laxalt express the view that “[s]hould an irresistible impulse to legislate in this area prevail, however, a minimal improvement to the bill would be an amendment to eliminate jails, prisons, and correctional facilities from its coverage”

125. *E.g.*: *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess.* (1977); and *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess.* (1977).

126. See text following notes 108-10.

conditions which have been documented in various institutions across the nation and the significant improvements which have resulted from the Justice Department's involvement in suits brought against such institutions during the early 1970's. Up to the present time, the Attorney General has also intervened in actions brought by private citizens and contributed to the prompt resolution of cases that had previously threatened to drag on for years.¹²⁷

Of the two bills, H.R. 10 reflects less cautious draftsmanship and may provide slightly greater overall coverage for institutionalized persons. In particular, H.R. 10, in contrast to S. 10, does not place limitations on the Attorney General's authority to intervene in suits brought by the institutionalized. Thus, H.R. 10 is a more satisfactory bill than S. 10. Nonetheless, both would grant the Attorney General standing to bring suit on behalf of the institutionalized. Whichever form the Congress ultimately adopts, the legislation will have a positive impact on the operation of countless institutions and help guarantee the continued protection of vital constitutional rights.

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127. *Senate Report, supra* note 31, at 15-16.