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H.R. 4109, "The Prison Abuse Remedies Act of 2007"

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Mr. Chairman and members of the Committee, thank you for inviting me to speak on H.R. 4109, the "Prison Abuse Remedies Act of 2007." My name is John Gibbons. Over many years as both a Judge on the U.S. Court of Appeals for the Third Circuit and as an attorney I have become familiar with the difficult challenges faced by inmates and correctional facilities. I became most informed on the scope and degree of these challenges, however, serving with former U.S. Attorney General Nicholas de B. Katzenbach as Co-Chairs of the Commission on Safety and Abuse in America's Prisons.

Created by the Vera Institute of Justice, the Commission - composed of a group of twenty distinguished pubic servants - undertook a 15-month public examination of the most pressing safety and abuse issues in correctional facilities for prisoners, staff, and the public. The Commission heard from hundreds of experts, correctional facility personnel, and inmates. We visited jails and prisons nationwide. The Commission issued a report in June 2006, including thirty recommendations; among these were four recommendations concerning reform of the Prison Litigation Reform Act (PLRA).

In its report, *Confronting Confinement*, and recommendations, the Commission stressed the importance of oversight and accountability in addressing safety and abuse in corrections facilities. We found that federal court litigation has been one of the most effective forms of that oversight and accountability. The Commission identified several aspects of the PLRA that inhibit access to the federal courts and thus diminish the level of productive oversight and accountability the courts have demanded. The Commission recommended four changes to the PLRA that would improve access to the federal courts: (1) eliminate the physical injury requirement; (2) eliminate the filing fee requirement and restrictions on attorney fees; (3) lift the requirement that correctional agencies concede liability as a prerequisite to court-supervised

settlement; and (4) change the exhaustion rule and require meaningful grievance procedures. THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT, at 86-87 (June 2006). This is not, as the report stressed, an exhaustive list of reforms that can be made. Indeed, I am pleased to support H.R. 4109, which adopts essentially all of the Commission's recommendations, and also makes other significant amendments to the PLRA that will ensure that federal courts can provide justice to individual inmates and compel reform of institutions riddled with abuse.

Let me first address the important role the judicial branch plays in improving the conditions in jails and prisons. I may have a certain bias, but I tend to think judges can do a reasonably good job of resolving conflicts. Moreover, courts have often been the only means of external and sustained oversight of prisons and jails. And courts have proven to be quite good at monitoring conditions of confinement.

In discussing prison and jail conditions and prisoner abuse it is important not to lose historical perspective. Notwithstanding the problems we confront today, thirty to forty years ago prisons were in a far more deplorable state.

It was judicial intervention that led to the elimination of dangerous out-of-date correctional facilities in many states and reduced hazardous overcrowding in other prisons. *See, e.g.*, *Guthrie v. Evans*, 93 F.R.D. 390 (S.D. Ga. 1981); *Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986). Court involvement improved treatment of prisoners, addressing unnecessary and excessive force by corrections officers. *See, e.g.*, *Sheppard v. Phoenix*, 210 F. Supp. 2d 450 (S.D.N.Y. 1991); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). Litigation also secured improvement in appalling and substandard medical and mental health services for prisoners. For example, my law firm represents all of New Jersey's inmates diagnosed with HIV and AIDS

under a consent decree entered into in 1992, before the PLRA, which prohibited segregated housing and led to improved medical treatment. *Roe v. Fauver*, C.A. No. 88-1225 (AET) (D.N.J. March 3, 1992). Decrees like these are advances that should be praised and preserved, not bemoaned and rolled back.

The most obvious winners from court involvement in jails and prisons may be inmates. But as the Commission Report makes clear, the improvement of safety and reduction of abuse in prisons in America benefits everyone, including corrections staff, inmates' family members, and the greater public. *Confronting Confinement*, at 11. This fact is all the more significant given the continuing rise in the incarcerated population. According to a new report by the Pew Public Safety Performance Project, one in every one hundred adults in the United States is now in jail or in prison. THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (Feb 28, 2008), available at http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100(3).pdf. But we cannot cling to the illusory belief that what happens in prison stays in prison. Inmates take what they experienced in correctional facilities and share that with society at large once they are released, and staff bring home the problems they confront in there. Thus it behooves us all to improve the treatment of inmates and the one proven method has been through litigation and judicial resolution and oversight.

As scholars of prison litigation have observed, court have generally not sought out radical solutions divorced from the realities confronting prison officials. On the contrary, "the litigators and the judges in these cases sought out and relied on the best and the brightest among the acknowledged leaders in American corrections," relying on their testimony as expert witnesses and their judgment as special masters and monitors. *See* Malcolm M. Feeley & Van Swearingen,

The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts, and Implications, 24 PACE L. REV. 433, at 437-38 (2004).

In the Commission's study of prisons, we found that litigation was often welcomed, even invited, by prison administrators who sought improvement in their facilities. Indeed, criminology professor and researcher Barbara Owen told the Commission that corrections officials have asked her, "why don't you call up some of your friends and have them sue me?" *Confronting Confinement*, at 85. James Gondles, the executive director of the American Correctional Association, explained that litigation has led to increases in budgets and improvement in programs in correctional facilities, preventing the need for additional lawsuits. *Ibid.*

Unfortunately, the passage of the PLRA marked a decline in effective judicial oversight. The PLRA unnecessarily constrains the judge's role, limiting oversight and accountability, and ignoring the judiciary's demonstrated capacity and ability to handle what are generally basic civil rights cases. While there may have been a need to reduce illegitimate claims, the purported curative aspects of the PLRA have led to a dangerous overdose, squeezing out legitimate claims and greatly diminishing judicial oversight. Data may indicate that prisoner lawsuits have been almost cut in half, but they do not demonstrate that frivolous claims have been properly vetted. If we assess whether a claim is meritorious based on its success then the PLRA must be characterized as having failed because the proportion of successful suits has declined since the PLRA was passed. *Ibid.* And with that we have also seen an erosion of judicial oversight. The Commission found that between 1995 and 2000, states with little or no court-ordered regulation of prisons increased more than 130 percent, from 12 to 28 states. *Ibid.*

Reform of the PLRA need not open up the floodgates of prisoner litigation as some fear. The amendments to the PLRA in H.R. 4109 reflect thoughtful modifications that would permit and facilitate meritorious claims, and thus useful and effective judicial oversight, without overburdening the courts. In addressing the PLRA last year, the Supreme Court aptly characterized the task before you: "Our legal system . . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to the law. The challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 127 S. Ct. 910, 915 (2007). I now turn to how H.R. 4109 meets this challenge and improves upon the efforts of the PLRA.

Section 2 of H.R. 4109 eliminates the physical injury claim requirement for seeking compensatory damages under the PLRA. Without this critical change to the law, the PLRA bars an inmate from filing a federal civil rights action "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997(e). Serious abuse, of course, need not leave indelible physical traces. Sexual assault is one of the most insidious examples that may not leave visible marks or scars, but assuredly causes harm and trauma. Other abuses also may not cause physical injuries but do rise to the level of constitutional violations and merit legal redress. These include denial of due process, horrific conditions of confinement, and denial of religious freedom and free speech rights.

Sections 7 and 8 of H.R. 4109 restore attorney fees for PLRA claims and eliminate the filing fees for indigent prisoners. The PLRA is currently replete with provisions creating disincentives and economic burdens, discouraging inmates from filing claims, and deterring lawyers from representing inmates, even in meritorious cases. It makes little sense to discourage

lawyers' involvement in prisoner cases if the purported goal of the PLRA is in part to improve the quality of claims. Indeed, counsel may serve as a screening mechanism, vetting some claims raised by an inmate and often presenting them more clearly than might the inmate.

Section 6 of H.R. 4109 removes provisions in the PLRA that permit federal courts to issue consent decrees only if the correctional agencies acknowledge they had committed constitutional violations. 18 U.S.C. § 3626 (a)(i)(A), (c)(1). These provisions have undermined the settlement of cases because they struck at the very appeal of settlement, which is avoidance of concession of liability. In my experience as both a judge and as an arbitrator it strikes me as particularly odd to close off the options of opposing parties. Keeping all alternatives on the table is the surest way to achieve resolution of the conflict to the satisfaction of both sides. With the elimination of these requirements, federal courts will be more likely able to issue consent decrees and undertake their agreed upon critical oversight function. Section 6 also returns to the courts greater flexibility in managing their cases by providing them the authority to extend time periods before parties may move for termination of prospective relief. Currently defendant parties may move to terminate relief two years after an order and then every year thereafter. This amendment will reduce premature re-litigation and economize judicial resources, trusting in the courts to oversee their cases.

Section 3 of H.R. 4109 makes some much needed modification to the exhaustion requirement. At present, and as interpreted by the Supreme Court as recently as 2006 in *Woodford v. Ngo*, 126 S. Ct. 2378 (2006), the PLRA bars a prisoner from filing a claim in federal court unless the inmate has exhausted all administrative remedies and grievance procedures provided by the correctional facility. Failure to exhaust, which includes any procedural default such as failing to meet a two day grievance deadline, results in the automatic

dismissal of the case. Section 3 amends the PLRA, providing that while an inmate must first present her claim for consideration to prison officials, if a prisoner fails to so present and the federal court does not find the claim to be frivolous or malicious, then the court shall stay the action for up to 90 days and direct the prison officials to consider the claims through the relevant procedures.

The amendment goes a long way toward curing the inequities that occur when an otherwise valid claim is dismissed on the basis of technical violations, technical processes that are often unfair and unclear to prisoners.

Consider, for example, the scenario Justice Stevens discusses in his dissent in *Woodford v. Ngo*. An inmate who is raped by prison guards and suffers a serious violation of his Eighth Amendment rights may be barred by the PLRA from bringing such a claim if he fails to file a grievance within the narrow time requirements that are often fifteen days, but in nine states span only two to five days. 126 S. Ct. 2401-02.

Or consider the case of *Balorck v. Reece*, in which a prisoner was hospitalized during the five-day period he had to file a grievance for failing to treat his heart conditions. Discharged back to prison thirty days later, he was not permitted to file a grievance by the Grievance Aide, and because he then failed to ask for an extension of time to file as per prison policy, his claim was dismissed for non-exhaustion. 2007 WL 3120110 (W.D. Ky. Oct. 23, 2007).

Precluding an inmate who has suffered sexual assault from raising a legitimate claim in federal court - who may have failed to meet the parsimonious time requirements of the state's grievance system owing to a reasonable fear of retaliation or immediate trauma - does not comport with the legislative intent of the PLRA. Nor should hyper-technical adherence to unfair grievance procedures that are mischaracterized by prison staff prevent an injured inmate from

filing his claim in federal court. As Senator Orrin Hatch explained in introducing the legislation, "I do not want to prevent inmates from raising legitimate claims." 141 Cong. Rec. 27042 (Sept. 29, 1995) (quoted in *Woodford*, 126 S. Ct. 2401). Added co-sponsor Senator Strom Thurmond, "[The PLRA] will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates." 141 Cong. Rec. 27044 (Sept. 29, 1995) (quoted in *Woodford*, 126 S. Ct. 2401). The amendments in H.R. 4109 help realize that laudable goal of the sponsors of the PLRA. Some critics suggests that alleviating the exhaustion requirements will reward lazy inmates who fail to file timely grievances and will result in stale claims. However, in my experience in both adjudicating and litigating prisoner complaints, I rarely encountered an inmate who was loathe to complain and file a grievance, barring fear of retaliation.

It deserves mentioning that the grievance procedures themselves must be improved. It is neither sensible nor just to require that inmates exhaust procedures that do not afford them legitimate means to remedy their complaints. The *Woodford v. Ngo* decision left unaddressed "whether a prisoner's failure to comply properly with procedural requirements that do not provide a 'meaningful opportunity for prisoners to raise meritorious grievances' would bar the later filing of a suit in federal court." 126 S. Ct. at 2403 (Stevens, J., dissenting (quoting majority opinion)). At least three justices made clear that they would likely consider such preclusion unconstitutional. *Id*. at 2403-04. (Stevens was joined in dissent by Justices Souter and Ginsburg). The PLRA should be amended to fulfill the constitutional requirement "that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges." *Id.* at 2404 (citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996)).

At a minimum, Congress should not apply the exhaustion requirement in instances where the grievance procedures do not provide a meaningful opportunity to raise meritorious grievances. Congress previously tethered exhaustion to fulfillment of federal standards for grievance procedures. The predecessor to the PLRA, the Civil Rights of Institutionalized Persons Act (CRIPA), limited application of the exhaustion rule to the existence of grievance procedures that met the standards set by the Department of Justice. 42 U.S.C. § 1997e(a)(2) (1994), *amended by* Prison Litigation Reform Act of 1995 § 803(d); 28 C.F.R. §§ 40.1-40.22. Our Commission recommended a return to this link and a return to encouraging meaningful grievance procedures.

The DOJ standards include simple but essential features such as written grievance procedures available to all employees and inmates, 28 C.F.R. § 40.3; assurance of invoking grievance procedures regardless of discipline or classification to which inmates may be subject, 28 C.F.R. § 40.4; applicability to a broad range of complaints, 28 C.F.R. § 40.4; affording a reasonable range of remedies, 28 C.F.R. § 40.6; and a simple standard form for initiating grievances. States or subdivisions of the states may apply to the Attorney General for certification of grievance procedures. 28 C.F.R. § 40.11. An application for certification shall be denied in the event the Attorney General finds the procedures do not comply with these standards or are "no longer fair and effective." 28 C.F.R. § 40.16. These regulations also require the Attorney General to notify the federal appellate and district courts of the certification status of the grievance procedures. 28 C.F.R. § 40.21. The legislative history indicates the very purpose behind exhaustion under CRIPA was to "stimulate the development and implementation of effective administrative mechanisms for the resolution of grievances in correctional . . . facilities." H.R. Conf. Rep. No. 897, 96th Cong. 2d Sess. 9 (1980). The PLRA turned that

laudable goal on its head, making exhaustion a blunt instrument barring even meritorious claims regardless of the inadequacy of the grievance procedures.

Also improperly included in the overbroad sweep of the PLRA are juvenile inmates. Happily, section 4 of H.R. 4109 seeks to rectify this morally unsound application and exempts juveniles from the PLRA. Especially vulnerable to abuse in jails and prisons, yet less mentally equipped than adults to maneuver administrative and legal processes, it is especially galling to burden juveniles with the stringent time and filing requirements of the PLRA. Moreover, I have not seen statistical evidence that juveniles have filed excessive, frivolous lawsuits.

In conclusion, I unhesitatingly express my support for H.R. 4109. The bill takes significant steps toward rectifying the overbroad and overly harsh provisions of the PLRA that have denied inmates with meritorious claims their day in court. In addition, the bill reaffirms Congress's faith in the Judiciary to resolve and improve conditions and abuses in our Nation's teeming jails and prisons.

As Justice Stevens observed in commenting on the PLRA, Congress has a "constitutional duty 'to respect the dignity of all persons,' even 'those convicted of heinous crimes.'" *Woodford v. Ngo*, 126 S. Ct. at 2404 (Stevens, J., dissenting) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). These amendments in H.R. 4109 go a long way toward recognizing and fulfilling that duty. I thank the Chairman and the members of the Committee for the opportunity to present this information to you.