Department of Justice

STATEMENT

OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"REVIEW OF THE PRISON LITIGATION REFORM ACT:
A DECADE OF REFORM OR AN INCREASE IN PRISON ABUSES?"

PRESENTED ON

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Mr. Chairman and Members of the Subcommittee:

Thank you for giving me the opportunity to appear before you today to discuss the current operation of the Prison Litigation Reform Act and the proposed Prison Abuse Remedies Act. The Department recently obtained a copy of the text of the proposed Prison Abuse Remedies Act and has not yet had an opportunity to review it. As a result, I will not be able to address any specific proposals or provisions in that bill at this time.

The Prison Litigation Reform Act, which Congress enacted on a bipartisan basis and with the support of the Clinton Administration in 1996, represents an important accomplishment. All of the provisions of that law were designed to establish a balance between the rights of prisoners to seek effective judicial redress for constitutional violations arising from conditions of their confinement and society's interest in decreasing the quantity of meritless lawsuits purportedly premised on those rights.

The law has worked to accomplish this goal. In 1994, about 25% of the civil cases filed in federal court were prisoner suits. That is, the total number of lawsuits that were filed by the approximately 1.5 million prisoners in state and federal facilities amounted to more than a third as many cases as were filed that year by the remaining 300,000,000 Americans—along with corporations and other private institutions—combined. The overwhelming majority of these cases were dismissed for lack of merit, but not without consuming an inordinate amount of judicial and administrative resources and inevitably delaying the resolution of legitimate civil suits.

Prisoners, who did not contend with the common deterrents against litigation that ordinary Americans faced, "often brought [cases] for purposes of harassment or

recreation."[1] This state of affairs benefited no one: It did not help rehabilitate prisoners, rarely resulted in uncovering actual constitutional violations, distracted prison officials from the efficient operation of facilities, and delayed justice for other civil litigants.

In addition, at the time that the PLRA was enacted, federal litigation sometimes produced open-ended consent decrees that would lead the courts to exercise significant and long-term administrative operational control over prison facilities. Therefore, Congress, with the active support of the Clinton Administration, supported the PLRA's intent "to place limits on judicial oversight of prisons through the establishment of specific statutory standards for the entry and maintenance of judicial relief in prison conditions cases."[2]

The PLRA contains a number of provisions geared to balance prisoner rights and effective administration of the nation's prisons and courts. For instance, to eliminate frivolous claims based on mere offended sensibilities, the legislation requires prisoners who seek compensation for mental or emotional injury to demonstrate an accompanying physical injury as well. Such evidence is normally required under well-settled principles of common law as well as for civil rights claims brought outside the context of prisoner suits. It is important to bear in mind that this requirement does not prevent prisoners from seeking judicial recourse when they suffer constitutional injuries without physical harm.[3] Such injuries may not be physical, but they are serious, and the PLRA permits recovery for them.

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[1] Testimony of Associate Attorney General John Schmidt, "Overhauling Our Nation's Prisons." Senate Judiciary Committee, July 27, 1995 at 6.
[2] Testimony of Associate Attorney General Schmidt, "Implementation of the Prison Litigation Reform Act," Senate Judiciary Committee, Sept. 25, 1996 at 3.
[3] *See, e.g., Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003)(prisoners can recover nominal damages under PLRA for a constitutional injury absent a physical injury); *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003)(same); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002)(prisoner can recover

Similarly, Congress imposed a requirement in the PLRA that prisoners exhaust administrative remedies before filing suit. This is one of the most important provisions of the Act, and it was designed to advance several objectives. As the Supreme Court has ruled, PLRA's exhaustion requirement "gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors."[4] The Court has noted that the exhaustion requirement was enacted "to reduce the quantity and improve the quality of prisoner suits. . . . [T]he internal review might filter out some frivolous claims. And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy."[5] The last point reflects the fact that the exhaustion requirement is not designed to impair inmates' ability to succeed in court but rather to improve the quality of inmate complaints that eventually make their way to court and thus to facilitate the likelihood that prisoners with meritorious claims will prevail.

The existing administrative process is a legitimate avenue for prisoners to redress grievances in a timely manner. Prisoners need not fear retaliation from prison staff for filing grievances.

The governing Bureau of Prisons regulations provide confidentiality to the nearly 200,000 inmates in the federal prison system who choose to avail themselves of the process.[6]

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compensatory damages for constitutional non-physical injuries). Courts have also allowed prisoner lawsuits under civil rights laws that do not require physical injury. *See, e.g., Jackson v. District of Columbia*, 254 F.3d 262, 266 (D.C. Cir. 2001)(RFRA); *DeHart v. Horn*, 390 F.3d 262, 272 (3d Cir. 2004)(RLUIPA).

[4] *Woodford v. Ngo*, 126 S. Ct. 2378, 2387 (2006).

[5] *Porter v. Nussle*, 534 U.S. 516, 524-35 (2002).

[6] *See* 28 C.F.R. Part 542.

Congress also sought to reduce frivolous prisoner suits by ensuring that prisoners begin to consider common economic disincentives to bringing litigation. The absence of those disincentives significantly fueled the large number of frivolous prisoner cases that were brought before passage of the PLRA. Most civil litigants pay a portion of the costs of the court's adjudication of their case through filing fees. Before the PLRA was enacted, however, inmates were routinely granted *in forma pauperis* status and were able to file numerous cases at no cost whatsoever. The PLRA ended this practice and required inmates to pay filing fees in the federal courts, just as other plaintiffs must. Recognizing that inmates often have limited financial means, the PLRA balances this requirement by allowing inmates to pay their filing fees over time, a privilege not afforded to other plaintiffs in the federal courts.

Moreover, the PLRA provides that prisoners who egregiously abuse their access to the federal courts by filing three cases that are dismissed as malicious or frivolous or for failing to state a claim cannot ordinarily file additional cases without paying their filing fees in full. Obviously, this provision discourages the filing of frivolous lawsuits. Equally obvious is the fact that removing this barrier for frequent filers will generate *more* frivolous claims. Under current law, prisoners face the same sanctions as non-prisoner civil litigants who may be prohibited from filing if a court determines that a litigant has filed an excessive number of non-meritorious lawsuits. Again, however, balance is maintained under present law.

Despite this provision, prisoners can file additional cases if they pay the filing fee, and they can even file without prepayment of the entire fee if they seek remediation for a legal violation that poses an imminent danger.

In fact, the Supreme Court of the United States has characterized the three-strikes provision as the most successful part of the PLRA in reducing frivolous lawsuits.[7] Despite a reduction in prisoner lawsuits from 41,679 in 1995 (before enactment) to 25,504 in 2000 (after enactment), "prisoner civil rights and prison conditions cases still account for an outsized share of filings: From 2000 through 2005, such cases represented between 8.3% and 9.8% of the new filings in the federal district courts, or an average of about one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country."[8] The fact that thousands of prisoner cases continue to be brought each year demonstrates that the federal courthouses are still wide open to prisoner lawsuits.

These thousands of lawsuits are brought notwithstanding the caps on attorneys' fees associated with such cases. Some of these suits are brought by attorneys *pro bono* or funded by charitable organizations. It is true that the 150% cap on fees means that, in cases in which prisoners recover $1 in damages, their attorneys recover only $1.50 from the defendant. Few if any litigants in normal circumstances would actually file a lawsuit where the damages suffered were worth only $1, however, and it is appropriate to ask what the societal benefit from such a suit would be. Further, it is an open question why compensation for attorneys who bring such suits should be raised, when such a reform would serve only to increase the volume of such litigation. Preserving the opportunity for the filing of meritorious lawsuits has no obvious relation to the volume of lawsuits for nominal damages.

[7] *Woodford v. Ngo*, 126 S. Ct. at 2388 n.4.
[8] *Id.*and *id.* at 2400 (Stevens, J., dissenting).

There is a more subtle means by which the PLRA increases the likelihood that judicial relief will be provided in prisoner cases that actually have merit. When 25% of a court's civil docket consists of claims brought by prisoners who have relatively large amounts of free time but have not exhausted administrative remedies, the predictable result is the one that obtained before 1996: large numbers of lawsuits—well-founded and meritless alike—reviewed by a weary and increasingly unenthusiastic judiciary. In such circumstances, judicial consideration of even potentially meritorious cases will receive a jaundiced eye. Justice Robert Jackson's remark with respect to a similar category of prisoner cases more than half a century ago applies as well to prisoner civil rights cases before enactment of the PLRA: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[9] Legitimate prisoner lawsuits must receive the judicial solicitude that they are due. The PLRA as enacted, in part by reducing the number of frivolous cases, has strengthened the quality of the prisoner cases that proceed to consideration on the merits, and has inevitably increased the chances that valid claims will succeed.

As previously noted, the PLRA was also enacted in part "to eliminate unwarranted federal-court interference with the administration of prisons."[10] The law contains a number of provisions designed to advance this objective. For example, consent decrees establishing judicially enforceable prospective relief in prison condition cases are required to contain an admission of the violation of a federal right. It is one thing for the federal courts to maintain a supervisory role over prisons when established

[9] *Brown v. Allen*, 344 U.S. 443, 532, 537 (1953)(Jackson, J., concurring).
[10] *Woodford v.* Ngo, 126 S. Ct. at 2387 (citation omitted).

civil rights have been violated. It is another matter entirely when federal courts impose administrative requirements on prisons that are not based on any actual violation of federal law. Too often in the past, state officials would agree to consent decrees that did not purport to rest on any actual violations of federal law. This permitted those officials to deflect responsibility for prison conditions by blaming federal courts for onerous administrative rulings. The state officials who succeeded those who had entered into open-ended decrees frequently found that courts were unwilling to reopen the decrees even if no violations of federal law were occurring. Such a state of affairs is not consistent with either the appropriate judicial role or with constitutional principles of federalism.

It bears emphasizing that the PLRA does not discourage settlements in prison conditions litigation but narrows only the scope of consent decrees and other court-ordered relief. Settlements, as opposed to consent decrees, are not affected by the PLRA, and the Department has often obtained the relief that it seeks by entering into memoranda of understanding rather than consent decrees. Requiring courts to reconsider the continuing need for longstanding consent decrees and other court-ordered relief—as opposed to voluntary settlements—vindicates principles of accountability and federalism. Moreover, in the Department's experience, deadlines actually serve the goal of state compliance with consent decrees, as state officials discover that such compliance will actually lead to the termination of those decrees. In the past, whether prison officials came into compliance with consent decrees often had little or no effect on whether courts would terminate them. In those circumstances, prison officials had no incentive to comply sooner rather than later. And since enactment of the PLRA, the Department has

construed the deadlines in a way to permit consent decrees to continue while courts and prison officials take reasonable steps to meet the deadlines for reviewing the decrees. Once again, both as drafted and in practice, the PLRA works to secure prisoner rights. It also provides autonomy for prison officials to manage their facilities efficiently without judicial micromanagement unrelated to any actual violation of federal law.

Mr. Chairman, every law deserves congressional assessment of its operation and Congress's consideration of potential improvements. The PLRA, however, represents a well-considered congressional response to real problems that achieved its goals while taking care not to create new perils. Because it established a careful balance that the Department of Justice and the Supreme Court have taken care to maintain, the Act has reduced frivolous lawsuits and the unnecessary intrusion of the judiciary in the day-to-day operation of the nation's prisons while preserving the legal rights of inmates and their ability to obtain judicial redress for actual violations. The law should not be changed so as again to encourage the filing of the sort of frivolous lawsuits that the PLRA appropriately ended, with their negative effects on other civil litigants, prison officials, and judges, and their consumption of resources to no good end. It is simply not the case that all prisoner lawsuits uncover and remedy violations that would otherwise go unremedied or that more prisoner lawsuits are necessarily better than fewer. In fact, the history of such lawsuits before and after the enactment of the PLRA is just the opposite: Congress's reasonable restriction of these lawsuits has preserved the ability of legitimately harmed inmates to gain access to the courts and prevented the negative effects of frivolous cases in ever greater numbers.

Thank you, Mr. Chairman, for allowing me to appear before you today. I will be happy to answer any questions that you might have.