[28] But see *Jones* v. *Eastern Maine Medical Center*, 448 F. Supp. 1156 (D. Me. 1978), where the court stated that the provision of free medical assistance to indigents is not a public function.

[29] J. Nowak, R. Rotunda, and J. Young, *Constitutional Law* 460 (1978).

[30] See also *Evans* v. *Abney*, 396 U.S. 435 (1970), where the Court invalidated a trust which had set up a racially restrictive public park and allowed the land to revert to the heirs of the maker of the trust.

[31] J. Nowak, R. Rotunda, and J. Young, *Constitutional Law* 461 (1978).

[32] See also *Moose Lodge No. 197* v. *Irvis*, 407 U.S. 163 (1972), where the Court found that state furnished services such as electricity, water and police and fire protection would not give rise to a finding of state action.

[33] But see *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952), where the Court applied due process guarantees to a regulated transit company stating: "We find . . . a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments . . . We . . . recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission . . ." At 462.

[34] The Court distinguished *Public Utilities Commission* v. *Pollak*, *supra*, from the situation presented by *Moose Lodge* by stating: "Unlike the situation in *Public Utilities* . . . where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." At 177 footnote 3.

[35] See also, *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973).

[36] See also, *Schlein* v. *Milford Hospital, Inc.*, 561 F.2d 427 (2d Cir. 1977); *Greco* v. *Orange Memorial Hospital Corporation*, 513 F.2d 873 (5th Cir. 1975), cert. denied 423 U.S. 1000 (1975); *Taylor* v. *St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975), cert. denied, 424 U.S. 948 (1976).

[37] For example see *Ruffier* v. *Phelps Memorial Hospital*, *supra*.

Mr. President, as I stated yesterday, this bill would give the long arm of the Federal Government the power to go into the States and exert tremendous control over institutions that are purely State institutions. We think that is a great mistake, and our opinion is borne out by the Governors of the States; it is borne out by the attorneys general of the States; it is borne out by other officials of the States.

I will read a few samples of statements from Governors, attorneys general, and other officials, and then I will ask that the other statements be printed in the RECORD.

Yesterday, I engaged in a colloquy with the able Senator from West Virginia, Senator JENNINGS RANDOLPH. I had no contact with the Governor of West Virginia on this subject, but this morning I received a wire from the Governor of that State, and I was glad to receive it. It reads as follows:

I am opposed to S. 10 which permits unnecessary Federal control of institutional care at the State level. West Virginia has made progress which insures proper institutional care and judicial remedies and S. 10 is unnecessary. Your support will be appreciated.

JOHN D. ROCKEFELLER IV,
Governor, State of West Virginia.

Mr. President, I should like to make an inquiry about the agreement. As I understand it, anyone who wishes to offer an amendment may do so. How much time will be allotted for that purpose?

The PRESIDING OFFICER. Thirty minutes on all amendments.

Mr. THURMOND. In other words, the time I am using now is on the bill, as I understand it.

The PRESIDING OFFICER. The Senator is correct.

Mr. THURMOND. This does not affect the time of anyone who offers an amendment.

The PRESIDING OFFICER. The Senator is correct.

Mr. THURMOND. Some Members on our side will offer amendments today, and I want to be sure that they will not be affected.

Mr. President, I am just going to present a few samples of letters that I think are significant. I have this letter from the attorney general of Alaska:

We greatly appreciate the opportunity you have extended to us to comment on S. 10, the Senate bill that would permit the United States Attorney General to initiate or intervene in civil rights actions against state mental institutions and jails.

As I am sure your are aware, the State of Alaska is currently embroiled in a number of disputes with the federal government, primarily concerning federal control over land and other state natural resources. I view S. 10 as just one more way that the national government will be able to impose its will, however laudable it believes the goals are, upon the states. In addition, I am concerned about the way in which this proposed law would affect any number of small institutions, primarily local jails in isolated areas of Alaska, that reflect the different cultures and lifestyles in those communities.

If such a bill is to become law then I believe that section 2 of the bill, requiring the Attorney General to certify that he has attempted to conciliate the disputes between the parties, also be made a condition of the United States intervening in any pending action under section 3, and not just when an action is to be initiated. If the bill is not amended in that way then the reasonable requirements of section 2 can be too easily circumvented.

Again, thank you for the opportunity to comment on this bill.

Yours very truly,

AVRUM M. GROSS,
Attorney General.

I have a letter from the Governor of Georgia:

Thank you for your recent letter sharing with me your concerns regarding S. 10, which addresses the rights of institutionalized persons. It is my understanding that a similar bill has already passed the House.

I am in agreement that the mentally disabled must be assisted in obtaining legal services, and I am confident that Georgia's current statutes make adequate provision to provide these services. In 1977, I appointed a committee to rewrite our statutes regarding rights of the mentally ill, mentally retarded, alcoholics and drug abusers who may need involuntary commitment and treatment in order to protect themselves as well as others. This committee included attorney advocates for the mentally ill and mentally retarded, citizen interest groups, members of the General Assembly and others. The resulting amendments were enacted in 1978 and received additional "fine tuning" in the 1979 session of the Georgia General Assembly.

In regard to state correctional facilities, I am strongly opposed to giving the United States Department of Justice opportunities for direct intervention into the state correctional system without a formal process addressing specific complaints, and I am opposed to federally established minimum standards for state correctional facilities without input from the states and without benefit of state legislative action.

A national policy to define and protect the constitutional rights of inmates of state and local institutions should only be established in formal consultation with state government.

With kindest regards, I am

Sincerely,

GEORGE BUSBEE.

Mr. President, I have a letter here from the Governor of Michigan:

STATE OF MICHIGAN,
Lansing, July 23, 1979.

HON. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter expressing concern regarding the possible enactment of S. 10. I agree with you that we should move toward increasing state-federal cooperation rather than establishing mechanisms that will result in adversary confrontations.

Michigan joins the National Association of Mental Health Program Directors in the position that there is no need for S. 10 and that such legislation will place further burdens on state legal activities, overload already heavy court calendars, and duplicate ongoing legal remedies.

The State of Michigan has established an extensive network of recipient rights offices at all state hospitals and centers for the developmentally disabled for the purpose of ensuring and protecting the rights of recipients of mental health services.

In addition, a specific protection and advocacy system outside the Department of Mental Health has been established for the developmentally disabled with legal expertise available, free of charge, to all developmentally disabled citizens.

I assure you there are sufficient numbers of qualified legal experts available within the state to pursue appropriate legal redress for violations of rights of recipients of mental health services and further involvement by the Justice Department would be redundant.

Legal intrusion by the U.S. Department of Justice will polarize agencies and reduce state and federal agency cooperation compounding the problem of creating better interagency relationships and promoting cooperation.

Warm personal regards.

Sincerely,

WILLIAM G. MILLIKEN,
Governor.

Mr. President, I have a letter from the Governor of Oregon:

OFFICE OF THE GOVERNOR,
Salem, Oregon, June 4, 1979.

HON. STROM THURMOND,
Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: I agree with your opposition to S. 10 relating to the constitutional rights of persons in public institutions.

Court action initiated by the Unted States Department of Justice is not an effective or appropriate way to assure that citizens in public institutions receive proper care and treatment. There are not sufficient deficiencies in the institutions to warrant intrusion of the Federal Government in an adversarial role into the state's management of its facilities.

Thank you for bringing this bill to my attention. I will let the Oregon Congressional Delegation know that I see no need for S. 10 or H.R. 10, and I will urge them to oppose enactment of this legislation.

Sincerely,

VICTOR ATIYEH,
Governor.

Mr. President, I have a letter here from the Governor of Nebraska:

STATE OF NEBRASKA,
Lincoln, Nebr., May 24, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter and information regarding S. 10.

As you may know, the State of Nebraska is currently involved in litigation concerning a State institution for the mentally retarded. The Department of Justice has intervened in the lawsuit. After their intervention, the case changed from one involving patient rights to one challenging the philosophy behind the structure of the state institutions.

Although I do not feel it would be appropriate to comment on the specifics of the case, the case has made me aware of problems which enactment of legislation such as S. 10 could cause. Such legislation tends to disrupt cooperation between levels of government and delays solutions to the problems. I oppose S. 10 and heartily support your efforts to defeat it.

With kind regards,
Sincerely,

CHARLES THONE,
Governor.

Mr. President, I have a wire here from the Governor of South Carolina. I believe this is a copy of a wire sent to the distinguished chairman of the Constitutional Subcommittee, Senator BAYH. He says:

DEAR MR. CHAIRMAN: I have concluded a review of bill S. 10 pending before your subcommittee, which would authorize the U.S. Attorney General to institute or intervene in actions alleging deprivation of constitutional rights of institutionalized persons. We have a functionally effective ombudsman system in the State of South Carolina, independent State advocacy units, and constantly seek to upgrade facilities and conditions in State institutions. The answer to all problems is not always found in the courts. I strongly urge you and your subcommittee to consider more desirable alternatives to achieving necessary protections for citizens who are institutionalized. I consider S. 10 both unnecessary and undesirable.

RICHARD W. RILEY,
Governor, State of South Carolina.

Mr. President, I have a letter here from the Governor of Mississippi:

THE CAPITOL,
Jackson, Miss., June 19, 1979.

Hon. STROM THURMOND,
U.S. Senate State of South Carolina, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your recent letter concerning S. 10.

I have studied this bill carefully and believe this area of State and local concern may best be regulated through State legislation along with the regulations and standards adopted by the various agencies within a State.

The passage of this bill would infringe upon a State's rights of self government. The ability of the State to govern its internal affairs should not be carved away any further than has been done in the past. We are willing to work with federal agencies in this area, however the enactment of S. 10 would surely create friction and confrontations between States and federal agencies at a time when cooperation is most needed.

Again, thank you for writing and if I may be of any further assistance, please do not hesitate to contact me.

With kindest personal regards and best wishes, I am

Sincerely your friend,

CLIFF FINCH,
Governor.

Mr. President, I have a letter here from the Governor of Indiana:

OFFICE OF THE GOVERNOR,
Indianapolis, Ind., May 22, 1979.

Hon. STROM THURMOND,
U.S. Senator,
Washington, D.C.

DEAR SENATOR THURMOND: Having reviewed S. 10, it is my opinion that the bill would permit unnecessary federal control over institutional care at the state level. While it may be true that 10 or 15 years ago, many states were not meeting their obligations to those confined in state institutions, fortunately, that is no longer true.

In the past several years, Indiana, like many other states, has moved affirmatively in this area. Examination of Indiana's significant progress has been made in the provision of care and protection to inmates, as well as in respect for human rights. Where Indiana and other states have fallen short in meeting their responsibilities in the institutional area, advocacy organizations for the various persons confined have shown they can be very effective in their use of the judicial system.

In view of the states' progress in the provision of institutional care and judicial remedies which assure additional progress, S. 10 would be an unnecessary layer of federal intervention in an area already being handled effectively at the state level.

Kindest personal regards,

OTIS R. BOWEN, M.D.,
Governor.

I especially wish to call that letter to the attention of the able chairman of the subcommittee who is a distinguished Senator from that State.

Mr. President, I have a letter here from the Governor of Virginia:

COMMONWEALTH OF VIRGINIA,
Richmond, Va., May 7, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR STROM: Thank you for your letter of May 1 and the copy of Senate Bill 10.

I am enclosing a copy of a letter I have written Virginia's Congressional Delegation on this legislation for your information.

I do appreciate your bringing this to my attention, however.

With all good wishes, I am
Very truly yours,

JOHN N. DALTON.

And in the copy of the letter to the delegation, he opposes vigorously S. 10:

APRIL 19, 1979.

Hon. JOSEPH L. FISHER,
Cannon House Office Building,
Washington, D.C.

DEAR JOE: I have been advised that House Bill 10 concerning the rights of the institutionalized has cleared the House Judiciary Committee and is tentatively scheduled to be heard on the floor on April 26, 1979. A similar bill, S. 10, has been introduced in the Senate.

I continue in my opposition to the bills as being unnecessary and redundant. I am concerned that the Attorney General may require a large bureaucratic organization to attempt a good faith effort to comply with their provisions, and such an expensive bureaucracy is unnecessary. I also feel that there is now ample provision to ensure a full and fair consideration of alleged violations of an individual's civil rights and that the bills would interpose the Attorney General as some sort of official lawyer for those confined. In brief, I feel there is an ample body of case law already existing to resolve disputes in the courts, and the scales of justice are not unduly tipped in favor of the states. Therefore, the system proposed by these bills are unnecessary, redundant and unduly expensive. I further feel they represent an intrusion into State prerogatives.

A copy of a position paper setting forth Virginia's position on the two bills is attached for your use. I hope you seriously consider our position.

With all good wishes, I am
Very truly yours,

JOHN N. DALTON.

Mr. President, I have a letter here from the attorney general of California:

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE,
Sacramento, Calif., November 1, 1979.

Hon. STROM THURMOND,
U.S. Senate, Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of September 14, 1979, in which you asked for my thoughts concerning S. 10, a bill which would authorize the United States Attorney General to bring civil actions on behalf of institutionalized persons in state and local facilities.

I am opposed to S. 10 because it fosters confrontation between the state and federal governments instead of cooperation which is sorely needed to insure that the rights of the institutionalized are safeguarded. Treatment of institutionalized persons is a serious concern. However, it is as much a state and local concern as it is a federal one. It is a mutual concern which requires coordinated effort and cooperation between the various levels of government.

Consequently, comprehensive and cooperative national and state legislative programs have ben enacted to improve the quality of life for the confined. California has responded to the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. §§ 6001–6081) with extensive legislation which recognizes a responsibility to assure the dignity and self-respect of these persons. This legislation established the California Development Disability State Plan (Cal. Wel. & Inst. Code §§ 4560–4565), a State Council on Developmental Disabilities (Cal. Wel. & Inst. Code §§ 4520–4554), and Area Boards on Developmental Disabilities which are mandated to protect and advocate the rights of all persons with developmental disabilities (Cal. Wel. & Inst. Code §§ 4570–4631). The rights of the involuntarily detained are precisely defined by state law (Cal. Wel. & Inst. Code §§ 5325–5331). For those imprisoned persons, California has abandoned the concept of "civil death" and has restored all civil rights, and these may be restricted only when necessary for the reasonable security of institutions and the reasonable protection of the public (Cal. Pen. Code §§ 2600–2601). These are but a few of the provisions of California law which afford means of redress to confined persons claiming deprivations of rights.

S. 10 threatens to disrupt coordinated state and national programs like those established in California. I am concerned that the possibility of lawsuits with the United States will adversely affect the cooperative and open-exchange relationships we seek with the United States Attorneys and the Federal Bureau of Investigation. Interjecting the United States Department of Justice as overseer in the operation of state institutions for the confined realigns the United States and State as courtroom adversaries.

This unnecessarily promotes confrontation instead of cooperation.

It is already not uncommon for California to provide the United States Department of Justice with access to confined persons and their institutions, to cooperate in federal investigations and to hold conferences with federal officials. Indeed, where federal money is dispensed, such scrutiny is necessary. However, the spirit of a cooperative effort to solve the problems of the helpless should not be blended with the coercive element of a threatened lawsuit. In the study of the care due the infirm, ill, disabled and handicapped, reasonable men, including experts in the social sciences, sometimes disagree on methods and means. Supplying the federal conferees with the "big stick" to prosecute can only chill the openness necessary for meaningful consultation and negotiation.

Litigation and more threats thereof are not the ultimate solution in obtaining care and treatment for those confined in state or local facilities. Government officials and employees have been inundated with federal lawsuits. Nevertheless, most of the improvements in our system and its institutions have been brought about by legislative and administrative actions.

Providing the United States Attorney General with a vehicle to bring actions against state and local governments can only encourage resort to the courtroom, and more litigation. Comprehensive and cooperative planning, participated in by all government entities, has thus far been the most successful means to the end which is commonly desired, namely, good care and treatment for institutionalized citizens.

Most cordially,

GEORGE DEUKMEJIAN.

Mr. President, I have a letter here from the attorney general of Florida, and a copy attached thereto to Senator CHILES on this subject:

DEPARTMENT OF LEGAL AFFAIRS,
Tallahassee, Fla., May 14, 1979.

Re: S. 10 (H.R. 10 in the House of Representatives)

Hon. STROM THURMOND,
U.S. Senator,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you very much for your letter of May 1, 1979, regarding S. 10 (H.R. 10 in the House of Representatives), which would permit the United States Attorney General to bring suit directly against state prisons and mental institutions to assert violation of federal constitutional rights.

I share your concern for this legislation and am strongly opposed to this proposal. I have previously contacted Florida's senators and governor on this matter and urged their opposition to this bill. For your information, I am enclosing my correspondence to Senator Chiles.

Should you need additional assistance or information, please feel free to call on me.

Sincerely,

JIM SMITH,
Attorney General.

DEPARTMENT OF LEGAL AFFAIRS,
Tallahassee, Fla., February 16, 1979.

Hon. LAWTON M. CHILES,
U.S. Senator,
Federal Building,
Lakeland, Fla.

DEAR LAWTON: I understand you have been requested to co-sponsor S. 10, which would permit the United States Attorney General to bring suit directly against state prisons and mental institutions to assert violation of federal constitutional rights. While I believe that such rights ought to be protected, I am writing to you to strongly urge your opposition to this proposal. A federal lawsuit is a rather inefficient and costly means to achieve the improvements we all desire. Federal dockets are so crowded as it is now, that civil suits move very slowly, if at all. Institutional suits typically require the attention of a federal judge for years. Moreover, courts are ill-suited to resolve these issues. All too often such cases turn upon amorphous "expert" opinion as to psychological harm and rehabilitative theories. I strongly believe that institutional problems must be resolved legislatively, not by judges. If Congress is seriously concerned that the living environments of state institutions be improved, it should assist the states by returning tax revenues to states for that purpose. The Attorney General might then have a useful role to oversee the proper expenditure of federal money.

The bill which is now before you is very much the same as proposals in past years. The new 30-day notice period is of little value to state officials in suits of this kind since state legislatures meet only once each year. In sum, I hope that you will oppose S. 10.

Sincerely,

JIM SMITH,
Attorney General.

Mr. President, all of these letters, I might say, express opposition. These letters are from Governors, attorney generals, and other officials expressing opposition to S. 10.

Mr. President, I have a letter here from the Governor of Arkansas:

STATE OF ARKANSAS,
Little Rock Ark., May 31, 1979.

Re: S. 10

Hon. STROM THURMOND,
U.S. Senator,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: This Office has reviewed the referenced bill and agrees with your observation that it may well strain federal-state relationships in the absence of any federal funding to permit states to comply with equitable affirmative relief ordered by federal courts. In addition, since individual plaintiffs may bring actions under present law imposing a lesser burden of proof, the need for this legislation is dubious.

Thank you for giving this Office the opportunity to review and comment upon this measure.

Yours truly,

FRANK B. NEWELL,
Administrative Assistant.

Mr. President, I have a letter here from the Governor of Connecticut:

OCTOBER 3, 1979.

Hon. STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: I am writing concerning S. 10 which proposes to authorize the Attorney General to institute legal action on behalf of institutionalized persons in cases where such persons are purportedly deprived of rights, privileges or immunities provided by the Constitution or Laws of the United States.

It is important to note that the Justice Department already has adequate authority to act in those cases where it is deemed necessary, and that existing controls and regulations administered by other Federal agencies, vis-a-vis the Developmental Disabilities Act, Medicaid and Medicare regulations, Education of all Handicapped Children's Act (94-194) provide sufficient protection for residents of state-run institutions.

Furthermore, Connecticut, through its protective services, and advocacy laws, and other statutes protecting the handicapped already has sufficient authority to protect the rights of the institutionalized and it is currently exercising it, as evidenced by recent federal court action initiated by Connecticut's Office of Protection and Advocacy of the Handicapped and Developmentally Disabled Persons in a case concerning the care of mentally retarded persons within this State.

Should the bill be approved by the Committee. I would urge you to consider these existing remedies prior to making a decision on the bill.

With best wishes,

Cordially,

ELLA GRASSO,
Governor.

Mr. President, I have a letter here from the attorney general of Hawaii:

STATE OF HAWAII,
Honolulu, Hawaii, May 18, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: This letter is to acknowledge receipt of your letter of May 1, 1979, relating to bill S. 10 which grants standing for the United States Attorney General to initiate suits against the states on behalf of institutionalized persons. I appreciate your forwarding me your informative comments on the bill.

After an initial review of S. 10, I agree with you that the individual states should have the authority to regulate the operation of its institutions with minimum federal infringement. The State of Hawaii is capable of effectively operating its own institutions. It appears that allowing the United States Attorney General to initiate suits against state institutions may not be the appropriate means of remedying problems that exist in such institutions. Furthermore, there are presently sufficient avenues of relief for an institutionalized person who has any complaints, including filing suit in federal court under 42 USC 1983.

I will keep in mind your comments on S. 10 when I consult with Governor George R. Ariyoshi on this matter. Again, thank you for your sincere efforts in providing me information on this matter.

Very truly yours,

WAYNE MINAMI,
Attorney General.

Mr. President, I have a letter here from the attorney general of Kansas:

STATE OF KANSAS,
Topeka, Kans., May 9, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of May 1, 1979, concerning S. 10. At this point I am opposed to passage of such legislation as it appears to pose another bureaucratic problem where there are already legal remedies available. I know of no instance when the Office of Attorney General of Kansas was unwilling to cooperate in fulfilling the duty of caring for the mentally ill. Until a need is shown in this state I cannot support S. 10.

Very truly yours,

ROBERT T. STEPHAN,
Attorney General of Kansas.

Mr. President, I have a letter here from the attorney general of Idaho:

STATE OF IDAHO,
Boise, Idaho, May 24, 1979.

Senator STROM THURMOND,
U.S. Senate, Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your correspondence concerning Senate Bill

10, sponsored by Senator Birch Bayh of Indiana. This office has already corresponded with the National Association of Attorneys General, indicating our opposition to the bill. However, we feel obliged to personally advise your office that we are in opposition to Senate Bill 10.

A copy of your correspondence with its enclosures, has been forwarded on to the Idaho Governor's Office.

Very truly yours,

MICHAEL B. KENNEDY,
Deputy Attorney General,
Chief, Criminal Justice Division.

Mr. President, I have a letter from the Governor of Maryland:

STATE OF MARYLAND,
Annapolis, Md., May 24, 1979.

Hon. STROM THURMOND,
U.S. Senate, Dirksen Building,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of May 1, 1979 concerning S. 10, which would give the United States Department of Justice certain rights of suit on behalf of persons in state institutions.

Maryland is concerned about federal decision making in dealing with areas of state responsibility. Attorney General Sachs is working with the National Association of Attorneys General in an effort to tighten up conditions in which federal intervention might take place, should legislation similar to S. 10 move forward. There are, of course, enormous fiscal implications involved in most initiatives for deinstitutionalization or institutional improvement. Maryland would welcome federal cooperation in this sphere.

I appreciate hearing from you.

Sincerely,

HAROLD HUGHES,
Governor.

Mr. President, I have a letter here from the Governor of Louisiana:

STATE OF LOUISIANA,
Baton Rouge, La., May 25, 1979.

Hon. STROM THURMOND,
U.S. Senate, Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of May 1, 1979, informing me of S. 10 which would allow the United States Justice Department to initiate suits against the states on behalf of institutionalized persons. As you have noted, this bill raises many questions concerning federal interference in state affairs and promotes conflict rather than cooperation.

I will be contacting the Louisiana Congressional Delegation concerning this legislation and have shared your letter with other state officials. I appreciate your calling this matter to my attention.

Sincerely,

EDWIN EDWARDS,
Governor.

Mr. President, I have a letter here from the attorney general of Illinois:

Chicago, Ill., September 26, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: I am responding to your letter of September 14, 1979 to William J. Scott, Attorney General of the State of Illinois. Mr. Scott recently underwent coronary bypass surgery or he would have answered your letter personally. He sends his regrets and has asked me to respond for him.

I agree with your conclusion that S10 would give the United States Department of Justice too much oversight authority with respect to the operations of state institutions. Section 1 of the Act gives the Attorney General of the United States almost unlimited discretion to decide when to inject the United States government into the operations of State facilities. That is not to say that some involvement at some time might not be required because there are instances where the rights, privileges, and immunities, secured by the Constitution are being violated, but the Bill as it now stands would give the Attorney General of the United States the independent discretion to make that type of finding. Further, Section 2 of the Act gives the Attorney General of the United States the authority to virtually mandate and require sovereign states to do those actions which the Attorney General of the United States, in his opinion, feels are required when they may not actually be required.

It is difficult for state and local governments to operate institutions in a manner which best serves not only the residents of its institutions but also the taxpayers who are required to support those institutions. Adding yet another federal bureaucratic taskmaster is not the answer and unless S10 is modified it would seem to be a poor Bill in its current posture.

Again, Mr. Scott had desired to answer your inquiry personally but that was impossible and if there is anything more that can be done by this office please contact me at the above address or call me at (312) 793-3117.

Very truly yours,

FRANK M. GRENARD,
Executive Assistant.

Mr. President, I have a letter here from the attorney general of Maine:

DEPARTMENT OF THE ATTORNEY GENERAL,
Augusta, Maine, June 15, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: This is in response to your letter of May 1, 1979, expressing concern over S. 10, a bill to authorize the Justice Department to bring a civil action to enforce the rights of persons residing in state institutions and prisons. My office has followed the course of S. 10 and its companion H.R. 10 and shares your concern with the possible impact of this legislation on the operation of state government.

In 1975 a class action was filed against the State of Maine on behalf of persons residing at Pineland Center, Maine's institution for the mentally retarded. The class as certified by the U.S. District Court included not only current and future residents of Pineland, but also residents who had been released from Pineland Center years ago. The suit was brought initially by Pine Tree Legal Assistance, Inc., of Portland, Maine, but control of the suit was quickly taken over by the Mental Health Law Project, Washington, D.C.

The dual nature of the certified class and dual representation of the class made defense of the suit very difficult. The suit was settled by consent in July 1978, but only after two years of negotiation, and at a cost of several million dollars, including $90,000 in attorney's fees. The negotiations were so protracted and so costly because of dual representation. Pine Tree Legal Assistance and the Mental Health Law Project frequently disagreed on the goals of the lawsuit and on the terms on which the goals could be achieved.

The State of Maine is sensitive to the needs and rights of persons residing in her institutions and prisons. This office believes, however, that persons in institutions and prisons are adequately represented at this time. In fact, Maine's experience as related above suggests the interjection of the Justice Department in institutional litigation may significantly impede the resolution of the issues raised in such litigation by inserting yet another party with a potentially different point of view. That will only aggravate the rather ironic predicament confronting the states, which compels them to expend money to meet litigation costs when that money might otherwise be used to remedy problems in state institutions and prisons.

Thank you for your personal invitation to comment on S. 10 and please be assured of Maine's support for your position.

Very truly yours,

RICHARD S. COHEN,
Attorney General.

Mr. President, I have a letter here from the attorney general of Missouri:

ATTORNEY GENERAL OF MISSOURI,
Jefferson City, Mo., May 21, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter regarding the institutions legislation proposed by Senator Birch Bayh. I am deeply alarmed about this incursion of the federal government into the internal administration of state institutions.

I appeared before a House Committee last year regarding this matter and stated my clear objection to this unwarranted infringement of the U.S. Department of Justice.

It should be noted that these matters are all being litigated very frequently in the federal courts and there is no need to have the Justice Department bring additional suits.

I am currently defending a significant number of suits relating to the conditions in virtually every institution in my state that have been brought by legal aid societies, private parties and others. Additional funding for the Justice Department would be a senseless duplication of federal involvement in an area which is already made difficult by the costly litigation which impairs the ability of the states to correct problems which do exist.

Thank you for your concern and your support in this matter.

Most sincerely,

JOHN ASHCROFT,
Attorney General.

Mr. President, I have a letter here from the attorney general of Montana:

ATTORNEY GENERAL OF MONTANA,
Helena, Mont., September 26, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your September 14, 1979 letter concerning S. 10. Following your first letter some months ago, I wrote directly to both Senators Melcher and Baucus to express my own concerns on S. 10. I enclose a copy of my letter.

Very truly yours,

MIKE GREELY,
Attorney General.

JUNE 27, 1979.

Senator MAX BAUCUS,
U.S. Senate,
Washington, D.C.

DEAR MAX: I recently learned that the House of Representatives has passed H.R. 10. A corresponding bill, S. 10, is presently pending in the Constitution Subcommittee of the Senate. These bills, which would authorize the Attorney General of the United States to institute civil actions on behalf of the United States to secure the constitutional rights of inmates and patients of state institutions, is of grave concern to the State of Montana and to me as a state Attorney General.

My concerns are not with the spirit or overall intent of the bill, since irrespective of the bill the States are obligated to respect the constitutional and legal rights of

their citizens. Rather, my concern is with the onus placed upon the Governor and state Attorney General to formulate an adequate response to institutional conditions or practices found objectionable by the United States Attorney General within a very brief, thirty day period. The bill lacks any requirement that federal aid be made available to assist the States in improving institutional conditions, care and procedures.

Section 2(a) of S. 10 provides that as a prerequisite to bringing any action, the United States Attorney General must certify that "at least thirty days previously" he notified the Governor and state Attorney General of objectionable institutional conditions or practices and supplied them with supporting facts concerning the conditions or practices. Section 2(a)(2) & (3) requires the Attorney General to make a reasonable effort to eliminate the alleged conditions on an informal basis by consulting with both the Governor and Attorney General.

But while the Attorney General must further certify that (in his opinion) state officials have had adequate time to take appropriate action, state officials are in effect given a deadline to formulate a response and plan of action, satisfactory to the Attorney General, within thirty days. Such a short time is unreasonable. The conditions or practices may not be susceptible to instant solution.

Formulating a responsive proposal, and then carrying it out, requires investigation, careful planning and coordination among state agencies and officials. It may require additional funds not immediately available, and in some cases an act of the legislature.

The difficult position which a state will face in responding within thirty days is further compounded by the lack of any provision requiring federal assistance to implement responsive measures. In many cases the willingness and desire of state officials to ameliorate objectionable conditions may be stymied by a lack of available funds.

I therefore urge you to recommend and support amendments before the Constitution Subcommittee and on the floor of the Senate which will increase the thirty day notice requirement to at least 120 days and provide for direct federal financial assistance to implement remedial measures agreed to by a state and the Attorney General.

Very truly yours,

MIKE GREELY,
Attorney General.

Mr. President, I have a letter here from the attorney general of Nebraska:

DEPARTMENT OF JUSTICE,
Lincoln, Neb., May 24, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: We received your letter and materials concerning S. 10 and appreciate your interest in this matter.

This office has presented oral and written testimony in opposition to this bill and its predecessor. We have also joined with the Honorable Senator Exon of Nebraska in his opposition to this bill. We have learned through a long bitter struggle that litigation is not the answer to this problem.

If we can be of any assistance in further opposition to this or similar legislation, please let us know.

Very truly yours,

PAUL L. DOUGLAS,
Attorney General.

Mr. President, I have a letter and a statement here from the attorney general of New Hampshire, Thomas D. Rath:

THE ATTORNEY GENERAL,
Concord, N.H., May 9, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you for your letter of May 1, 1979 concerning legislation now pending in Congress which would allow the United States to sue states over conditions in state institutions and/or to intervene in pending suits concerning institutional issues.

My office has recently been made painfully aware of many of the problems that may be raised by intervention by the United States. A suit involving the state institution for the retarded is now pending in the United States District Court for the District of New Hampshire, and the Justice Department has moved, and been allowed, to intervene in that case.

On March 28, 1979, I testified against S. 10 before the Subcommittee on the Constitution of the Senate Judiciary Committee concerning our involvement in this case. Although I am certain you have already received one, I am enclosing a copy of my testimony.

My office certainly opposes the legislation in its current form. Please let me know if there is anything I can do to assist you in your opposition to this bill.

Sincerely yours,

THOMAS D. RATH,
Attorney General.

STATEMENT OF THOMAS D. RATH

Mr. Chairman, members of the Committee, I thank you for giving me this opportunity to appear before you to express my opposition to S. 10, which would extend specific authority to the United States to sue states and/or to intervene in suits against states to redress the rights of institutionalized persons in state institutions.

I appear today as the Attorney General of a state now being sued by the United States over conditions in its state institution for the retarded, the Laconia State School and Training Center. I believe that the experience of New Hampshire with federal intervention in litigation now pending before the United States District Court for the District of New Hampshire [1] is pertinent to this Committee's examination of the proposed legislation now before you and will provide you with evidence to support a limitation of the federal authority with regard to suits against the states proposed in this bill. I would like to share that experience with you after a more general discussion of why I oppose this legislation as it is now proposed.

At the outset, I would like to state that I favor the proposal made by the National Association of Attorneys General for a Presidential Commission to study the issues involved in the care of institutionalized persons and to recommend a national policy concerning adequate care for such persons. My concern about S. 10 is that it would result in the formulation of a federal policy concerning the treatment of institutionalized persons through litigation. I believe that such a policy would be fragmented,[2] and I object to the formulation of policy *against* the states in an adversarial process, rather than with their cooperation and mutual agreement.

I do not share the "conviction" of Assistant Attorney General Drew S. Days, III, as expressed in his testimony before this Committee on February 9 of this year, that litigation is "an appropriate and necessary means by which the rights of [institutionalized] persons may be vindicated." [3] Mr. Days expressed the opinion of the Department of Justice that states are incapable and unwilling to improve their institutions and that litigation is necessary to force, or at least encourage, the states to make such improvements. While I will agree that all governments, state and federal, are not now blesssed with an abundance of resources, I do not believe that the states are unwilling to resolve problems in this area. Moreover, I do not think that the process of litigation is the appropriate way to obtain cooperation from the states or to achieve constructive change in the area of institutional services.

My primary objection to the formulation of policy through litigation is that it has been my experience that litigation hardens positions; it does not make them more flexible. It is very difficult for a state to cooperate with the federal government when the United States is taking an adversarial position against it. This is particularly true where, as in our case, the United States takes sides in litigation which the state is attempting to settle or in a case where the United States intervenes in litigation involving personal damage claims. Where policy is sought to be made by litigation, federal experts, who might otherwise be in a unique position to offer to a state the technical or financial assistance contemplated by this legislation, become witnesses against the state and are therefore unavailable to assist the state in resolving the problems to which this legislation is addressed. Moreover, litigation in this area has a detrimental effect on settlement possibilities because it involves political considerations inherent in conflicts between state and federal governments.

For these general reasons, I oppose this legislation as an attempt to create federal policy in the area of institutional services and programs by an adversarial process against the states, particularly where Congress has already established a detailed and effective system of administrative penalties under various federal spending programs covering this same area. Litigation should be a matter of last resort. I therefore believe that Congress should pursue all other options, including the Presidential Commission proposed by the National Association of Attorneys General, before enacting legislation which would vest the Department of Justice, the litigative arm of the federal government, with policy-making functions for the states.

Although I oppose this legislation and therefore favor postponement of this legislation until the Presidential Commission proposed by NAAG completes its work, I recognize that the interests of the states must be balanced against the rights of institutionalized persons. Thus, I do not necessarily oppose all litigation by the United States in this area and all legislation giving the United States the authority to sue or intervene in suits involving institutionalized persons. We all must recognize that there are circumstances in which it may well be appropriate for the United States to sue to vindicate the rights of institutionalized persons. Where, as described in Section 1 of S. 10, a state, or its employees, subjects persons in institutions to "egregious and flagrant conditions" which are willful and wanton, and pursuant to a pattern and practice of resistance to the rights of such persons, and the Governor or Attorney General fail to correct those abuses within a reasonable time after a specific delineation of the conditions and after the consultation with respect to financial, technical or other assistance that would aid in correcting the conditions, then litigation by the United States is, without question, appropriate.

What concerns me is not so much that the United States is empowered to bring suit against the states or to intervene in pending suits to redress the rights of institutionalized persons, but rather the conditions under which those actions are brought.

Footnotes at end of article.

Thus, if legislation in this case is to be passed, I favor: (1) more specific definition of the conditions which may lead to suit or intervention by the United States; (2) recognizing that such specificity may not be possible, strict compliance with specific conditions designed to avoid litigation prior to any action by the United States against a state whether by initiation of suit or intervention in pending litigation; and (3) court review of federal compliance with those specific pre-suit conditions.

Measured against the criteria which I believe should be imposed prior to litigation by the federal government against the states whether by initiation or intervention, I find S. 10 to be wanting in four respects.

DEFICIENCIES IN S. 10 AS NOW PROPOSED

First, the circumstances under which the United States may decide to initiate litigation and/or to intervene are extremely vague. Section 1 of the Bill, which covers initiation, vests total discretion with the Attorney General to determine when there is "reasonable cause" to bring an action.

In this determination of "reasonable cause," the Attorney General, and only the Attorney General, decides whether conditions in state institutions are: (1) "egregious and flagrant," (2) result from "willful or wanton" conduct, as opposed to merely negligent conduct, and (3) result from a "pattern or practice" on the part of the state as opposed to being isolated events.

Under these tests, it is obvious the Attorney General must assess institutional conditions, personal motives, and state practices against some standard to determine whether those conditions violate those standards and whether the extent of the violation is "egregious or flagrant." At the same time, however, the Attorney General and his staff do not have to reveal the standards they are to apply. In fact, S. 10 specifically provides that its passage "shall not authorize the promulgation of regulations defining standards of care." As I have noted, relevant institutional standards are not precise. I believe that the assessment of institutional conditions and individual motives against undefined and unreviewable standards creates the possibility of substantial abuse of discretion in instituting actions against the states.

The conditions imposed by S. 10 with respect to the Attorney General's intervention in litigation against states are even more vague. Section 3 of S. 10 allows the Attorney General to intervene without any preintervention notification or negotiation whenever he has reasonable cause to believe that the conditions alleged to exist in the pending suit are a result of a state pattern or practice. Once again, no standards for determining the merits of the allegations are mentioned, and there is no available review of the investigation conducted by the Attorney General in order to determine whether his intervention is merited. As I will discuss later in this testimony, I see no valid practical distinction between initiation of litigation by the United States against a state and United States intervention in a pending case. In both instances, the United States becomes a complainant and the parties stand opposed to one another as plaintiff and defendant. Thus, I see no reason to provide different standards for the initiation of litigation and intervention. As with Section 1, the vagueness of Section 3 creates an obvious potential for abuse of discretion by the Justice Department.

My second major objection to the currently proposed legislation concerns the nature of the pre-suit conditions specified in Section 2. Recognizing that a more precise definition of the conditions pursuant to which the Attorney General may exercise his authority under Sections 1 and 3 is unlikely, I believe that control over abusive litigation against the states may be ensured by imposing strict and realistic conditions precedent to litigation. Those conditions should be designed to give specific and adequate advance notice of problems which the United States has with state institutions and to ensure that all measures short of litigation are exhausted. In this regard, I believe that the thirty day notice period provided by Section 2(a)(1) is grossly inadequate.

There is no reason why the United States cannot give at least six months advance notice of intent to sue and of the conditions which it believes must be remedied. It is entirely unreasonable to expect a Governor or Attorney General to be able to negotiate with the Justice Department or to take action to redress alleged violations within thirty days. This is particularly true in New Hampshire where the Legislature meets only for six months every two years and where in many instances a special session would be required to improve institutional conditions.

I have no substantial problems with the notice provisions set forth in Sections 2(a)(1) (A), (B), and (C) except that, as I will point out later in this testimony, I would make compliance with those requirements reviewable by the courts. I would however, recommend the addition of other items as part of the required certifications. I submit that the Attorney General should be required to certify prior to initiating a suit or to intervention that the state is not in compliance with standards promulgated by various federal agencies pursuant to federal statutes implementing federal spending programs pursuant to which the state receives funds for the institution. Prior to asserting a federal interest in litigation, the Attorney General should be required to certify that violations of such federal statutes have occurred, the nature of violations of federal statutes and also to certify that at least one compliance action under these statutes either has been filed or, if such an action cannot be filed, the reasons why such an action cannot, or has not, been filed. The purpose of such a certification would be to prevent the Justice Department from instituting action against a state over an institution which other federal agencies deem to be in compliance with various standards adopted by those agencies. It is certainly not unreasonable to require that prior to institution of suits against states, the federal government must ensure that the states are not in compliance with standards adopted by the agencies of the United States.

Section 2 also requires that the Attorney General certify that he has "made a reasonable effort to consult" with the Governor or Attorney General concerning "financial, technical and other assistance which may be available from the United States to assist in the correction of such conditions." Once again, I consider this notice provision to be too vague. Since as noted later in this testimony, the Attorney General's certification under this section may expose the Governor or State Attorney General to a personal damage action, I believe that the Attorney General should be required to specify that the United States has made such assistance available and to specify the type of assistance offered before filing suit. This will ensure that the United States makes a good faith effort to identify and make that assistance available and will also ensure that such assistance for which the state is eligible exists in fact.

The remaining portions of Section 2 of S. 10 as proposed also require a certification that the Attorney General has "endeavored" to eliminate the illegal practices informally and that, in his opinion, the state officers have had an opportunity to correct the conditions and have failed.[4] These portions of Section 2 lack any specificity as to the efforts made by the Justice Department to gain a settlement prior to suit or as to the facts on which the Attorney General's opinion of unreasonable time for compliance is based. I recommend the inclusion of specific language in this section requiring the Attorney General to specify all actions taken to obtain informal resolution of the conditions which the Attorney General considers a basis for suit, and a requirement that he specify the basis of his conclusion that a reasonable time for compliance has passed.

My third objection to S. 10 is that unlike its predecessor in the 95th Congress, S. 1393, it does not provide for pre-intervention notification similar to the presuit notification in Section 2 of S. 10.[5] The original version of S. 1393 did not call for any pre-intervention notification; however, that bill was amended to provide that prior to intervention, the Attorney General would be required to issue a certification nearly identical to that required by S. 1393 (and in S. 10) as a precondition to suit.

The difference between the pre-intervention and pre-suit notification in S. 1393 was that in the case of intervention, no pre-suit negotiations were required. See S. Rep. 95-1056 at 4-5 and 30. I believe that pre-intervention notification similar to that required in S. 1393 and pre-intervention negotiations should be required in this bill.

While, as a matter of law, an intervenor's role in a particular litigation is more limited than that of a plaintiff (since the vitality of the intervenor's action will depend on the plaintiff's cause of action), the practical distinction between intervention by the United States in a suit against a state and a direct suit against a state is a distinction without a difference. In both cases, the United States files a complaint against state officials, presents its case individually, and will be able to subject the defendants to extensive discovery, and to participate as an independent party during the trial. In short, once intervention is granted, the ability of the United States to litigate against state officials is precisely the same as if it had instituted the suit in the first instance.

The Justice Department has often argued in institutional cases that the concerns of federalism inherent in suits between the United States and a state[6] are not involved when the United States is only an intervenor, since the individual plaintiffs, and not the United States, have called the state into court.[7] That argument must however be weighed against the arguments Justice has consistently made before this Committee in order to support legislation allowing their intervention.

In the hearings on S. 1303 and in the testimony on this bill, the Department of Justice has consistently contested that its intervention in institutional suits is made necessary by the limited resources of private plaintiffs. See e.g. Civil Rights of Institutionalized Persons, Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary on S. 1393, June 17-July 1, 1977, at 33-34. The primary purpose stated for having the Justice Department intervene in or initiate institutional litigation is to have the Justice Department direct the litigation. Indeed, in this regard, the Senate Report on S. 1393 stressed five considerations which were said to favor action by the Justice Department in institutional suits: (1) the massive litigative resources of the Justice Department and its access to experts; (2) the skilled staff of the Department; (3) the "credibility" which the "superior resources and skill" of the Justice Department would give the case; (4) the ability of the Justice Department to speed the case toward resolution; and (5) the ability of the Justice Department, through its resources, to force the states to settle and to implement orders. S. Rep. No. 95-1056 at 19-21. These factors are

Footnotes at end of article.

hardly consistent with the argument that intervention by the United States does not implicate serious problems of federalism because the United States is not the primary party plaintiff. The pre-suit notification requirements were included in S. 1393 and in this bill[8] to ensure that litigation by the federal government against the states would be severely limited so as to avoid conflicts between the states and the federal government whenever possible. Those conflicts are no less minimized merely because the United States, with all of its "superior resources and skill" in litigation, is not the only Plaintiff. Since in cases of intervention the United States is no less a litigator than in cases where the United States initiates the suit, pre-intervention notification is no less important. I therefore recommend that the pre-intervention notification provided in Section 3(a) of S. 1393 be added to this bill.

As a final point with respect to pre-intervention notification, I believe that pre-intervention negotiation should also be required. In its Report on S. 1393, this Committee stated that there was "no possibility of pre-suit negotiations" in cases of intervention. S. Rep. No. 95-1056, at 30. I believe that this statement misses the point. While it is obviously is not possible for the United States to enter into negotiations as to the case-in-chief prior to intervention, it is entirely possible for the United States to enter into settlement negotiations as to its own concerns and complaints prior to intervention.

In many instances, the United States may have different concerns and different problems from those raised by the plaintiffs in their complaint. Because of this fact, it is entirely appropriate that the United States should discuss its concerns with the state before it seeks to intervene. Once the federal government has intervened in the case, the state defendants are then unable to discuss the possibility of resolving the United States' concerns without also discussing similar concerns with the other plaintiffs in the lawsuit. For this reason, I recommend not only that a pre-intervention notification be added to S. 10, but that the Attorney General be required to certify prior to intervention that he has exhausted the possibility of resolving the United States' dispute with the defendants by informal methods. On a more practical level, such a requirement might also have the advantage of creating a more cooperative relationship between the United States and the state defendants in the event that the United States is finally compelled (and permitted) to intervene.

My final concern with the currently proposed legislation relates to the three factors I have just discussed. I have noted that given the vague standards by which the Attorney General of the United States may decide to bring litigation against the states in the form of direct suit or by intervention, there is a substantial possibility that the Attorney General's decision to litigate may be subject to abuse. Since, as I have noted previously, added specificity of the standards for filing actions seems unlikely, I believe that in conjunction with very specific pre-suit or pre-intervention notification and certification, the Attorney General's certification should be subject to review by the federal courts.

In making this suggestion, I am not advocating that the Attorney General's decision with respect to matters such as whether the case is one of "public importance" or whether a "pattern or practice" of conduct exists should be subject to review. Rather I am only suggesting that the state defendants should have the right to challenge the factual determinations which the Attorney General sets forth in his certification. For example, the state defendants should be able to challenge the fact that the Attorney General has not provided the state with any of the supporting facts giving rise to the alleged conditions which have led to initiation of litigation or intervention in a pending suit. State defendants should also be entitled to challenge the Attorney General's certification that he has pursued informal settlement possibilities and/or that he has made "financial, technical or other assistance" available to the state defendants.

It is worth noting that there is no legal bar to the review of the Attorney General's certification. In those instances in which the courts have considered the certification procedure of the Attorney General under other civil rights statutes,[9] the courts have generally found his certification to be unreviewable;[10] however, the basis of each of those decisions was that the defendants had sought to review general and discretionary certifications of the Attorney General such as whether "reasonable cause" existed or whether the case was one of general "public importance." In addition, those cases involved a situation in which a statute pursuant to which the Attorney General was to make his certification did not require specific factual determinations prior to certification. There is an obvious contrast to the situation with respect to this proposed legislation, where the Attorney General's certification required that he make factual determination.

In the one instance in which a certification involving specific facts was found to be unreviewable,[11] the Fifth Circuit Court of Appeals found that the Attorney General's certification was unreviewable because Congress had clearly indicated that such a review was not to be allowed. Assistant Attorney General Days has suggested that a similar expression of Congressional intent be made with respect to the proposed legislation.[12] While such unreviewability has an obvious implication in light of the *Greenwood* decision, there is nothing to prevent the Congress from making certification reviewable.

As I have stated, in the absence of specific standards and the review of those standards by the courts, there is an obvious possibility that litigation against the states will not be used as a matter of last resort, but will become a powerful and oppressive tool against the states. The Justice Department has assured this Committee that it will "engage in consultation with state officials whenever appropriate, whether to seek to avoid the necessity of litigation or whether to have the full benefits of their views" and will "take very seriously its duties to comply with . . . provisions" of the act pertaining to pre-suit negotiations.[13] I believe that the Justice Department's statements in this regard and the need for specific pre-suit or pre-intervention notification and negotiation which is reviewable by the court may best be evaluated through a review of the actions of the Justice Department in filing litigation against the states and, in particular, by a review of its intervention in the suit now pending against the State of New Hampshire.

NEW HAMPSHIRE'S EXPERIENCE WITH UNITED STATES INTERVENTION

On August 29, 1978 the Department of Justice filed a motion for leave to file a complaint in intervention in litigation involving Laconia State School and Training Center pending in the United States District Court for the District of New Hampshire.

Laconia State School and Training Center is the only state institution for the retarded in New Hampshire. It has approximately 600 residents, most of whom are severely and profoundly retarded. In the past few years, six of the twelve residential units at the institution have obtained HEW certification as intermediate care facilities for the mentally retarded so that the residents living in those units may receive federal Medicaid funding.

As early as January of 1978, my office had been in contact with the Office of the United States Attorney for the District of New Hampshire concerning Laconia State School. I was informed by the United States Attorney that several parents had complaints about conditions at the School, but no specification of charges was ever given to this office, with exceptions I will discuss in a moment.

In January or February of 1978, FBI agents interviewed employees at Laconia State School and, to the best of my knowledge, made a report to the United States Attorney concerning their findings. In an effort to resolve the problems raised by the parents and investigated by the FBI, an Assistant Attorney General in my office contacted an Assistant United States Attorney and arranged a tour of the facility for the United States Attorney's office. My Assistant then accompanied the Assistant United States Attorney on a tour of the facility and arranged a meeting with the Superintendent of the institution, Dr. Jack Melton, to discuss any concerns about the institution.

Sometime in March or April of 1978, my Assistant met with the Assistant United States Attorney to discuss the findings of that office's investigations. As the chief law enforcement officer for the State of New Hampshire, I obviously desired to be apprised of any criminal violations that might be occurring at the institution, that persons responsible for those violations would be prosecuted or have their employment terminated. Only one isolated incident of wrongdoing on the part of a former state employee was presented to my office. Following this initial meeting, my office indicated a willingness to meet with members of the United States Attorney's Office at any time to discuss the situation at Laconia, and offered to make the prosecutorial services of my office available if it proved necessary.

At approximately the same time that my office was contacted about complaints by the United States Attorney's Office, we also received complaints from other attorneys representing the parents of residents at the School, which complaints concerned use of medication at the institution. After those complaints were made, representatives from my office met with representatives of the parents on several occasions and made available to those representatives substantial amounts of information concerning medication prescribed and administered at the institution. Based on our conversations with those representatives, the medical procedures at the institution were substantially revised and partially at their suggestion, a unit-dose system of administering medication was implemented.

On April 12, 1978, a group of six individual residents at the institution and the New Hampshire Association for Retarded Citizens filed suit against the Governor of the state and several other state officials. The broad allegations in the complaint challenge the living conditions and services provided at the institution, as well as the services provided in the community. Although it contained specific factual allegations of conditions in the institution, the complaint did not specify any of the proposed relief sought by the Plaintiffs for either the institution or in the community, except to state that the Plaintiffs seek a "normalized environment" for each resident of the institution and the community. Subsequent to the date of the filing of the complaint, my office was informed by counsel for the Plaintiffs that the Plaintiffs would seek to close the institution in its entirety and to require the state to provide services for the developmentally disabled only in community settings.

Footnotes at end of article.

Prior to the filing of the litigation, my office had sought to discuss the proolems of the institution with counsel for the Plaintiffs, but had been unsuccessful in our attempts in that regard. From the outset of the litigation, we have taken the position that there are violations of law occurring at the institution and in the availability of community services, and that the Division of Mental Health would devote its energy to the formulation of a deinstitutionalization plan. In fact, formulation of that plan was under way at the time the suit was filed. Efforts to convince counsel for the Plaintiffs to begin settlement negotiations were being made at the time that the United States filed its complaint in intervention in August. Subsequent to that filing, counsel for the Plaintiffs stated that they would not agree to begin negotiations unless, as a precondition to those negotiations, the Defendants would agree to close the institution.

In late August of 1978, I received a telephone call from the United States Attorney informing me that the United States was about to bring suit against the state within a few days following our conversation. On August 29, the proposed complaint for intervention was filed with the Court. On August 30, 1978, one day after the filing of the proposed complaint in intervention, I received a letter from United States Assistant Attorney Drew S. Days, III. In its entirety, that letter stated as follows:

"DEAR MR. RATH: I am writing to advise you that the United States will shortly file a Motion For Leave To File Complaint In Intervention in the above captioned case.

"We hope that our participation will assist the parties and the court in resolving the issues raised by this litigation.

Sincerely,

DREW S. DAYS, III." [14]

While it would be difficult to disagree with the reasons for intervention stated in Mr. Days' letter, those reasons must be contrasted to the allegations in the Complaint in Intervention and to the allegations later made in oral argument before the United States District Court. The United States' Complaint in Intervention simply restated, although in less precise form, the allegations of the Plaintiffs, charging the state Defendants with widespread and systematic abuses of constitutional rights of the Laconia State School. The Complaint also alleged that the United States had "an interest in halting widespread and systematic deprivations of the constitutional rights of its citizens as is evidenced by 18 U.S.C. 241 and 242," the criminal civil rights statutes. At the hearing for the motion to intervene, a Justice Department attorney raised a number of specific allegations never before made available to the Defendants, and stated that because the Defendants had denied various allegations in their answer to the complaint, "the state Defendants have officially taken the position that the abuses do not exist." [15]

With the exception of their discussions with the Plaintiffs, I must assume that the allegations made by the United States are based on their inspection of the School, including the inspection by the FBI. I must make assumptions in this regard because, in spite of the fact that I have continually requested access to any reports concerning conditions at the institution, I have never been given a copy of any such report and at least, on one occasion, the United States has answered an interrogatory by stating that the information gathered by FBI constitutes the work product of the United States and is therefore not subject to disclosure.[16]

On September 22, 1978, in an effort to obtain specification of the concerns of the United States, I wrote to Assistant Attorney General Days suggesting that the motion for intervention be withdrawn until such time as representatives of our respective offices could discuss those concerns and the possibility of their resolution.[17] Since our office was anxious to settle the litigation but had been unable to even begin settlement negotiations with the Plaintiffs, I believed that the United States might in fact be able to assist us in achieving settlement by providing the Defendants with the expertise available to the United States, including assistance in the formulation of a deinstitutionalization plan. I believed at that time, and I continue to believe today, that the United States could have substantially assisted the parties in this litigation without becoming a litigant itself.

On October 16, after the arguments before the Court on intervention had been completed, I received a reply from Mr. Days.[18] Mr. Days stated that he remained committed to seek intervention, and that he did not see why intervention by the United States would pose any obstacle to negotiations. With respect to my request for pre-filing negotiations, he stated that he did not think those negotiations would be appropriate since the United States could not negotiate a resolution of the lawsuit before it became involved.

On October 24, 1978, I again wrote to Mr. Days and requested an opportunity to discuss the concerns and complaints of the United States.[19] With respect to his concerns about pre-filing negotiations, I pointed out that my office was not trying to obtain a settlement of the suit between the Plaintiffs and the state, but was attempting to negotiate and perhaps settle the concerns of the United States with respect to the state Defendants. Referring to the provisions of S. 1393 which required pre-intervention notification and which I understood to state the policy of the Department of Justice, I requested notice of the facts on which the Justice Department based its complaint concerning conditions at the institution and the proposed solution to those conditions. In short, I simply took the position that, if only as a matter of courtesy, the state was entitled to know the basis of the United States' complaints.

Mr. Days has never answered my letter.

On November 29, 1978, the United States District Court granted the United States' requested intervention.[20] Since the date of the United States' intervention, the Defendants have been subjected to extensive discovery by the Plaintiffs and by the United States as a Plaintiff-Intervenor.[21]

During the same period of time that the United States was seeking intervention in this case, important developments occurred in the State of New Hampshire. In November of 1978, the Honorable Hugh J. Gallen was elected Governer of the state and became the primary Defendant in the lawsuit. Prior to his election, Governor Gallen made the issue of services provided at Laconia State School a major focus of his campaign. Since the time of his election, the Governor has taken dramatic steps to improve conditions at the institution as well as in the community. Although the Governor has generally attempted to restrict spending in other areas of the state budget, he has recommended an increase of 35% in the budget for the developmentally disabled. The Governor's proposed budget calls for the expenditure of some $8,000,000 in the next biennium, approximately $4,000,000 of which will be spent on the School and $4,000,000 of which will be used to improve community services. It is anticipated that these expenditures will ensure that within the next two years every individual residing at the institution will have an individual habilitation plan and be receiving services in accordance with ICF/MR standards. In addition, the Governor's proposed budget anticipates that 100 residents will be deinstitutionalized within the next two years and that, based on experience of those individuals and the expenditure of additional sums for community services, many, if not all, of the remaining residents at the School will be deinstitutionalized.

Shortly after Governor Gallen took office, he requested an opportunity to have his Executive Assistant for Policy Development and his legal counsel meet with the attorneys for the Plaintiffs and for the United States. The meeting between those parties and representatives of my office was held on January 23, 1979. At that meeting, the state representatives outlined the Governor's proposed plans and suggested that the litigation be stayed for short periods of time so that the parties might work together to develop a plan for improvement of services during the current legislative session. Although the Justice Department attorney responsible for the litigation and the United States Attorney agreed to listen to whatever proposals were suggested, they stated that they could not agree to any stay of discovery or of litigation, nor were they prepared to tell the state what relief they would be seeking.

Since the date on which the United States sought an intervention on the case, my office has consistently requested that the United States inform us what relief they will be seeking in the case. The United States has not yet indicated the nature of that relief. Indeed, at subsequent meetings between myself and the Governor's legal counsel, my office has been informed by counsel for the United States that the United States will not be able to tell the Defendants what improvements it wishes to see made in the institution or to specify its concerns about conditions at the School or in the community until it has conducted discovery.

Further evidence of the inability of the United States to specify the factual bases for its intervention is found in answers to interrogatories propounded by the Defendants and answered in January of this year. In its answers to these interrogatories, the United States indicated that with respect to the allegations in its complaint of "widespread and systematic deprivations" of constitutional rights "evidenced by 18 U.S.C. 241 and 242," it had not alleged a violation of either of those criminal statutes. As for the "substantive deprivations" of constitutional rights alleged to be occurring at the School, the United States said that "[d]iscovery will be in process shortly, and more detailed information concerning these deprivations will be available to Defendants as it becomes known to the United States." Even more pertinent in this regard is the fact that the United States answered interrogatories requesting information on investigations conducted by the United States into services provided by the Defendants or the State of New Hampshire to developmentally disabled persons by stating that it was not aware of any such investigations with the exception of two routine audit investigations and the FBI investigation to which I have referred to above.

I believe it to be apparent from the inability to specify the nature of the relief it is seeking and from its inability or unwillingess to discuss specific concerns in any detail that the United States could not possibly have complied with the pre-intervention notification requirements of S. 1393. In stark contrast to the cautious approach to litigation which the Department of Justice assured this Committee it would pursue, the United States sought to intervene in this suit without any advance notice and without any attempt to provide the state with assistance. In view of these facts, I submit

Footnotes at end of article.

that it is necessary to place limitations on the discretion of the Department of Justice to initiate or enter suits against the state.

In its report on S. 1393, the Senate Judiciary Committee stated as follows:

"The committee does not intend that the Attorney General shall initiate litigation against a State or local government which is fully aware of the challenged conditions or practices in its institutions, concedes their unconstitutionality, and is presently engaged in active remedial measures which eliminate the need for litigation by the Attorney General. S. Rep. No. 95-1056 at 29."

While the State of New Hampshire is not, at this time, willing to stipulate that the conditions at Laconia State School are unconstitutional, the Defendants have been willing to admit to violations of law and are presently engaged in attempts to obtain legislative approval of a budget which will support a plan to improve conditions at the institution and the community. In spite of those efforts, the State of New Hampshire has never been given any notice of any technical or financial assistance which might be available to the state to resolve problems at Laconia State School. In the meantime, while this litigation progresses, the staff of Laconia State School has spent more than 2,000 hours in the past year on matters directly related to this lawsuit at the expense of providing services to residents at the School. Federal Experts who might otherwise be of assistance to the School have instead been used to gather facts for the purpose of litigating against the State. In summary, although the participation of the United States has not necessarily prevented settlement in this case, it has done nothing to enhance those prospects and/or the prospects to improve services provided to residents of the School.

I would like to add one final observation about intervention in litigation against the states. I believe it is also necessary to view federal action in this area in conjunction with the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. Our experience with that Act has been that it is a deterrent to settlement of lawsuits since plaintiffs' attorneys realize that by continuing to litigate, they may gain a substantial lump sum payment from the state. Under that Act, there is little incentive on the part of plaintiffs to sign a consent decree even where the defendants are willing to do so since by continuing to litigate after a defendant indicates a desire to settle or admits liability, the plaintiffs may ensure a larger recovery of attorneys' fees.

This Committee stated in this Report on S. 1393 that federal intervention may have the effect of forcing defendants "who would otherwise engage in dilatory tactics in an effort to stall resolution of a case until plaintiffs' resources are exhausted," to seek settlement. S. Rep. 95-1056, at 21. I believe there are two sides to that coin; where states wish to obtain a settlement of litigation and the plaintiffs are not willing to negotiate, partially because of the possibility of attorneys' fees, the intervention of the United States only serves to exacerbate the problems by encouraging plaintiffs already unwilling to settle to continue to litigate knowing that the massive resources of the United States are available to assist in that litigation and to increase attorneys' fees. In short, the resources of the United States can be used to block settlement of the litigation and to increase attorneys' fees for plaintiffs.

As is, I believe, evident from the above, S. 10 in its present form raises more questions and causes more problems than it resolves. Arming the Justice Department with the authorization contemplated by this bill, in light of the demonstrated practices of that department, can only result in lengthier and more counterproductive litigation.

It is clear that more study must be given to this bill, perhaps following the NAAG proposal. At the very least, I would ask that strong consideration be given to the amendments suggested herein in order to make the Justice Department's actions more accountable and predictable.[12]

I would urge this committee to remember that essentially what we are talking about here is the improvement of conditions of those least fortunate members of our society. I submit that the litigation model proposed by the Justice Department in S. 10 is not the most effective way and certainly not the most efficient way to deliver these changes in as expeditious fashion as possible. I thank the committee for the opportunity to share this testimony with you today.

FOOTNOTES

[1] *Garrity, et al. v. Gallen, et al.*, Civ. Act. No. 78-116. The matter is referred to in the testimony of Assistant Attorney General Drew S. Days, III, before this Subcommittee on February 9, 1979, at 5.

[2] In considering the dilemma faced by states when federal policy is formulated through piecemeal litigation, it is important to take note of how rapidly professional and legal theories are changing with respect to treatment of the mentally ill, habilitation of the mentally retarded, and rehabilitation of prisoners. For instance, whereas in 1972, the courts emphasized improvement of conditions and care for the mentally retarded *within* the institution (See, *e.g., Wyatt v. Stickney*, 344 F. Supp 387 (M.D. Ala. 1972), today, the emphasis appears to be on deinstitutionalization and the provision of services in community-based settings. (See, *e.g., Holderman v. Pennhurst*, 446 F. 1295 (E.D. Pa. 1977). Thus it can be readily seen that Presidential Commission Report on the proper role of institutions over the next decade or more would be invaluable to state officials and the courts because it would provide a clear direction for both state planning and judicial relief.

[3] *Days' Testimony*, at 13.

[4] It is worth noting that the provisions of S. 10 governing the Attorney General's certification that the Governor and Attorney General of the state have been notified of unconstitutional conditions and have failed to correct those conditions parellels the language used by the courts to define the qualified immunity of state officials from personal liability. See *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90 (1974) and *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed2d 214 (1975). The Attorney General's certification that the state officers are aware of the unconstitutional conditions and have failed to correct them, would appear to be an open invitation to the filing of personal damage actions against those officers. The possibility of such suits constitutes a compelling reason to require the Attorney General to be extremely careful and specific in his certification and to allow state officers to obtain review of that certification by the courts.

[5] A section by section analysis of S. 1393 is contained in Senate Report 95-1056, Report of the Senate Judiciary Committee on S. 1393 at 25, *et seq*.

[6] These concerns are described in detail in the opinions in *U.S. v. Solomon*, 419 F. supp. 358. (D. Md. 1976) affd. 563 F. 2d 1121 (4th Cir. 1977), and *Alexander v. Hall*, C.A. No. 72-209 (D.S.C. June 12, 1978).

[7] This argument was used in the United States District Court in New Hampshire as a basis for distinguishing intervention from the initiation of litigation prohibited by the *Solomon* Court.

[8] See Mr. Days' testimony of February 9, 1979, at 10.

[9] See *e.g.* 42 U.S.C. 2000-a5 (public accommodations); 42 U.S.C. 2000b (public facilities); 42 U.S.C. 2000c-6 (school desegregation); 42 U.S.C. 2000e-6 (employment); 42 U.S.C. 2000h-2 (Attorney General intervention).

[10] See *e.g. United States v. Greenwood Municipal Separate School District*, 406 F. 2d 1086 (5th Cir. 1969), *cert. denied*, 395 U.S. 907 (1969); *United States v. Building and Construction Trades Council of St. Louis, Missouri*, AFL-CIO, 271 F. Supp. 447 (E.D. Mo. 1966); *United States v. Northside Realty Association, Inc.*, 474 F. 2d 1164 (5th Cir. 1973).

[11] *U.S. v. Greenwood, supra*.

[12] See *e.g.* Testimony of Drew S. Days, III, in the Hearings Before the Subcommittee of the Constitution on S. 1393, at 35.

[13] Mr. Days' testimony of February 9, 1979, at 10 and 12.

[14] A copy of Mr. Days' letter is attached to this testimony.

[15] This Justice Department attorney accused the state of subjecting people to degrading conditions and of such various practices as poking residents with safety pins, striking them with fists, hitting them with bats, forcing them to sit in straight jackets for hours and subjecting residents to punitive forms of isolation and seclusion. The Defendants do not believe these allegations to be true. Furthermore, it is my opinion that the United States now knows these allegations to be untrue based on their inspection of the institution.

[16] The Assistant Attorney General in my office responsible for this litigation has since been told that the FBI report will be produced, but that no date for production can be given. It is perhaps interesting to note that if the report was prepared in preparation for litigation, the United States had planned to bring suit as early as January, prior to the Plaintiffs' suit. If this is so, one must ask why the allegations in the complaint were not discussed with my office when we requested an opportunity to discuss the concerns of the United States.

[17] A copy of my letter to Mr. Days is attached to this testimony.

[18] Copy of Mr. Days' response is attached to this testimony.

[19] Copy of my letter of October 24, 1978 is attached to this testimony.

[20] Although the Court agreed with the Defendants' contention that the United States needed specific statutory authority to intervene in the litigation, it concluded that such specific authority was found in Rule 24(b) of the Federal Rules of Civil Procedure, which section allows governmental officers to intervene in an action whenever a party to the action relies as part of its claim or defense upon an statute of executive order administered by a federal or state governmental official or agency. The Court therefore allowed the United States to intervene on that basis; however, it also allowed the United States to intervene to assert the constitutional rights of the residents of the School. In December of 1978, my office requested a rehearing on the Court's order of intervention asking that the government's participation be limited to the interest of the United States in the enforcement of various statutes and regulations. Our motion for rehearing is still pending before the Court.

[21] The United States has had four expert witnesses tour the Laconia State School and has been given an opportunity to engage in extensive discussions with the staff of the School. It is perhaps interesting to note that during each occasion on which expert witnesses have visited the institution, at least one of those experts have been accompanied solely by counsel for the Plaintiffs rather than counsel for the United States. This perhaps demonstrates the extent to which the

resources of the United States are available only to one side in the proceeding.

Attached as an appendix to this testimony are some suggested amendments to S. 10.

Here is a letter from the attorney general of North Carolina:

STATE OF NORTH CAROLINA,
DEPARTMENT OF JUSTICE,
Raleigh, N.C., May 14, 1979.

Re Senate Bill 10.
Hon. STROM THURMAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMAN: Last year one of the attorneys in my office researched Senate Bill 1393 which as amended is exactly the same as Senate Bill 10 which was reintroduced by Senator Bayh. It is my opinion that Senate Bill 10 is an unwarranted intrusion into the affairs of the states and was written in the belief that states are incapable of or unconcerned with providing proper care for institutionalized persons in their custody. I think this is a blatant affront to the dignity of the states and directly contrary to the principles of federalism, which is a part of the foundation of our constitutional form of government.

I should think the United States Attorney General would be busy enough in assuring that the constitutional rights of persons in federal custody are not violated and does not need the additional responsibility of overseeing the fifty states. Moreover, in a time when the citizens are demanding a reduction in the size of the bureaucracy, this bill runs counter to the wishes of the taxpayer.

I am enclosing a copy of a letter to Senator Morgan on Senate Bill 1393. This letter was written at my direction and I fully concur with its contents. I am also enclosing a copy of my remarks to the Senate Committee on the Judiciary on the "Civil Rights Improvement Act," which I understand either will be or has already been reintroduced. The comments I made on that bill are in many respects equally applicable to S. 10.

Thank you for giving me this opportunity to comment on this bill. If I can be of further assistance to you in this or any other matter, please do not hesitate to call upon me.

With highest regards, I remain
Yours truly,

RUFUS L. EDMISTEN,
Attorney General of North Carolina.

Here is a letter from the attorney general of North Dakota:

STATE OF NORTH DAKOTA,
Bismarck, N. Dak., September 21, 1979.

Hon. STROM THURMOND,
U.S. Senator,
Washington, D.C.

DEAR SENATOR THURMOND: This is in response to your letter of September 14, 1979, in which you alert me to the provisions of S. 10, a Senate bill now pending before the full Judiciary Committee.

As you noted, this bill would interject the United States Department of Justice as an overseer in the operation of state institutions for the mentally ill, retarded or elderly and in the operation of state prisons, including local jails.

The bill sets forth a procedure by which the United States Attorney General may institute civil actions on behalf of persons residing in state institutions, seeking equitable relief when institutionalized persons are allegedly deprived of constitutionally secured rights and the alleged deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of constitutionally protected rights. Such a procedure is an unnecessary and unwarranted extension of federal involvement in the administration of state institutions.

Current federal law authorizes civil actions for redress of deprivation of constitutionally protected rights under color of state law, and awards of attorneys fees to successful litigants. Current federal law also authorizes criminal prosecution in certain cases of deprivation of constitutionally protected rights under color of state law.

I am especially concerned about Subsections 2 (1) and (2) of the bill which requires that upon commencing an action, the United States Attorney General must certify that the governor and the state attorney general of a state have been notified by the United States Attorney General or his designee of the measures which he believes may remedy the alleged conditions which deprive rights, privileges or immunities secured or protected by the Constitution or laws of the United States; and that the governor and state attorney general have been made aware of federal financial or technical assistance available to assist in the correction of such conditions. Apparently if a state, for whatever reason, fails to seek all available federal assistance for state institutions, that state is subject to a lawsuit. The judgment of the Justice Department will thus be imposed on the qualified specialists who are administrators of state institutions.

S. 10 would not provide any greater protection to institutionalized persons than what is currently available. It would simply create another level of federal bureaucracy not nearly as sensitive to the rights of North Dakota citizens who are institutionalized nor as well-equipped to protect those rights as those agencies, officials and individuals now working institutionalized persons.

North Dakota legislators and state officials are acutely aware of their responsibilities to institutionalized persons. The North Dakota Legislature has enacted jail standards legislation which directs the Attorney General to promulgate jail rules and regulations and to enforce those rules and regulations. A legislative interim committee is developing a corrections master plan and another is studying the special needs of North Dakota's institutions for the mentally retarded. There is no necessity of federal supervision of such efforts.

I oppose S. 10 for all the above reasons.

Sincerely,

ALLEN I. OLSON,
Attorney General.

Here is a letter from the attorney general of South Dakota:

STATE OF SOUTH DAKOTA,
Pierre, S. Dak., May 18, 1979.

Hon. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: I will be succinct. I am opposed to Senate Bill 10 and hope that it will die in Senate committee. I have informed our senior Senator McGovern of my opposition and have informed, as you requested, the Governor and certain legislators.

You might inform the sponsors of the bill for me that we presently have a board of charities and corrections, a legislature, a governor, a warden, superintendents of various remedial schools, and a host of other people trying to do the very best they can for our institutionalized citizens. I would hope that the committee would remember that those people institutionalized are the sons and daughters, mothers and fathers of people who live in our state and vote for the people responsible for these institutions.

I may point out, Senator Thurmond, with a note of bitter humor, that there are many of us who would like to institutionalize some of the Justice Department lawyers who fly out from Washington to solve all of our problems and then go back home to fight the Civil Service Reform Bill. It may be good for tourism in our state, but it certainly is not good for government.

Respectfully submitted,

MARK V. MEIERHENRY,
Attorney General.

Here is a letter from the attorney general of Tennessee:

STATE OF TENNESSEE,
Nashville, Tenn., October 2, 1979.

Senator STROM THURMOND,
U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR THURMOND: I have received your letter of September 14, 1979, in reference to S. 10, 96th Congress, 1st Session. I appreciate your interest in the opinions of the States on this matter; and, in view of the fact that I have been following closely the progress of S. 10, I am grateful for the opportunity to express the position of the State of Tennessee. Initially, I am sanguine that the State of Tennessee supports the assumptions underlying the Bill: that institutionalized persons should not be subjected to conditions (egregious, flagrant or otherwise), that would deprive them of rights guaranteed by the Constitution or laws of the United States; and that persons subjected to such conditions are entitled to both equitable *and* legal relief.

Despite agreement with the above-stated assumptions, this office does not support S. 10. Specifically, it is the opinion of this office that S. 10 ignores many practical problems encountered in meeting the needs of institutionalized persons as well as the potential for state-created rights to provide creative and meaningful solutions to the problems. The following briefly outlines our objections to S 10.

First, it is unclear whether S. 10 applies to only physical conditions, or whether it applies to both physical conditions and other statutory rights such as rights to treatment and education. If S. 10 is intended to apply to the latter situations, it is the opinion of our office that many issues raised by federal statutory and regulatory schemes need to be resolved between the states and the federal agencies involved before the Attorney General of the United States intervenes.

Second, S. 10 renders state constitutional and statutory provisions ineffective, if not insignificant, by providing that all actions be brought in federal court. Specifically, since S. 10 requires a federal forum, the state claims become merely pendant and as you are well aware, federal courts are reluctant to construe state statutory and constitutional provisions more broadly than is necessary to resolve the federal claims. Consequently, many state statutes may be interpreted initially by a federal district court, a situation that is acceptable to the State of Tennessee. Further, by requiring the Attorney General of the United States to bring actions in federal courts, the state courts are deprived of an opportunity to resolve matters that are of utmost importance to the states.

Third, Section 2 of S. 10 apparently presumes that allegedly unconstitutional institutional conditions can be quickly and simply remediated. Specifically, this section requires as a condition precedent to the initiation of an action that the Attorney General of the United States certify, inter alia, the following:

(1) That 30-day notice has been given to the State of the alleged violation.

(2) That reasonable efforts have been made to consult with the State regarding financial, technical or other assistance that could assist in correcting the situation, and

(3) That the appropriate officials had a reasonable amount of time to take the appropriate action.

The presumption that institutional conditions can be quickly and simply remediated is belied by both the present inability of federal programs to accomplish this end and the difficulties encountered by federal courts in implementing institutional reforms. In fact, it is the experience of this State and the federal courts, that the ultimate solution to institutional reform involves increased and substantial appropriations by the state legislatures and long-term planning by state administrators. In view of the fact that S. 10 ignores past experience that indicates that complex political decisions underlie resolution of the problems associated with institutional conditions, it is unacceptable.

Fourth, S. 10, which creates an adversary relationship between the State and Federal governments, conflicts with the federal statutory programs that rely principally upon the States for implementation. Specifically in most instances, the states and the federal government are presumed to be working toward the same end. When this presumption is incorrect, the federal statutes usually provide specific mechanisms for problem-solving. It would appear that the resolution of problems existing in regard to implementation of federal statutory rights should be based upon the federal agency responsible for overseeing the program, and not the Attorney General of the United States.

Finally, numerous mechanisms presently exist for the enforcement of the rights of institutionalized persons. These include private causes of action, expressed or implied, as well as mechanisms for problem-solving between the states and the federal government. Further, private actions are encouraged, both by the appropriation of statutory attorney's fees and the appropriation of substantial sums for the representation of institutionalized persons by Legal Services Corporation and other advocacy groups. Given the multitude of existing enforcement mechanisms, it would seem that the federal government could better protect the rights of institutionalized persons by spending federal monies directly upon the identified needs of this population.

In conclusion, while the State of Tennessee supports the principal assumption underlying S. 10, it does not support the bill itself. The experience of this State has shown that litigation is tremendously expensive, both in terms of time and money. Further, neither the lawsuits in this State, or in other States, have produced immediate resolution of the problems encountered in the provision of institutional services. It is clear that institutional reform requires the infusion of millions of dollars of state and federal money; and to add another enforcement mechanism to the myriad of mechanisms that presently exist is to ignore the real needs in this area. In short, given the existence of numerous legal remedies, the addition of another is not merely wasteful, but patently counterproductive.

I hope that this brief discussion of S. 10 will be of some use to you. If you have further questions regarding this matter, or if I can be of some assistance to you, please contact me.

With kindest regards and best wishes.

Sincerely,

WILLIAM M. LEECH, JR.,
Attorney General.

Here is a letter from the Attorney general of West Virginia:

STATE OF WEST VIRGINIA,
Charleston, W. Va., October 16, 1979.

HON. STROM THURMOND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: I would like to thank you for your correspondence giving me an opportunity to express our office's feelings concerning S. 10. It is very pleasant to note that our views on this disturbing piece of legislation coincide.

The Office of the Attorney General for the State of West Virginia has reviewed the text of S. 10 and we conclude that there are so many unanswered questions attending this bill that we must go on record as opposing its passage. Therefore, you may feel free to use this letter in whatever manner you feel is appropriate.

Herewith are our major concerns regarding this legislation:

(1) Much of the caseload of this office's Trial and Appellate Division already consists of civil rights cases brought by institutionalized persons, frequently with representation by public interest organizations. Most of these suits are brought to challenge the constitutionality of conditions of confinement in West Virginia's public institutions. We have dealt with between fifty and eighty suits every year since 1974 filed by our prison population alone; this fact can be appreciated only when one considers that West Virginia is a small state with a total adult prison population of approximately 1200. Our attorneys, therefore, are already regularly required to address a multitude of claims alleging inadequate provision of treatment and care. The attorneys feel that most meritorious claims have already been raised or will soon be raised by private parties, making federal involvement in this area at best superfluous. They also feel that the public defenders and public interest attorneys in our State are sufficiently motivated and aggressive to raise on their own, not just meritorious claims, but claims designed specifically to attack the good faith efforts by the State government to provide adequate care by challenging the courts to define new and frequently dubious "rights" of incarcerated persons. The injection of the Justice Department into these ongoing courtroom battles, while with good intentions, would ultimately serve only to increase the number of cases in an area where there is already adequate remedy at law. It would serve only to strain our office's resources.

(2) We also question the concept underlying this bill in light of the doctrines of federalism. This bill will allow the federal government to directly intervene in governmental functions clearly allocated to the states. This intervention is no less a legitimate cause of serious concern because it is in the guise of advocacy on behalf of those presumably not in an optimum position to assert their own rights. It is now accepted social policy in our country to allow the creation of private and semiprivate legal aid organizations whose specific function it is to make just such advocacy on behalf of the incarcerated in opposition to state government. This policy is endorsed by Congress by their allocation of millions to fund such groups. We infer from this funding that Congress has already decided that such nongovernmental groups are best suited as advocates for the institutionalized. The new form of federal intervention proposed by S. 10 is also no less questionable because it would be in the form of judicial action as opposed to administrative regulatory action attended by all the burdensome conditions placed on federal funding. There exists at present a plethora of federal funding authorities for state mental, penal and juvenile institutions which are staffed by experts in the various fields who are much better suited to formulate policy and develop practices than the lawyers of the Justice Department. S. 10, on the other hand, would allow the Justice Department to use the leverage of civil action in order to effect its own concepts of mental health and correctional policy.

(3) We are concerned, furthermore, about the loopholes contained in S. 10. Section Two contains what seems to be safeguards to insure that the Justice Department brings suit only after it has failed to obtain the cooperation of state officials. Unfortunately, Section Three provides the Justice Department with the means to avoid the requirements of Section Two; all that is needed is the existence of another plaintiff, of which there is never any shortage, particularly in the area of adult corrections, and the Justice Department can bring all their resources to bear against the states without meeting the prerequisites of Section Two.

(4) We believe that S. 10 gives the federal government inappropriate means to dictate policy to the states. If the Justice Department so desires, it may attempt to compel the courts to pass judgment on every state institution in the country irrespective of a state's financial resources or budgetary policy. The ultimate gravamen of this bill is that through the courts the federal government can force state legislatures to make policy decisions and appropriations in the area of mental health and corrections against their wills.

(5) We also believe that S. 10 would put the Justice Department in a preposterous position. On one hand the Justice Department is defense counsel for employees of the Federal Bureau of Prisons in prisoner civil rights actions, but, on the other, S. 10 would enable and encourage the Justice Department to assist inmates of state correctional institutions when they bring such actions against employees of the state.

In summary, this office takes the stand that S. 10 provides a highly inappropriate vehicle to the federal government to interfere with policy-making functions that properly belong to the states. In our society the mere threat of a lawsuit can be one of the most efficacious ways of compelling someone to act in ways contrary to their own interests. S. 10 at its very heart would give this coercive power to the federal government in such a singular way as to empower it to supervise the operations of all state institutions. We strongly feel that this vehicle is an unnecessary one; there is no lack of plaintiffs and no lack of legal aid and public interest attorneys.

I think it is appropriate to note that federal and state court decisions within the past few years have established major guidelines by which institutions (as defined in the bill) are now operated and maintained with respect to the rights of those institutionalized. I am unaware of any state that is not currently making a determined and concerted effort to meet those guidelines.

The cost of such an effort nationwide is, of course, enormous. If Congress believes that this is an area in which there must be federal involvement, I respectfully suggest that financial assistance, not revenue wasting litigation, is a better solution. Before the limited legal resources of the states and the federal government are thrown into pitched battles in every federal courthouse throughout the land in lengthy and enormously costly litigation, I would suggest that we determine—perhaps through an impartial Presidential Commission—how serious the problem really is; what standards are to be used or required (there are some currently); what capital and operational costs will be required to meet any such standards; and what is the fiscal ability of the states to comply with those needs or mandates.

I sincerely believe that the great majority if indeed not all the states are currently making major efforts to provide appropriate care, treatment and confinement conditions to those in their state who are institutionalized. Admittedly, this has not always been true. But I also believe, with all due respect, that the Congress does not have all of the available, pertinent and current facts regarding those state efforts upon which it properly can base a decision to authorize

such federal action and involvement in these state activities. A Presidential Commission might obtain such facts and offer other recommendations for an acceptable solution to the problem. S. 10 offers not a solution, but confrontation, litigation and an inappropriate and severe test of the doctrine of federalism.

On the basis of my experience as a former State Commissioner of Institutions, member of the ABA Committee on Legal Rights of Prisoners, Immediate Past President of the National Association of Attorneys General and Attorney General of West Virginia for the past eleven years, I oppose the passage of S. 10 in its present form for the reasons set forth above.

Sincerely,

CHAUNCEY H. BROWNING,
Attorney General.

Here is a letter from the attorney general of Nevada:

STATE OF NEVADA,
Carson City, Nev., October 30, 1979.

Hon. STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR THURMOND: I agree with your position on S-10 and support efforts made to defeat the bill.

The initiation of court action by the United States Department of Justice against the states is not an expeditious or appropriate method to assure the rights of persons confined to mental institutions, nursing homes, prisons and facilities for juveniles and the handicapped.

The State of Nevada can provide quality services to its citizens without the necessity for Department of Justice intervention. Such judicial intervention will divert time, money and energy to legal defense. State resources can better be used to provide direct care to institutionalized persons.

Thank you for your concern regarding S-10. I will forward copies of this letter to Nevada Senators Howard Cannon and Paul Laxalt and Congressman James Santini.

Sincerely,

RICHARD H. BRYAN,
Attorney General.

Here is a letter from the attorney general of Washington, the State of Washington:

OLYMPIA, WASH., *May 9, 1979.*

Hon. STROM THURMOND,
U. S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: Thank you very much for your thoughtful letter of May 1, 1979 on S. 10. I am delighted in your understanding of, and opposition to, that proposal.

Both the National Association of Attorneys General and I, as Attorney General of the State of Washington, have opposed the bill and its predecessors as an outrageous violation of the basic precepts of federalism. Our experience in the State of Washington with the Department of Justice has been almost entirely negative. It's interferences with the appropriate determination of state policies of the state itself are simply too numerous to mention.

You have already put your finger on the most important objection to S. 10: The separation of the enforcement authority of such policies as the department may determine to be appropriate from the responsibility of coming up with the money to implement them. I hope that you can presuade your colleagues of the justice of your position and I will continue to oppose the proposal with my own congressional delegation.

Sincerely,

SLADE GORTON,
Attorney General.

Here is a letter from the attorney general of Wyoming:

CHEYENNE, WYO., *July 13, 1979.*

Re S. 10, H.R. 10.
Hon. STROM THURMOND,
U. S. Senate,
Washington, D.C.

DEAR SENATOR THURMOND: The State of Wyoming, while supporting the objectives of the "Institutions Bill" with regard to fully protecting the rights of institutionalized persons, vehemently objects to the procedure for correction envisioned by the bill. In line with the position announced by the National Association of Attorneys General and the National Association of State Mental Health Program Directors, we believe that there exist far more reasonable alternatives to the litigious solution suggested by this legislation.

The practical problems which the bill raises are overwhelming. It seems possible, for instance, that the Justice Department might prevail in litigation against a political subdivision, resulting in an order that the subdivision take corrective action far beyond its means to accomplish. I am advised that Congressman Kastenmeier's amendment to allow federal financial assistance to the defendant state or subdivision failed to pass, indicating that while the federal government is granted the right to make the initial determination that an egregious condition exists, there is no concomitant duty to lend assistance in any meaningful way.

But the elected representatives of the states can support a bill which suggests a procedure which has cost one state $56,000 to answer one set of interrogatories, when that same amount would probably have corrected the egregious condition, appears to be a sterling example of an exercise in counterproductivity.

This is, after all, a nation of states. It seems as though some of our congressmen forget that they are elected to represent the people of those states, and not to bludgeon them with needless lawsuits.

I sincerely hope that the United States Congress will recognize the pitfalls inherent in this legislation and take proper steps to enact law which puts the federal government and the states on the road to a cooperative solution. The disagreements which this state has had with the federal government are well known to all. I believe that these differences are, to a large degree, the result of precipitous action taken by our lawmakers without due regard for the legitimate interests of the several states, and the special conditions which exist in each.

Why not spend the tax dollars of the people of this state to help them, rather than to sue them.

Sincerely yours,

JOHN D. TROUGHTON,
Attorney General.

Mr. President, I ask unanimous consent that letters from various other officials throughout the United States be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE STATE OF SOUTH CAROLINA,
Columbia, S.C., March 26, 1979.

Hon. BIRCH BAYH,
Chairman, Senate Judiciary Subcommittee on the Constitution, Dirksen Senate Office Building, Washington, D.C.

Dear Mr. CHAIRMAN: This Office has experienced the conduct of litigation by the U.S. Department of Justice from 1972 until 1978 in the case of Alexander v. Hall, Civil Action No. 72-209. This was a suit alleging the unconstitutionality of the South Carolina Mental Health commitment laws and also raised issue as to adequacy of treatment for those patients residing at South Carolina State Hospital. The purpose of this letter is to inform you of our opposition to the enactment of S. 10 and H.R. 10 based upon the experience of this Office in defending Alexander v. Hall. I recommend that this Subcommittee pay great heed to the April 4, 1978, letter of the National Association of Attorneys General, a position with which this Office wholeheartedly concurs.

The South Carolina experience in the defense of Alexander v. Hall proved to be extremely costly and time consuming, both for attorneys in this Office and for individuals involved in the treatment of the mentally ill at South Carolina State Hospital. This suit was ultimately dismissed but only after four years of litigation with the Department of Justice.

I feel compelled to add one further alternative to that mentioned by the National Association of Attorneys General in its letter of April 4, 1978. There presently exists in the Department of Health, Education and Welfare extensive regulations governing the appropriate care of individuals in State mental institutions in order for those institutions to receive Medicare and Medicaid funds. A goal of improving the conditions of the mentally ill can be much better served through enforcement of existing regulations by HEW personnel trained in the field rather than through the adversary approach of pitting federal lawyers against state lawyers.

I sincerely hope that this Subcommittee can achieve its goal of the protection of citizens who are less able to protect their own rights without authorizing the indiscriminate initiation of litigation by the Department of Justice. I use the word "indiscriminate" advisedly because, throughout the conduct of this litigation in South Carolina, the Justice Department repeatedly refused to advise this Office or the Court of the standards that were allegedly not being provided to the citizens of this State. Furthermore, the Justice Department refused to acknowledge the existence of detailed standards of adequate treatment set forth in HEW regulations with which all South Carolina State Institutions comply.

Thank you very much for your consideration and interest in this matter.

Very truly yours,

DANIEL R. MCLEOD,
Attorney General.

STATE OF NEW MEXICO,
Santa Fe, N.M., May 28, 1979.

Hon. STROM THURMOND,
U.S. Senator,
Washington, D.C.

DEAR SENATOR THURMOND: I agree that S. 10 constitutes an erroneous approach to securing the rights of persons residing in state institutions.

We, in New Mexico, have made tremendous strides in the last few years in insuring that the rights of our institutionalized citizens are protected. Advocacy groups have established a viable rapport with the Attorney General's office, with other state agencies, and with the judicial system to react quickly when any shortcomings in our institutions are identified. Legal representation is also readily available in any type of commitment to our state facilities. Our State has at least as well-defined an understanding of the needs of its institutionalized citizens as does Washington and our officials are more interested than would be Washington lawyers in meeting the needs of these citizens.

Cooperation between the States and Washington is bound to have demonstrably better results than the confrontation approach which S. 10 would seem to foster.

A copy of this letter is being sent to New Mexico Attorney General, Jeff Bingaman, for his consideration and review.

If I can be of further assistance, please let me know.

Sincerely,

BRUCE KING,
Governor.

STATE OF INDIANA,
Indianapolis, Ind., June 28,1979.

HON. STROM THURMOND,
U.S. Senator.
Russell Senate Office Bldg.,
Washington, D.C.

DEAR SENATOR THURMOND: Before you come to a conclusion as to S. 10 which is pending in the Constitution Subcommittee of which you are a member, please review the enclosed statement which I have previously submitted on behalf of the National Association of Attorneys General and myself representing the considered research and experience of the chief legal officials of all fifty states.

Thank you very much for your consideration of all aspects of this important matter—both the short range fashionable ones and the long range substantive ones.

Best personal wishes.

Respectfully yours,

THEODORE L. SENDAK,
Attorney General of Indiana.

TESTIMONY OF THE HONORABLE THEODORE L. SENDAK, ATTORNEY GENERAL OF THE STATE OF INDIANA, ON PROPOSED S-10 BEFORE THE SENATE SUBCOMMITTEE ON THE CONSTITUTION

I would like to thank the Committee for this opportunity to present written testimony in opposition to S-10. This testimony reflects my personal views; the views of numerous officials in Indiana; and my assessment, based upon my year as President of the National Association of Attorneys General, of the views of the chief legal officials of all the states.

The National Association of Attorneys General (NAAG), which is composed of the attorney general from each state plus the four territories, overwhelmingly reaffirmed its position in opposition to the institutions bills in a resolution passed at the Mid-Winter Meeting on December 3, 1978. See copy attached. In addition, several attorneys general from different jurisdictions have offered testimony before Congress on the predecessor bills, S-1393, H.R. 2439, and H.R. 9400.

There are several problems with these bills. First, they are unconstitutional in that the Tenth Amendment to the Constitution of the United States reserves to the states and to the people all power not specifically delegated to the United States. Obviously, there is no delegation of authority in the Constitution for the Executive Department to sue on behalf of private individuals.

Second, the bills are not needed since they purport to provide relief where numerous remedies already exist. For example, Congress has provided in 42 U.S.C. § 1983 for suits for an alleged "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. My office is currently defending over 350 suits under § 1983, a substantial number of which are class actions, i.e., actions brought by a named party for the benefit of themselves and "all other similarly situated" persons. Those suits involve all aspects of individual rights including conditions in all of the state correctional institutions, mental health problems, racial composition of public schools, abortion, welfare claims, personal injuries, and other areas. Many of these cases are brought pro se, i.e., by the complaining party without aid of counsel, and are later taken over by so-called public interest law groups. If brought pro se, the Supreme Court has held that all proceedings must be construed liberally in favor of the complaining party, and thus, they are not held to strict compliance with court rules or procedure. See *Haines* v. *Kerner*, 404 U.S. 519 (1972).

An example of the onus of these cases arose in July and August 1978, when four Deputy Attorneys General on my staff tried an eighteen day lawsuit in federal district court in Indianapolis concerning the conditions of confinement at the Indiana Reformatory. The case started in 1975 as a pro se complaint. In early 1976, Legal Services Organization took over the prosecution. The Justice Department was allowed to intervene in that case as a "litigating amicus curiae," and it assisted the Legal Services Organization in litigating all aspects of imprisonment such as food, health, recreation, training, discipline, etc. My staff has spent over 2,300 hours on that case, which has yet to be decided by the Court. In requesting intervention in that case, the Justice Department listed many prison suits in which it had intervened as a litigating amicus. See copy of "Motion for Leave to Participate as Amicus Curiae" and "Memorandum of the United States in Support of its Motion for Leave to Participate as Amicus Curiae" in *French* v. *Phend*, IP 75-677-C, attached hereto. NAAG records indicate that the Department of Justice has intervened in prison cases in at least twelve states.

The Justice Department also has been permitted to intervene as a litigating amicus in cases involving the mentally retarded and mentally ill, including cases in Alabama, New York and Pennsylvania.

In addition to the above, Indiana has provided a remedy for the representation of "developmentally disabled" persons by the creation of the Protection and Advocacy Service Commission for the Developmentally Disabled, a federally funded state agency under P.L. 94-103, "The Developmentally Disabled Assistance and Bill of Rights Act." See Indiana Code 16-13-19-1 et seq. That agency is charged with the duty, among other things, to:

"Provide legal and other advocacy services throughout the state to individuals or organizations on matters related to the protection of disabled persons;" [I. C. 16-13-19-5 (3)].

Additional remedies are also available, including: 28 U.S.C. § 1915, which allows a federal district court to authorize any suit to be brought without the payment of fees and costs and allows the judges to appoint counsel to represent the complainant; I.C. 34-1-1-3, which allows a state court to appoint counsel to represent "a poor person" either as a plaintiff or defendant in a lawsuit; and I.C. 33-1-7-2, which makes it the duty of the Public Defender's Office of the State of Indiana to represent any person in any penal institution in the state who is without funds to employ private counsel. In that regard, there is a branch office of the Public Defender at the Indiana State Prison with a full time deputy on duty.

In addition to these services, most areas of Indiana are served by groups such as the Legal Services Organization, Legal Aid Society, Project Justice and Equality, American Civil Liberties Union, etc., so that free legal assistance is readily available to institutionalized persons.

A third reason why these bills are not needed is that they will have a substantially adverse effect on the relationship between the federal and state governments. That relationship is getting more strained all the time with actions being taken by Congress and by Federal agencies such as the FTC to regulate conduct traditionally regulated by the states. These bills will further affect that relationship since the states will be called upon to defend all lawsuits brought by the Justice Department against the state agencies and officials involved.

In addition to these problems regarding S-10 generally, there are questions with specific sections with the bill. Section 2 gives the United States Attorney General far reaching authority, even extending to replacement of the functions of state legislatures. The Attorney General is required to give only thirty days notice to the Governor and state Attorney General listing the allegedly offending conditions, supporting facts, and the measures he believes may remedy the conditions. The notice must further provide that he has made a reasonable effort to consult with the state's Governor and Attorney General regarding federal assistance; that he has endeavored to eliminate the alleged conditions by informal methods; that he is satisfied that the officials have had a reasonable time to take appropriate action to correct such conditions; and that he believes an action by the United States is of general public importance.

Suppose, for example, that the Attorney General's staff tells him that there are constitutional violations in the Indiana penal system, which it did, and a general notice—supposedly containing "facts"—is sent to the Governor and the Attorney General. Further suppose that a member of the Governor's staff, one of my assistants and I fly to Washington, which we did, to meet with the head of the Justice Department's Civil Rights Division and members of his staff; and that during that meeting specific facts are requested since they had not been supplied earlier. When facts were finally presented, it was discovered that the Justice Department was working with completely outdated information. Allegedly offending facilities had been remodeled or totally replaced.

Even though the Justice Department abandoned its desire to challenge Indiana's entire penal system, it still intervened in the French case mentioned above. That case has gone to trial, and corrections experts have disagreed over the nature and extent of any problems.

A state legislature must be given sufficient opportunity to react to these alleged problems. In Indiana, the General Assembly meets for sixty days in odd years and thirty days in even years. Budgets are prepared during the long sessions with emergency matters considered in the short sessions. However, Indiana has a constitutional prohibition against going into debt. Thus, major expenditures cannot easily be undertaken as an "emergency" matter; and these functions concerning the proper allocation of state funds, programs to be implemented in state institutions, etc., are all decisions for state legislatures to make.

Another financial aspect of these bills is that they would enable publicly paid lawyers from the Department of Justice to bring or to intervene in actions on behalf of inmates in public institutions against public officials who will be defended by publicly paid lawyers for the state or local governments. This, along with the fact that the so-called public interest law groups are tax supported, means that the citizens of this country will be paying all sides in these disputes, as well as the judges, and will be paying to house, feed, and care for those bringing the suit. The taxpayers will further be required to pay for any measures taken as a result of these suits, on top of the taxes they already pay to build, maintain, improve, and expand the facilities without being mandated by courts. These payments in 1978-79 amount to over $67,400,000 for the 5,600 inmates and 2,900 parolees under the control of the Department of Corrections, with approximately $2,500,000 for the parolees and the remainder for the 5,600 incarcerated offenders.

The institutions bills also fail to consider another very important fact, and that is that all alleged violations of constitutional rights do not occur to people in state and local institutions. Federal prisons are

equally vulnerable to such charges, as a review of the cases in Federal Supplement and Federal Reporter will show. However, the United States Attorney General is not impowered to sue on behalf of a person in a Federal institution. The apparent disregard of the Fourteenth Amendment rights of persons in federal institutions by this differentiation will further adversely affect the federal state relationship and civil rights.

It is my opinion that S–10 and similar so-called institutions bills are duplicative of existing remedies, and are completely unneeded. I would hope that this Committee would recommend that the bills not pass.

Thank you very much.

STATE OF NEW YORK,
Albany, N.Y., September 26, 1979.

Hon. STROM THURMOND,
Committee on the Judiciary, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR THURMOND: I urge you to oppose S. 10, a bill that would grant the Justice Department standing to sue states for alleged violation of the rights of institutionalized individuals.

The Departments of Justice and Health, Education, and Welfare already have sufficient authority to protect the rights of the institutionalized and they are currently exercising it.

Sincerely,

JAMES E. INTRONE,
Acting Commissioner.

STATE OF NEVADA,
Carson City, Nev., October 1, 1979.

Senator STROM THURMOND,
Russell Office Building,
Washington, D.C.

DEAR SENATOR THURMOND, on behalf of the State Division of Mental Hygiene and Mental Retardation I would like to indicate support of any efforts on your part to defeat S–10. The concept of providing quality, humanistic care to the mentally ill and mentally retarded citizens is one to which Nevada strongly ascribes. However, it appears that S–10 would arrange a system of intervention on the part of the Federal Department of Justice in state affairs that would be contraproductive. It would create confrontation rather than cooperation between the federal and state governments. It would not provide any federal assistance in correcting problems identified. The economic and human costs of responding to Department of Justice inquiries into state mental health and mental retardation programs could be much better applied to responding to the needs of the citizens of the state who require such programs. The system created by S–10 would serve no useful purpose and would interfere with the states' right and responsibility to care for its handicapped citizens.

Thank you for your consideration of these thoughts. If the Nevada State Division of Mental Hygiene and Mental Retardation can provide you with additional information in your efforts on this matter, please feel free to contact me.

Respectfully submitted,

JERRY GRIEPENTROG,
Administrator.

SHERIFF OF UNION COUNTY,
La Grande, Greg., October 18, 1979.

Senator STROM THURMOND,
Russell Senate Office Building,
Washington, D.C.

SIR: I have just been made aware of Bill No. 10.

I want to speak against this bill in the same manner as the Oregon State Sheriff's Association. I also have some additional thoughts.

I presume that whenever a complaint is made, the United States Attorney General will assign someone to do an on premises investigation and inspection. Recognizing that there will be complaints from every facility in the nation, I can see that there would be a tremendous work force needed.

It seems to me, that ultimately, the Federal Government would be placed in the position of being inspectors of all jails throughout the United States.

I don't know for certain who is seeking this legislation. If I did, I would probably understand what the motivation is for this step.

In summary, I wish to urge serious consideration of what this bill implies. If this type of Federal intervention is allowed, we might give consideration to having the Federal Government simply fund and operate all jails in the nation.

On second thought, that may be the answer. The Federal Government would then have to figure out how to pay for the results of some of the "well thought out" decisions of the past.

Sincerely,

ROBERT V. PRICE,
Sheriff of Union County.

BIG HORN COUNTY,
Basin, Wyo., October 18, 1979.

DEAR SENATOR: In reference to Senate Bill 10 (Rights of Institutionalized Persons) House of Representative Bill 10 I ask that you please vote against its passage as the potential for conspiracy by inmates and overzealous intervention by the Attorney General in matters more political than legal is considerable, given the extreme vagueness of the Bill.

Sincerely,

JON DAHLBERG,
Sheriff.

RESOLUTION AS ADOPTED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

INSTITUTIONS BILLS

Whereas, the 96th Congress will again consider legislation which would allow the Attorney General of the United States to institute and intervene in civil actions in certain cases against state governments alleging deprivation of the constitutional rights of institutionalized persons in jails, mental hospitals, facilities for the handicapped and mentally retarded, juvenile detention centers and nursing homes; and

Whereas, persons complaining of unconstitutional conditions of confinement in institutions have legal remedies under 42 U.S.C. 1983; and thousands of such cases staffed by public interest legal organizations and by private counsel are awaiting resolution in the courts; and

Whereas, there are now in place at the state level federally funded advocacy units and agencies to deal with the special problems and rights of many institutionalized persons by means of litigation and otherwise and the efforts of such units and agencies should not be duplicated; and

Whereas, formulation of a national policy to define and protect the constitutional rights of inmates of federal, state and local institutions should be undertaken in formal consultation with state government before legislation is enacted; and

Whereas, any federal legislation such as the institutions bills of the 96th Congress which fails to provide for the financing of the changes it seeks is unrealistic, unfair and unworkable;

Therefore, be it resolved that:

(1) The National Association of Attorneys General supports establishment of a Presidential Commission to study the issues involved in the care of institutionalized persons in local, state and federal institutions and to recommend improvements in the operation of the institutions, including the drafting of proposed minimum standards of care; and

(2) That a national policy concerning adequate care for institutionalized persons in local, state and federal institutions should develop from a shared commitment of local, state and federal government working together to define the causes and solutions to these problems; and

(3) A study of the fiscal aspects of institutional operations must be included in the work of the Commission to determine what financing methods are available and practicable to assure the improvement of care to at least a constitutional minimum; and

(4) The Washington Counsel of this Association is authorized to present these views to the appropriate Congressional committees and to the Administration.

INDIANA SHERIFF'S ASSOCIATION, INC.,
Indianapolis, Ind., October 4, 1979.

Hon. STROM THURMOND,
U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR THURMOND: The Indiana Sheriff's Association's 26 member Board of Directors voted unanimously at their last Board Meeting to have their opposition to Senate Bill 10 expressed to you and other members of the Judiciary Committee.

This legislation does not appear to create any new rights for incarcerated persons that they do not now enjoy under existing State and Federal law. The most significant impact is that under this legislation, the inmate would no longer be required to initiate his own action, for the Attorney General would be authorized to initiate a civil action against any state, political subdivision, official or even the lowliest employee whenever the inmate alleges some real or imagined deprivation of his rights.

The effect of the bill would appear to be to remove entirely, the jurisdiction of the state courts in these questions where the Attorney General intercedes, and permit the full force of the office of the Attorney General of the United States to be brought against local county officials, Sheriffs, and Jail Personnel, with whatever credibility might be implied to the inmates cause of action.

We feel the potential for conspiracy by inmates, and overzealous intervention by the Attorney General in matters more political than legal is considerable.

It appears to us that there are sufficient existing state and federal laws that provide for the constitutional guarantees, rights, privileges or immunities of inmates. There are presently a number of investigative agencies, such as; Grand Jury, County and State Welfare Departments, County Health Officers, State Jail Inspectors, and others who have a statutory authority and duty to inspect jails and investigate any matter that appears to violate existing laws pertaining to the operation of the institution. If such violation should be found to exist, the agencies have the ability and means to bring about a remedy through the courts if necessary. It is also possible should an inmate desire to do so, to file a civil action against those responsible for the operation of the institution. This may be done by the inmate himself or with assistance from a legal service attorney, without cost to the inmate if he so requests.

It is for these reasons we do not feel that this legislation is needed or necessary to protect the rights of jail inmates. In respect to county jails and other correctional institutions, it would appear that this legislation would only create a need for additional staff and expenses for the Attorney Generals office and provide for a means for the federal government to circumvent those laws, and remedies that already exist for that very purpose.

We would therefore suggest that if this type of legislation is found to be needed to protect the rights of persons in other in-

stitutions, that the sections pertaining to jails and other correctional institutions be eliminated from the bill.

If you have any questions concerning our view of this matter, please let us know.

Sincerely,

JOHN O. CATEY,
Executive Director.

MICHIGAN SHERIFFS' ASSOCIATION,
Lansing, Mich., October 2, 1979.

Senator EDWARD M. KENNEDY,
Chairman, U.S. Senate Judiciary Committee, 2241 Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR KENNEDY: The Michigan Sheriffs' Association has reviewed the above referenced Bills. As a result of our analysis of these Bills and the impact of their passage on the police community and the total criminal justice system, the Michigan Sheriffs' Association is officially taking a position of opposition to the above Bills as they are presently written.

The reasons for opposition include:

1. This legislation created no new rights for incarcerated persons that they do not now enjoy under existing state and federal law.

2. The effect would be to remove entirely, the jurisdiction of the state courts in these questions where the Attorney General intercedes.

3. The potential for conspiracy by inmates, and overzealous intervention by the Attorney General in matters more political than legal is considerable, given the extreme vagueness of the Bills.

If you have further questions, please do not hesitate to contact Mr. Bernard Grysen, Executive Director, or myself.

Very truly yours,

DALE E. DAVIS,
Director of Legislative Affairs.

Mr. THURMOND. Now, Mr. President, the communications we have put in the RECORD are only some of those we have received.

I want to say, in closing, Mr. President, that it is difficult for me to understand why anyone would wish to impose S. 10 on his State. I cannot imagine why any Senator sitting in this body would wish to impose this bill on his State when the heads of the mental institutions in his State are opposed to it, the heads of the correctional insitutions in his State are opposed to it, when the nursing homes affected are opposed to it.

These are the people who work with the institutionalized. They are interested in them and in helping them.

Yes; there have been some abuses on both the State and Federal levels. Unfortunately, there will be some abuses in the future, no matter what takes place. There are bound to be some abuses.

However, Mr. President, that is no excuse for the Federal Government's coming in with its heavy hand and saying to the people of a State that despite the concerns and objections all of the people who run these institutions and who are opposed to this intervention by the Federal Government that the States must be subjected to this treatment at the hands of the Federal Government.

Who wants that type of action by the Federal Government? After all, who runs the State? Is the Federal Government going to run the State? If the people in the States, or practically all the people in the States, want to control their own institutions, why not let them do it? Why do we have to have the Federal Government come in and initiate suits?

I repeat a statement I made yesterday that under the law now anyone can bring a suit. He can bring it in the State court or the Federal court, and if it is in the Federal court the Attorney General then can intervene to assist with the suit. But, Mr. President, to give them the power to initiate suits just does not make sense.

Mr. President, I want to say again that, in my judgment, the Federal Government has gone too far already in trying to dictate to the States, in trying to dictate to the people of the States, what they can do and what they must do, what they should not do. I think we have to get the Government back to the people. The people of this country have a right to run their own State governments without interference from the Central Union.

Mr. President, if the people who wrote the Constitution of the United States—and I think they are the wisest people who ever lived—were here today they would be shocked. They would indeed be shocked, to think that the Union, the Federal Government, the Central Government, the National Government, was trying to assume power to dictate to the States how to run their own institutions.

Again I say are not there people in the States interested in the institutionalized?

The point is made, of course, that there have been some abuses. I answered that. I said sure, there have been. There always will be. But again I repeat that when an investigation was made down in Atlanta, Ga., of the Federal penitentiary recently—and that is a new report by the Senator from Georgia (Mr. NUNN) and the Senator from Illinois (Mr. PERCY)—they found abuses there.

Let the Federal Government clean up its own institutions. The States can take care of theirs. With all the abuses of alcoholism and narcotics that occur, according to Senator NUNN and Senator PERCY, in the Atlanta Penitentiary it ought to shock the Attorney General, it ought to shock the Justice Department. Let them clear up their own business and let the States alone. I think the States are doing a better job than the Federal Government in this field now. I think the States are operating their governments more efficiently and more economically than the Federal Government is being operated.

I am willing to trust the States. After all, we have got 51 governments in this country. We have got 50 State governments and we have got one Central Government, and when the Constitution was written it was never intended, and it never has been so construed, that the Central Government would take over the rights, the duties, and the responsibilities of the States.

I realize in the last 25 or 30 years the Central Government has gone a long way in entering into so many facets of life of the people in the States. But that was wrong, and let us not compound one wrong with another wrong. That is what we will do here if we pass S. 10.

I ask any Senator here who is thinking about voting for this bill to go back to his home State, talk to his people, talk to his officials, talk to the Governor, talk to the attorney general, talk to other people in whom he has confidence and ask them if they want the Federal Government to impose S. 10 on their people. S. 10 is a bill that will permit the State to be sued, that will permit the officials in the State to be sued, that will permit the taxpayers to be sued, because the taxpayers in the end are going to have to pay for it.

Mr. President, I am not going to take more time, but I just want to say that this is one of the most obnoxious bills that has come to my attention since I have been in the U.S. Senate.

The PRESIDING OFFICER (Mr. STEWART). The Senator requested that he be notified when he has 5 minutes remaining.

Mr. THURMOND. Mr. President, I hope the Members of this body will study this bill before they vote on it tomorrow. I hope the Members of this body will not vote to give the Federal Government more power than it has now. We should be getting the Federal Government off the backs of the people. That is what the people want. After all, we are servants of the people. I can tell you the people are dissatisfied. They have shown their disgust with Congress, they have shown their disgust with the Government, and the passage of this type of legislation tends to go further in that direction and to cause them to lose faith in their Government.

The humanitarian aspect is brought up. Of course, we all are interested in helping people who are mistreated, but that can be corrected in the States. It can be corrected by suits being brought in the States, if the government officials will not correct any problems which might exist.

There are plenty of agencies in the States now, such as legal aid societies. They have been bringing these suits as some of the Senators have noted. They have a right to bring those suits.

But let us not extend the power of the Federal Government where it is not needed. Let us keep the Federal Government out of everything we can. The Federal Government today is going much further than was ever intended under the Constitution and now is a good time to stop that.

If we stop S. 10, I think it will have a fine moral effect and will create more confidence on the part of the citizens of this country in their Federal Government.

When we pass a bill like this, it tends to shake the confidence of the people in the Federal Government. We do not want to damage the confidence of the people in the Federal Government, so let us stop S. 10. Let us kill S. 10 on tomorrow. I hope that will be done.

Mr. BAYH addressed the Chair.

The PRESIDING OFFICER. The Senator from Indiana.