

## COMMISSION ON SAFETY AND ABUSE in America's Prisons

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November 8, 2007

Hon. John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
2138 Rayburn H.O.B.  
Washington, DC 20515

Hon. Robert C. Scott  
Chairman  
Subcommittee on Crime,  
Terrorism, and Homeland  
Security  
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Hon. Linda T. Sánchez  
Chairman  
Subcommittee on Commercial  
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Hon. Lamar S. Smith  
Ranking Member  
Committee on the Judiciary  
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Hon. J. Randy Forbes  
Ranking Member  
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Hon. Chris Cannon  
Ranking Member  
Subcommittee on Commercial  
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Dear Chairmen and Ranking Members:

As the Co-Chairs of the Commission on Safety and Abuse in America's Prisons, we write in response to the request of the Subcommittee on Crime, Terrorism, and Homeland Security to offer our views on the Prison Litigation Reform Act (PLRA). We strongly believe that reform of the PLRA is of critical importance to improving conditions of confinement, and we welcome the opportunity to explain further how the Commission came to its conclusions.

As you may know, our Commission – bringing together an extraordinarily diverse group of 20 public servants – conducted a 15-month inquiry to understand and publicly discuss the most serious issues of safety in correctional facilities for prisoners, staff, and the public. The work of the Commission, which was created by the Vera Institute of Justice, led to thirty recommendations. Among the four major topics that we encountered were a collection of issues relating to the oversight of prisons and jails. One of these was the question of the use of federal court litigation – which is a critical

component of oversight – to confront and remedy constitutional and other violations that occur behind bars. Addressing the unique importance of access to the courts for the promotion of safe and humane correctional facilities, one of the Commission’s recommendations set out four reforms to the PLRA that Congress should undertake:

- Eliminate the physical injury requirement;
- Eliminate the filing fee for indigent prisoners or make it reflective of the person’s earning power, and eliminate the restrictions on attorneys’ fees;
- Lift the requirement that correctional agencies concede liability as a prerequisite to court-supervised settlement; and
- Change the exhaustion rule, including eliminating the procedural default component at issue in the recent U.S. Supreme Court decision in *Woodford v. Ngo*.

The Commission focused on these four reforms to the PLRA because they were highlighted by our witnesses, the scholarly and practical literature, and because they reflected the views of the Commissioners based on their considerable professional experience. These recommendations were not intended to provide an exhaustive list of ways in which the statute could be successfully reformed. One of the Commission’s goals throughout the report was to contribute to a conversation about how best to achieve improvements in correctional practice. We are grateful for the opportunity to continue that conversation in this hearing.

Our Commission concluded that there are aspects of the PLRA that, in effect if not in intention, present serious obstacles to the federal courts’ ability to deliver justice and protect prisoners who are in danger or subject to abuse. Ten years of experience with the PLRA provide a sufficient empirical basis to conclude that its reform is imperative.

We understand the core salutary feature of the PLRA to be its requirement that federal courts pre-screen prisoners’ lawsuits (28 U.S.C. §§1915(e)(2) and 1915A). That is, before defendant corrections officials are required to respond in any way to a complaint (indeed before they are even served with the complaint), the court must review the complaint and dismiss it if it is deemed frivolous, malicious, fails to state a claim for which relief can be granted, or seeks damages from a defendant who enjoys immunity. Named defendants suffer no prejudice if they present no response prior to the initial court screening – they cannot be found in default and no negative inference can be drawn from their silence. They have no obligation to respond unless and until the court determines that the prisoner has presented a claim that surpasses the PLRA’s statutory threshold. This pre-screening requirement strikes an appropriate balance between prisoners’ rights of access to the courts to remedy alleged constitutional violations and the burdens that all on prison officials to respond to individual lawsuits.

Other provisions of the PLRA do not strike the same balance and in practice function as insurmountable obstacles to many serious and meritorious claims. The Commission reached the conclusion that the PLRA’s physical injury requirement should be repealed. The requirement stands as an unconscionable bar to fully remedying – and thus, hopefully, preventing – a range of violations of constitutional rights. It is a blunt tool that does not differentiate in any way between meritorious and

non-meritorious claims. Rather, it discourages prisoners with very serious constitutional claims from bringing those claims to light in a federal court. Moreover, it does so in a way that discriminates for no valid purpose – and to much harmful effect – against prisoners. There is no comparable statutory bar for any other group of civil rights litigants to the recovery of monetary damages for violations by government actors of rights to freedom of religion or freedom of speech or deprivations of liberty or due process.

The Commission also recognized the importance of amending the PLRA's exhaustion rules. The exhaustion rule, like the physical injury requirement, poses far too high a barrier to a federal court hearing of federal law violations. Its breadth and inflexibility discriminates against prisoners among other civil rights litigants and results in the suppression of meritorious claims no less than non-meritorious claims, indeed perhaps even more so. As our Commission's final report explained, the PLRA (largely through the exhaustion requirement) has had the intended effect of suppressing prisoners' civil rights lawsuits. But it appears that it also has had the unintended, and dangerous, effect of sifting out meritorious claims somewhat more thoroughly than non-meritorious claims as shown by a decline in the ratio of successful suits (see our report, *Confronting Confinement*, at pages 84-85).

Furthermore, the exhaustion requirement has proven to be a difficult and contentious aspect of the statute, itself consuming a tremendous amount of judicial resources. The Commission's view was that exhaustion should only be required where the correctional system's grievance procedure was deemed sufficiently meaningful in terms of the remedies available and the flexibility of the procedures allowed. We were concerned that the rule dangerously puts form over function, too often barring access to the courts for no meaningful purpose or based on almost insurmountable procedural obstacles.

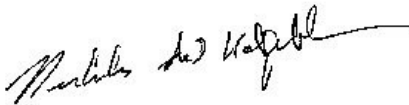
Our Commission further concluded that the PLRA could be amended to allow prisoners who prevail on civil rights claims to recover attorneys' fees. We see no reason to single out prisoners' civil rights claims for disparate treatment. Indeed, we recognize that prison litigation, especially class action litigation, plays a critical oversight role in our correctional institutions. Therefore, it ill serves prisoners, correctional agencies, and the public interest to discourage legal representation in these important cases. We are aware of no indication that the availability of attorneys' fees on the same basis as in other civil right matters results in frivolous or malicious litigation. On the contrary, one of the purposes of the PLRA – to improve the quality of prisoners' suits – would be supported by eliminating the disparate fee recovery rules.

Along the same lines, the Commission recommended that the PLRA be amended to reduce or eliminate the filing fees for prisoner lawsuits. Under the PLRA, even indigent prisoners must pay a filing fee of \$350, which is collected over time from their accounts (28 U.S.C. §§1914 and 1915(b)). This filing fee, which is imposed even on indigent prisoners and collected over time from their accounts, presents an insurmountable burden for many prisoners. As with many other provisions of the PLRA, it has the effect of discouraging (or even prohibiting) prisoners with meritorious claims from accessing the court system.

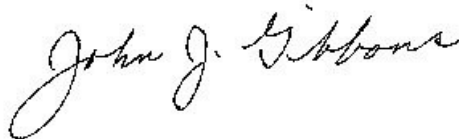
The Commission's recommendations regarding the PLRA are the result of a long and thoughtful process that took into account both the benefits and the costs of the Act. It is absolutely critical, we believe, that we not be content with rules that indiscriminately achieve one societal good (relief from the burdens of litigation) while at the same time causing injustice (barring remedies for very serious violations of constitutional rights). As a former federal judge and Attorney General of the United States, we believe that the parts of the PLRA that support our shared principles of justice can be preserved while those that conflict with those principles should be amended forthwith.

We thank the Subcommittees for holding what we believe to be a very important hearing on an issue that directly affects the millions of people incarcerated in the United States, as well as their families, and ultimately the communities to which they return after they are released. We look forward to the passage of amendments that reaffirm the positive goals of the PLRA while eliminating those that unfairly burden inmates and hinder meaningful oversight of America's correctional facilities.

Sincerely,



Nicholas de B. Katzenbach



Hon. John J. Gibbons