IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2184

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

DR. NEIL SOLOMON, et al.,

Defendants-Appellees

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF DEFENDANTS-APPELLEES, DR. NEIL SOLOMON, BERT SCHMICKEL, AND DR. MARVIN MALCOTTI

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QUESTIONS PRESENTED

1. Does the Attorney General of the United States without statutory authorization have authority to bring suit against State officials to enjoin alleged deprivations of 13th and 14th Amendment rights of third parties?

2. Has the Attorney General of the United States made sufficient allegation of injury in fact to its legal interests as to satisfy the requirements of standing?

STATEMENT OF THE CASE

This action has been brought by the Attorney General of the United States against three public officials with responsibility for the care of mentally retarded clients at the Rosewood Hospital Center. Dr. Neil Solomon is the Secretary of the Department of Health and Mental Hygiene and has the overall responsibility for all State health programs including State programs on behalf of the mentally retarded. Bert Schmickel at the time of the filing of this action was the Director of the Mental Retardation Administration with direct authority for programs in the area of mental retardation. Dr. Marvin Malcotti is the Superintendent of the Rosewood State Hospital (hereinafter "Rosewood") which is the subject of this suit.

Rosewood is a facility for the treatment and habilitation of the mentally retarded. The hospital is located in Owings Mills, Maryland, a suburb of Baltimore. Although Rosewood had 2400 residents at the time the complaint was filed, the hospital census has now been reduced to about 1600 persons. The State of Maryland has embarked voluntarily on a program to improve the quality of care and habilitation given to residents at the hospital.

The complaint alleges that conditions at Rosewood are such that the rights of its residents under the 8th, 13th and 14th Amendments to the Constitution have been violated. Nevertheless, no resident or guardian of a resident at Rosewood has joined this action as plaintiff or intervenor. With exception of the amicus curiae brief filed on appeal by the Mental Health Law Project on behalf of three organizations concerned with the mentally retarded, no organization representing the mentally retarded has participated in this case in any capacity. Although the Plaintiff has attempted to inject selected portions of the voluminous discovery into the argument on the legal questions, no evidentiary hearing has ever been held in this matter and there are no findings of fact for this honorable court to review. This court must deal with the important questions of authority and standing rather than the merits of this action.

In the proceedings before the District Court, the State moved to dismiss the action on the grounds that the United States lacked the authority and standing to bring the action. Judge Northrop dismissed this action for the reasons stated in his opinion, see Appendix at 11-40.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The instant case raises grave questions concerning federal-state relationships and the proper scope of the authority of the Executive Branch of the Federal government. As will be shown in this brief, the Attorney General is attempting in this case to circumvent the clear and frequently expressed will of Congress that the Attorney General not have the power to initiate this type of suit against state officials.

The Congress of the United States has expressly rejected every effort in the last 19 years to give the Attorney General statutory

authority to bring an action such as the instant case. On the other hand, Congress has given the Attorney General the authority to bring civil actions for injunctive relief to enforce individual rights under the 13th, 14th and 15th Amendments in a number of special areas such as voting, public accomodations, desegregation, employment and housing. Such authority has been closely circumscribed by safeguards to protect the rights of defendants and to protect the integrity of state government. All of the authority to enforce the provisions of the 13th, 14th and 15th Amendments is vested in the Congress of the United States. Since Congress has the exclusive authority to enforce the 13th and 14th Amendments as well as the 8th Amendment, applicability of which to the states is based on the 14th Amendment, see Powell v. Texas, 392 U.S. 514 (1968), and Congress has denied the Attorney General the power to bring this type of action to enforce such rights, this case must be dismissed on the grounds that the Attorney General has no authority to bring this suit.

Although a non-statutory right to sue has been recognized to protect the proprietary or governmental functions of the United States, or to prevent interference with interstate commerce or the national defense, the great weight of authority has rejected the extension of such a right to the protection of 13th and 14th Amendment rights of third parties.

The United States may not bring this action as a civil analogue to the enforcement of two criminal statutes, 18 U.S.C., Sections 241 and 242. Congress by statute has authorized private citizens, but not the United States, to bring civil actions analogous to 18 U.S.C., Sections 241 and 242. Additionally, these criminal statutes prohibit conspiracies to deny the equal protection of the laws on the grounds of race. The United States has made no

allegation of conspiracy to deny equal protection or of racially discriminatory action in this case.

As the United States has no statutory or constitutional authority to bring this action, it stands in the same position as any private litigant. As such it must allege sufficient injury to its own interests to establish its standing to bring suit in a federal court. The various "interests" recited in the Plaintiffs' briefs fail to establish such injury.

ARGUMENT

I. THE ATTORNEY GENERAL HAS NEITHER STATUTORY NOR INHERENT AUTHORITY TO BRING THIS ACTION.

A. The Congress Of The United States Has Consistently Denied The Attorney General The Power To Bring An Injunctive Action Against State Officials To Enforce The Rights Of Third Persons Under The 13th And 14th Amendments Except In Very Narrow Circumstances Not Here Relevant. Congress Has The Exclusive Authority To Enforce The 13th And 14th Amendments And Has Chosen To Do So By A Variety Of Other Mechanisms. Accordingly, The Attorney General Has No Authority To Bring This Action.

The fundamental question at issue in this case is the authority of the Attorney General of the United States, a part of the executive branch of the Federal government, to initiate, without the authority of a statute, suit for injunctive relief against the officials of a state government for the enforcement of 13th and 14th Amendment rights. The answer to this question can only be found by careful analysis of federal executive authority, particularly in the area of the enforcement of civil rights.

The landmark case on the question of executive authority is Youngstown Sheet and Tube Co., Inc. v. Sawyer, 343 U.S. 579 (1952), the so-called "Steel Seizure Case." The primary issue in that case was whether the President of the United States had the authority to seize the nation's steel industry in an effort to prevent a crippling steel strike during the Korean War.

The Court held that the seizure was beyond the powers of the executive branch because the President had no statutory or Constitutional authority to seize the steel mills. The power to do so could not be inferred from the statutes, as Congress had declined to give the President such authority. Justice Jackson and Justice Frankfurter wrote major concurrences which explained the rationale of the Court's decision. Justice Jackson's concurrence is of particular importance because of the guidelines it established for the analysis of federal power:

"1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the federal government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest lattitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

"2. When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or acquiescense may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

"3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." 343 U.S. at 636-38

Justice Jackson noted that the steel seizure had not taken place pursuant to a Congressional enactment, so that his first category was inapplicable. In reliance upon the exhaustive history of labor legislation set forth in Justice Frankfurter's concurrence, Id., at 597-609, Justice Jackson also stated that the case did not fall within the second category because Congress' failure to legislate steel seizure powers did not result from Congressional inaction,

acquiescence or inertia. Indeed, Congress had legislated mightily in the field of labor relations, but had expressly rejected the power to seize industrial facilities and thereby intervene directly in private business relationships. Congress instead decided upon an entirely different approach to emergency situations, i.e., the so-called Taft-Hartley injunction which provided for an 80-day cool-off period to permit the resolution of strikes endangering the national interest, see 29 U.S.C. Sections 178, 179, 180. The steel seizure therefore fit the third category. 343 U.S. at 640.

In reviewing the possible bases of executive power suggested by the United States in its argument to the Court, Justice Jackson determined that the executive had no inherent or constitutional power beyond that of Congress to seize mills. Thus, although the command of the Army and Navy under the Constitution was vested in the President, the power to declare war and to raise and support the armed services was reserved for Congress. Although the President has the duty to faithfully execute the laws, the laws themselves derive from Congress. See, U.S. Constitution, Article 1, Section 1. Justice Jackson concluded that the steel seizure was an improper exercise of power.

New York Times Co., v. United States, 403 U.S. 713 (1971), in which the Court held an injunction against publication of the so-called "Pentagon Papers" to be unconstitutional, followed the reasoning of Youngstown.[1] See, Concurring Opinion of Justice Marshall Id. at 740; see also Concurring Opinions of Justice Douglas, Id., at 720 and Justice White, Id., at 730. As Justice

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[1] An excellent article by Peter D. Junger, Down Memory Lane: The Case of the Pentagon Papers, 23 Case-Western Reserve L. Rev. 3 (1971) argues persuasively that New York Times Co. v. United States can only be understood as a separation of powers case rather than as a first Amendment case.

Marshall in particular noted, Congress had enacted legislation giving the executive branch the authority to prevent disclosure of classified material by the use of criminal sanctions. Civil injunctions had never been authorized and in fact had been rejected by Congress as an executive branch tool to prevent breaches of security. The Court had no authority to remedy what the executive branch felt to be a gap in the legislation, most particularly when Congress had expressly and conscientiously refused to fill that gap itself.

In an analysis of the instant case, two things must be determined: (1) into which of Justice Jackson's categories does this case fit, and (2) whether there is a source of federal executive authority to act without congressional authorization.

The Attorney General has not alleged that it is acting under a statute. Nor is this action based by necessary implication on any federal statute. The various statutes, 42 U.S.C. Section 1396(c) and (d), 20 U.S.C. Section 1401 _et seq_. and 42 U.S.C. Sections 2661-2666, 2670-2677, referred to in paragraph 11 of the Attorney General's complaint are appropriations statutes authorizing the use of federal funds for the construction and operation of state facilities for the mentally retarded. The references to these sections are only intended to serve as evidence of federal "interest" in the mentally retarded. _See_ discussion _infra._ This action therefore does not fall within the first category of Justice Jackson's analysis.

It is equally clear that this case does not fall within category number 2. The area of civil rights and specifically the enforcement of various portions of the Bill of Rights as well as the 13th, 14th, and 15th Amendments

are not areas in which Congress has exhibited "inertia, indifference or acquiescence". On the contrary, the area of civil rights has seen substantial legislative activity, see, generally, 42 U.S.C. 1971 et seq. and 18 U.S.C. Sections 241-45, much of it concerned with the authority of the Attorney General of the United States to enforce the constitutional rights of citizens. See, 42 U.S.C., Sections 1971, 1973, 1974, 1987, 2000a-5, 2000b, 2000c-6, 2000e-6, 2000h-2, 2000h-3, 18 U.S.C., Section 242.

As the filing of this action is clearly "incompatible with the express or implied will of Congress", see,discussion infra, the instant case falls clearly within category 3 of Justice Jackson's analysis. From 1957 to the present, the United States has undergone a virtual revolution in the enforcement of the rights of minorities. In particular, landmark legislation in the area of civil rights was passed in 1957, 1960, 1964, 1965, 1968, 1970 and 1972. The power of the Attorney General in the area of civil rights enforcement has been dramatically expanded. However, many proposals to expand the Attorney General's powers failed of passage, and what powers the Attorney General has to initiate such action are circumscribed. A review of the legislative history of the various civil rights acts will demonstrate that Congress has consistently rejected every effort to accord the Attorney General the power to bring the type of action represented by this case.

a. Civil Rights Act of 1957. The original version of the Civil Rights Act of 1957 contained a provision known as Title III, [2] which

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[2] "PART III - TO STRENGTHEN THE CIVIL RIGHTS STATUTES, AND FOR OTHER PURPOSES Section 121, Section 1980 of the Revised Statutes (42 U.S.C. 1985) is amended by adding thereto two paragraphs to be designated fourth and fifth and to read as follows: 'Fourth. Whenever any persons have engaged or there are reasonable grounds to believe that any persons are about to engage in any acts or practices which would give rise to a cause of action pursuant to paragraphs 1st, 2nd, or 3rd, the Attorney General may institute for the United States, or in

would have amended 42 U.S.C. 1985[3] to permit the Attorney General to initiate

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continuation of 2

first, second or third, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person. 'Fifth. The District Courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted in any administrative or other remedies that may be provided by law.' Sec. 122. Section 1343 of Title 28, United States Code, is amended as follows: (a) Amend the catchline of said section to read Section 1343. Civil rights and elective franchise. '(b) Delete the period at the end of paragraph (3) and insert in lieu thereof a semi-colon. (c) Add a paragraph as follows: (4) to recover damages or to secure equitable or other relief under any act of congress providing for the protection of civil rights, including the right to vote.' "

[3]Section 1985. Conspiracy to interfere with civil rights. First. If 2 or more persons in a State or Territory conspire to prevent by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder or impede him in the discharge of his official duties; Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States form attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; Third. If two or more persons in any State or Territory

civil actions for injunctive relief to protect 14th Amendment rights. Title III was inserted in response to a request by Attorney General Herbert Brownell, that he be given authority to seek civil remedies in the area of civil rights, remedies which Brownell felt were not available to him. See, Letter of Attorney General Herbert Brownell, H.R. Report No. 29, April 1, 1957, U.S. Code Cong. and Administrative News, 85th Cong., 1st Sess. 1957 vol. 2 at 1979-80. Under this provision no individual party needed to be joined as plaintiff and there were no limits on the discretion of the Attorney General other than that he should have reasonable grounds to believe that a conspiracy to violate someone's rights was taking place. Title III was included in the version of the bill which passed the House of Representatives on July 23, 1957, Id. 1966-67.

Serious questions were raised in the Senate as to the wisdom and constitutionality of Title III. Among the more serious objections were:

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conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any persons or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support, or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

(1) that Title III abrogated the right to a jury trial in that conspiracies to violate civil rights which ordinarily would be prosecuted criminally under 18 U.S.C., Section 242 would instead under Title III be the subject of civil sanctions including contempt proceedings, (2) Title III would upset the separation of powers between federal and state governments by permitting the Attorney General to initiate broad-gauge attacks on state institutions. See e.g., 103 Cong. Rec. 85th Cong., 1st Sess., 12530-12565 (July 24, 1957). The bill was amended to eliminate Title III, Id., at 12565, and the remainder of the bill was enacted by the Senate to become known as the Civil Rights Act of 1957, 42 U.S.C., Sections 1971, 1975.

The 1957 Act was not silent on the question of the powers of the Attorney General. The Attorney General was given specific authority to seek injunctive relief to prevent interference with the rights of citizens to vote in federal elections. Thus, Congress denied the Attorney General the broad powers originally proposed and instead substituted a very narrowly drawn extension of the powers of the Attorney General to initiate action.

b. Civil Rights Act of 1960. It had become obvious by 1960 that the 1957 Act was inadequate to protect the rights of minority citizens. A number of civil rights bills were introduced and assigned to a special House Subcommittee which recommended a bill to the House Judiciary Committee. H.R. 3147, the bill reported to the House Judiciary Committee, contained a modified version of Title III of the 1957 Act (indeed, the provision was Title III of H.R. 3147 and was referred to as such). The modified Title III would have permitted the Attorney General to initiate a civil action for equitable relief if he first received a written complaint from a person whose equal protection rights were violated. Thereafter, the Attorney General would have

had to certify that the said person was unable to protect his own rights. A civil action would be possible without written complaint against any persons attempting to hinder state or federal officials from carrying out court orders. See House Report No. 956 (Aug. 20, 1959). U.S. Code Cong. and Admin. News, 86th Cong., 2nd Sess. 1960, vol. 2 at 1954. The modified Title III was eliminated from the bill, H.R. 8601, which was reported to the House by the Judiciary Committee and which ultimately passed in the House, Id., at 1939.

During the floor debate in the Senate on H.R. 8601, an amendment was offered by Senator Case of New Jersey which would substantially have reincorporated Title III into the legislation. After vigorous debate, see e.g., 106 Cong. Rec. 86th Cong., 2d Sess., (March 10, 1960) at 5151-5182 the amendment was defeated, Id., at 5182.

The 1960 Act did address itself to the role of the Attorney General in civil rights proceedings by making minor changes in 42 U.S.C. Section 1971(c) permitting an action to be brought directly against a State. Section 1971(e) also created certain ministerial duties for the Attorney General when a suit under Section 1971(c) was found to be meritorious by a court.

c. The Civil Rights Act of 1964. In response to the racial crisis of the early 1960's, the Civil Rights Act of 1964, an Act substantially altering the relationship between the federal and state governments, was enacted.

The House version of the Civil Rights Act of 1964, H.R. 7152 was assigned to a subcommittee of the House Judiciary Committee for analysis. The version of H.R. 7152 which the subcommittee recommended to the Judiciary Committee contained as Title III a provision authorizing the Attorney General to initiate civil actions or to intervene in ongoing civil actions to enforce

the equal rights protection of the 14th Amendment. See, House Report (Judiciary Committee) No. 914, U.S. Code Cong. and Admin. News, 88th Cong. 2d Sess. 1964, vol. 2 at 2392. The Judiciary Committee removed the section authorizing the Attorney General to initiate action, but retained the provision authorizing the Attorney General to intervene in all equal rights cases provided that certain prerequisites be met. Id. at 2393, 2411.

Attorney General Robert Kennedy's remarks in opposition to that portion of Title III which was deleted are of some note in the context of the instant case. He stated in testimony before the Judiciary Committee that:

> "Title III would extend to claimed violations of constitutional rights in State criminal proceedings or in book or movie censorship; disputes involving church-state relations; economic questions such as allegedly confiscatory rate-making or the constitutional requirement of just compensation in land acquisition cases; the propriety of incarceration in a mental hospital; searches and seizures; and controversies involving freedom of worship, or speech, or of the press.
>
> Obviously, the proposal injects Federal executive authority into some areas which are not its legitimate concern and vests the Attorney General with broad discretion in matters of great political and social concern." Id. at 2450 (emphasis added)

The Attorney General in the instant case claims to have without congressional authority more power than the then Attorney General thought could wisely be granted his office by an act of Congress.

The 1964 Act as passed contained the provision permitting intervention in all equal rights cases provided that the Attorney General certify that the case was of general public importance. See, 42 U.S.C. Section 2000h-2. In addition to the general power of intervention in Section 2000h-2, the Attorney General was specifically authorized to intervene in cases in-

volving public accomodations, 42 U.S.C. 2000a-3(a), and employment 42 U.S.C. Section 2000e-5(e) (amended by 42 U.S.C. 2000e-5(f)), provided that in either case he certified that the case was of general public importance.

The 1964 Act also empowered the Attorney General to initiate civil actions in the areas of public accomodations, 42 U.S.C. 2000a-5(a), publicly owned or operated facilities other than educational institutions, 42 U.S.C. Section 2000b, public educational facilities, 42 U.S.C. Section 2000c-6, and equal employment opportunities, 42 U.S.C. Section 2000e-6. However in areas where such actions were authorized, Congress established important criteria to be met before suit could be brought.

Before action under 42 U.S.C. Section 2000a-5(a) or 42 U.S.C. Section 2000e-6 can be brought, the Attorney General must have reasonable cause to believe that someone is engaging in a "pattern or practice of resistance" to the exercise of the particular right protected. The complaint filed must be signed by the Attorney General or the Acting Attorney General and must state facts showing a pattern or practice of resistance. Actions brought under 2000a-5(a) may be heard by a three-judge court. See 42 U.S.C. Section 2000a-5(b).

Action under 42 U.S.C. Sections 2000b(a) and 2000c-6(a) may not be initiated except upon written complaint to the Attorney General from persons whose rights are being violated. Thereafter, the Attorney General must determine (a) that the complaint is meritorious, (b) that the complainants would be unable to maintain an appropriate legal action on their own and (c) that the action would materially further the attainment of the desegregation of the particular type of institution. Sections 2000b(b) and 2000c-6(b) define inability to maintain an action as (1) the inability to bear the

expenses of litigation, either personally or through an interested person or (2) the fear that such litigation would jeopardize the personal safety, employment or economic standing of the complainant or his family or property.

Assuming that a person was in criminal contempt of court for violating an injunction resulting from a civil action brought by the Attorney General or from an intervention by the Attorney General, the accused would have a right to a jury trial. The sentence could not exceed 6 months imprisonment or a $1,000 fine. See 42 U.S.C. Section 2000h. Although the powers of the Attorney General were increased greatly by the 1964 Act, that portion of the originally proposed bill which might have authorized the Attorney General to bring the instant case was not even reported out of committee.

d. The Voting Rights Act of 1965. The Voting Rights Act of 1965 was designed to protect the 14th and 15th Amendment rights of minorities, and led to a substantial increase in the involvement of the federal government in state governmental processes. The power of the Attorney General in particular was expanded enormously in the area of the enforcement of 15th Amendment rights.

The thrust of the Voting Rights Act was to avoid where possible the necessity of court action to enforce voting rights. An effort was made to reverse the burden of producing evidence by the establishment of presumptions of violations of rights based on percentages of non-voters in various states. Thus, under 42 U.S.C., Section 1973b(b), the Attorney General is directed to determine which states have literacy tests or other devices which could be used as instruments to interfere with the exercise of voting rights. The Bureau of the Census would thereafter have to determine whether fewer than 50% of the voting age population in such states were registered to vote. Such a dual determination would serve under 42 U.S.C. Section 1973b(a) to stop the

enforcement of such literacy tests or devices. If the Attorney General were to bring a civil action against the use of such tests or devices, a court would authorize the appointment of federal election examiners, 42 U.S.C. Section 1973a, who could register voters themselves, 42 U.S.C. Section 1973e. If a state involved in such discrimination were to institute a new test or device, the state would submit the proposed law to the Attorney General. If he did not act within 60 days, the law could go into effect. If he objected to the law on the grounds of its discriminatory effect, the state could bring an action for declaratory relief in the United States District Court for the District of Columbia. See 42 U.S.C. Section 1973c.

As part of this comprehensive scheme to protect voting rights, the poll tax in federal elections was prohibited, 42 U.S.C. Section 1973h(h), and the Attorney General was authorized to institute civil actions for injunctive relief to prevent enforcement of the poll tax. See 42 U.S.C. Section 1973h(b). The Attorney General was also authorized under 42 U.S.C. Section 1973j to seek injunctive relief against any effort to interfere with the enforcement of the Voting Rights Act. Such actions must be heard by a three-judge court. See 42 U.S.C. Section 1973bb-2(a)(2).

One source of criticism of the Voting Rights Act at the time of consideration was that it would not serve to protect citizens from the use of physical or economic coercion to prevent the exercise of voting rights, the rights to campaign for office, to hold meetings or to publish and speak in favor of or against candidates or on public issues. See e.g., House Report No. 439 (Judiciary Committee) (June 1, 1965) Additional Views of Rep. John Lindsay (R.NY), U.S. Code Cong. and Admin. News, 89th Cong., 1st Sess. 1965 vol. 2 at 2483-84. Accordingly, an amendment to the voting rights bill was

offered on the floor of the House of Representatives authorizing the Attorney General to bring civil actions for injunctive relief to prevent interference with first amendment rights. The amendment was rejected by the House of Representatives. See, 111 Cong. Rec. 89th Cong., 1st Sess. (July 9, 1965) at 16263-16265.

e. Fair Housing Act of 1968. The Attorney General was authorized in the Fair Housing Act to bring a civil action for injunctive relief when he should find (a) pattern or practice of resistance to the full enjoyment of fair housing rights or (b) that any group of persons has been denied such rights and such denial raises an issue of general public importance. See 42 U.S.C. Section 3613.

f. Voting Rights Act Amendments of 1970. The Voting Rights Act of 1965 was extended for an additional five year period in 1970 by the Voting Rights Act Amendments. The Attorney General's power to initiate civil actions was extended so that he could seek injunctions to prevent voting violations in states where the 50% determination had not been made, or where improper residency requirements were in effect, see 42 U.S.C. Section 1973aa-2. He could also bring actions to enjoin enforcement of any state laws which prevented persons between 18 and 21 from voting. See 42 U.S.C. Section 1973bb-2. Under both Sections 1973aa-2 and 1973bb-2, such civil actions must be tried before a three-judge court.

g. Equal Employment Opportunity Act of 1972. This Act substantially amended the equal employment opportunity provision of the 1964 Act. The 1972 Act extended the Attorney General's authority in one area, that is, the Attorney General was authorized to bring an action against a state governmental agency on grounds of employment discrimination upon request by the Equal Employment Opportunity Commission. See, 42 U.S.C. Section 2000e-5(f).

However, the 1972 Act substantially <u>reduced</u> the power of the Attorney Ceneral to initiate action to prevent employment discrimination. The 1964 Act had authorized civil action by the Attorney General where a pattern or practice of employment discrimination existed, <u>see</u> 42 U.S.C. Section 2000e-6(a). The 1972 Act added subsections (c), (d), and (e) to Section 2000e-6 which transferred all the Attorney General's powers in this area to the Equal Employment Opportunity Commission. In so doing, Congress in 42 U.S.C. Section 2000e-6(d) incorporated the procedures of 42 U.S.C. Section 2000e-5 into the prosecution of "pattern and practice" suits. Section 2000e-5(b) mandates that the Equal Employment Opportunity Commission attempt to resolve employment discrimination cases by informal methods of "conferences, conciliation and persuasion" before suit can be brought. Sections 2000e-5(b), (c) and (d) require the Equal Employment Opportunities Commission to defer to state and local anti-discrimination procedures when such are available. Under Section 2000e-8(b) the Commission is authorized to enter into contractual relationships with state and local agencies by which the Commission may agree to refrain from processing charges against the agency or to exempt the agency from certain requirements in an effort to permit the agency to resolve its own complaints. Thus the 1972 Amendments by substituting the Equal Employment Opportunity Commission for the Attorney General made a substantial change both in procedure and philosophy in dealing with employment discrimination cases.

h. <u>Voting Rights Act Amendments of 1975</u>. Congress has recently passed amendments to the Voting Rights Act of 1965 which make minor changes. The protections of the 1965 Act are extended to Spanish-speaking citizens and the Attorney General's authority under the Act is extended to reach such

citizens. Section 1973bb-2 is amended to reflect passage of the 26th Amendment giving persons 18 years and over the right to vote. See P.L. 94-73, 94th Cong. 1st Session (August 6, 1975).

i. H.R. 12230, 94th Congress, 2d Session, H.R. 12008, 94th Congress, 2d Session and H.R. 2323, 94th Congress, 1st Session

The Attorney General of the United States by letter of February 18, 1976, to the Speaker of the House of Representatives, transmitted to Congress a draft bill which would authorize the Attorney General to bring actions of the type represented in this case. H.R. 12230, 94th Cong. 2d Sess., and H.R. 12008, 94th Cong. are two slightly different versions of the Attorney General's draft. Copies of the letter and bills are included in this brief as Addenda A-C.

H.R. 12230 and 12008 provide in identical language that the Attorney General may file suit against state officials for such relief as the Attorney General may deem necessary, when he has reasonable cause to believe that the State is subjecting inmates of institutions to conditions which deny them rights secured by the Constitution or laws of the United States. Both bills especially define "institution" to include:

> "(4) Any institution or treatment facility for the mentally retarded;..."

Section 2 of the proposed bills requires that before the suit can be filed, the Attorney General must certify that: (1) he has notified officials of the institution of the alleged deprivation, (2) he is satisfied that the officials have had a reasonable time to correct such deprivations, and (3) the suit is in the public interest.

Section 3 of the bills provide that the Attorney General may intervene in cases brought by inmates seeking relief from the denial of rights

in state institutions. However, the Attorney General would have to certify that the case is of general public importance.

H.R. 2323 is similar to the other two bills, but is confined in scope to penal institutions. See, Addendum D.

The three bills were referred to the Subcommittee on Courts, Civil Rights and the Administration of Justice of the House Judiciary Committee. None of the bills were reported out of the Subcommittee so that the bills all died with the adjournment of the 94th Congress.

A number of conclusions relevant to the power of the Attorney General can be drawn from this history of civil rights legislation over the last twenty years.

On each occasion in which Congress has had an opportunity to vote on a measure which would have given the Attorney General the general authority to initiate civil actions to enforce rights under the 14th Amendment to the Constitution such measures have been soundly defeated. Furthermore, in 1964 such a provision was removed from the Civil Rights Bill while it was still in committee, and in the most recent Congress, three such bills died in committee.

Congress has substantially increased the powers of the Attorney General in this period. Yet these increases have been carefully restricted as to the subject matter and as to procedural safeguards. Thus, the Attorney General is free to bring suit only in the areas of voting rights, public accomodation, public facilities, school desegregation and housing.

The Attorney General's authority to bring actions even in these areas has been circumscribed. In cases involving public accomodations, employment discrimination and voting rights, the Attorney General has to find a pattern or practice of denial of these rights before a civil action may be initiated.

In cases involving state operated facilities and public schools, no action can be initiated except upon written complaint of the victim of discrimination. Additionally, the Attorney General has to find that the victims were unable to conduct the litigation because of expense or fears for personal or economic safety.

The Attorney General may not even intervene in an action under the equal protection clause of the 14th Amendment, despite the broad authority to do so, without certifying that the particular case is of general public interest. Furthermore, actions brought under the public accomodations laws may be heard before a three-judge court, and actions under the voting rights provisions must be heard by a three-judge court. Criminal contempt actions brought under any provision of the 1964 Act must be tried by a jury.

The 1972 amendments to the equal employment opportunities provisions of the 1964 Act are particularly significant in this context. Congress eliminated the power of the Attorney General to bring an action upon the mere finding of a pattern or practice of discrimination. It instead substituted the elaborate procedures of the Equal Employment Opportunity Commission which afford state and local agencies as well as companies, unions, etc., every opportunity to purge themselves of discrimination by conciliation, by contract with the EEOC, and by recourse to state and local procedures. In keeping with this approach, H.R. 12230, 12008 and 2323 all provided for an opportunity for state officials to be informed of violations and have a chance to correct rights violations before suit is brought. Congressional action thus demonstrated great concern not to inject the federal government too boldly into the operation of state and local institutions. Even the Justice Department's own bills recognized the necessity for harmonizing the protection of the institu-

tionalized with the principle of federalism.[4]

Congress has created a complex body of legislation for the enforcement of civil rights. Congress has had to pick and choose among various tools for the enforcement of rights to ensure both the maximum benefits to minorities and the minimum injury to important principles of federalism and the separation of powers. The bludgeon of the use of the full power of the federal government through the Justice Department to enforce the provisions of the 14th Amendment was rejected in 1957, 1960, 1964 and 1965 in favor of other measures. Despite the further opportunities to give the Attorney General broad powers in 1968, 1970, 1972, 1975, and 1976, Congress has chosen to legislate cautiously. In 1972 Congress actually withdrew such powers from the Attorney General and substituted procedures designed to minimize federal-state friction.

The Attorney General alleges that he has the inherent power to bring actions such as the instant one absent statutory authorization whenever the Attorney General in his discretion should find that the United States has an interest. If the Attorney General's position is correct, the Congress of the United States has been engaged in the incredible hoax over the last 20

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The United States has made much of Congressional passage of that portion of the budget of the Justice Department relating to the conduct of a group of suits including the instant case against a number of States. _See_ Brief of the United States at 22-25. The failure of the Congress to excise a $269,000 item involving 13 employees from a federal budget of over $400,000,000,000 involving millions of employees can hardly be said to reflect a change in a position of Congress so consistently held from 1957 to the present. The true indication of Congressional policy is the persistent refusal of Congress on each occasion in which the question has been presented to authorize the type of broad enforcement powers the Attorney General now claims to possess. _See_, _United States v. Solomon_, App. at 25.

years of passing legislation purporting to expand the Attorney General's authority, when, in reality, such legislation was in fact limiting it. Thus, by passing 42 U.S.C., Section 2000b stating that the Attorney General may initiate action against a non-educational state institution only if he receives a written complaint, which complaint must seem meritorious, and if he finds the complainant to be unable to bring the action because of fear of retaliation or lack of resources, Congress was imposing restrictions on the Attorney General's presently unfettered authority. Similarly, Attorneys General Brownell and Levy would seem to be seeking a reduction in their own authority when they submitted civil rights bills for consideration by Congress.

These conclusions are obviously absurd. Congress has been legislating vigorously over the last two decades to expand the degree of protection afforded to the rights of all of our citizens. The various civil rights acts are obviously grants of authority to the Attorney General which the Attorney General had never had before. In light of the legislative history and the statutory framework of the civil rights acts, the action of the Justice Department in the instant case must be seen as an effort to aggrandize power which Congress had consciously denied the Attorney General.[5] The use of executive

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[5]The Justice Department has relied upon United States v. California, 332 U.S. 19, 27-28 (1947) for the proposition that Congressional rejection of a statutory grant of authority should not disable the executive from acting. That case is distinguishable in that Congress rejected the two bills concerning the federal government's power to sue to void oil leases on the grounds that the United States clearly had such power already, Id. at 28 n. 4. A review of the debate in Congress at the time of the Civil Rights Acts of 1957, see, e.g. 103 Cong. Rec., 85th Cong., 1st Sess. at 12530-12565 (July 24, 1957) and 1960, see, e.g. 106 Cong. Rec. 86th Cong. 2d. Sess. at 5151-5182 (March 10, 1960), and the committee reports in 1964, see, e.g., House Report (Judiciary Committee No. 914, U.S. Code Cong. and Admin. News, 88th Cong. 2d. Sess. 1964 vol. 2 at 2392, demonstrates that Congress felt that the Attorney General did not already have the power which was the subject of dispute.

authority in this case is clearly and emphatically "incompatible with the express or implied will of Congress," Youngstown Sheet and Tube v. Sawyer, supra at 638 and is squarely within category 3 of Justice Jackson's concurrence.

Under these circumstances, the power to initiate an action could be exercised only if there were an independent Constitutional source of executive power in excess of that of Congress. Examination of applicable law makes it clear, however, that such an independent source of executive authority does not exist. The 13th and 14th Amendments themselves vest all enforcement power in the Congress. See Allen v. State Board of Elections, 393 U.S. 544 (1969); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach 383 U.S. 301 (1966). Thus Section 5 of the 14th Amendment provides:

> "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Section 2 of the 13th Amendment contains similar language. The vesting of enforcement power in Congress was not a capricious act. The 13th and 14th Amendments as well as the 15th Amendment, which also vests enforcement power in Congress, were the first Constitutional provisions which directly impinged upon the internal authority of the states and the exercise of state power. The power to enforce these amendments was therefore vested in Congress, the only branch of government which organically represents the states of the United States. Indeed at the time of passage of the amendments, Senators were elected by state legislatures and not by popular election. The structure of the Amendments is such that any encroachment upon state prerogatives and powers which may occur through the three amendments would be only those encroachments authorized by the representatives of the states themselves. See Allen v. State Board of Elections,supra, at 562-63. The amendments represent

an effort to balance the rights of minorities with the principles of federalism. The three amendments were designed to ensure that state governments would protect the rights of minority citizens, not to substitute federal authority for state authority. Enforcement power was reserved to Congress because Congress rather than the executive branch, could be relied upon to be sensitive to the needs of state government.

Since no power to enforce the provisions of the 14th Amendment by the executive branch exists within the 14th Amendment itself, to bring this action at all the Attorney General must show that it has constitutional power which derives from a source outside the 14th Amendment. Furthermore, such power must be sufficient to justify a change in the relationship between the federal and state governments which Congress has consciously declined to make. As Judge Northrop noted below, a "most severe" burden is placed upon the executive branch to show an independent source of authority where the executive intends to act contrary to the wishes of Congress in areas in which Congress has the exclusive constitutional enforcement authority.

Judge Northrop rightly held that the United States had not met that burden. In particular, he held that the duty to "take care that the laws be faithfully executed" U.S. Constitution Art. II, Section 3, cannot serve as an excuse to contravene or go beyond the laws established by Congress. This duty"... is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power," Youngstown Sheet and Tube v. Sawyer, supra at 610 (Frankfurter, J. concurring) quoting Myers v. United States, 272 U.S. 52 (Holmes, J.). Clearly, this provision would not permit the executive branch to act contrary to the wishes of the Congress which makes the laws.

Justice Frankfurter's concluding remarks in Youngstown are appro-

priate here:

> "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress. ...'Balancing the equities' when considering whether an injunction should issue, is lawyer's jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable jurisdiction."
> Youngstown Sheet and Tube Co. v. Sawyer, supra, at 609-10 (Concurrence of Frankfurter, J.)

Congress has struck the balance in the area of enforcement of the 13th and 14th Amendments by its creation of a wide range of remedies including private civil suits, administrative proceedings, conciliation, and a broad but limited authority on the part of the Attorney General of the United States to seek injunctive relief. The Attorney General's action in bringing this action is a bald effort to assert authority where there is none, and unilaterally to establish a new balance between public interests in contravention of the balance established by Congress.

B. Any Right Of The United States To Sue In The Absence Of Express Statutory Authorization To Do So Is Limited To Cases In Which It Seeks To Protect Its Proprietary Or Governmental Functions Or To Prevent Interference With Interstate Commerce Or The National Defense. The Great Weight Of Authority Has Rejected The Extension Of Such A Right To The Protection Of 13th And 14th Amendment Rights Of Third Parties.

The foregoing argument should not be understood as denying the United States the power to bring suit without statutory authorization in the proper circumstances. Indeed, such a right has long been recognized, see, e.g., Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818). The Courts have held that the United States may bring suit, without statutory authorization, to enforce contractual obligations, see, e.g., United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831). Dugan v. United States, supra; United States v. Harrison Co., 399 F. 2d 485 (5th Cir. 1968); United States v. Shanks, 384 F. 2d 721 (10th Cir. 1967); Kern River Co. v. United States, 257 U.S. 147 (1921); United States v. Rock Island Centennial Bridge Commission, 230 F. Supp. 654 (S.D. Ill. N.D. 1964). The United States has been permitted to sue to protect various property interests, see, e.g. Wyandotte Co. v. United States, 389 U.S. 191 (1968); United States v. California, 332 U.S. 19 (1947); Cotton v. United States, 52 U.S. (11 How.) 229 (1850); Griffin v. United States, 168 F. 2d 457 (8th Cir. 1948). The United States has also been allowed to sue to prevent the perpetration of frauds upon it, see, Kern River Co. v. United States, supra; United States v. American Bell Telephone Co., 128 U.S. 315 (1888); United States v. San Jacinto Tin Co., 125 U.S. 273 (1887).

On occasion the United States has been permitted to bring suit to permit it to exercise its governmental functions as in the areas of national defense, see, e.g., United States v. California, supra; United States v. Marchetti, 466 F. 2d 1309 (4th Cir. 1972); United States v. Arlington County, 326

F. 2d 929 (4th Cir. 1964); and United States v. Brittain, 319 F. Supp. 1058, (N.D. Ala. E.D. 1970), and interstate commerce, see, e.g., In re Debs, 158 U.S. 564 (1895); Sullivan v. United States, 395 U.S. 169 (1969); Sanitary District of Chicago v. United States, 266 U.S. 405 (1925); United States v. Republic Steel Corp., 362 U.S. 482 (1960); Wyandotte Co. v. United States, supra; United States v. City of Jackson, 318 F. 2d 1 (5th Cir. 1963) reh. den. 320 F. 2d 870 (1963); United States by Katzenbach v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (E.D. La. 1965) (3 judge court) rev'd 380 U.S. 128 (1965); United States v. City of Shreveport, 210 F. Supp.36 (W.D. La. 1962); United States v. Lassiter, 203 F. Supp.20 (W.D. La. 1962)(3 judge court) aff'd per curiam 371 U.S. 10 10 (1962); United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962); United States v. United States Klans, 194 F. Supp. 897 (M.D. Ala. 1961). The power of the United States to protect the lives of its officials engaged in the conduct of governmental business has also been recognized, see, In re Neagle, 135 U.S. 1 (1890).

The United States has not alleged, however, that it is suing to enforce the terms of a contract or grant, or to protect an interest in property, or to maintain the national defense, or to prevent a burden on interstate commerce, or to protect a federal official. The United States has brought this action squarely under the 13th and 14th Amendments to the Constitution. Despite the readiness with which courts have agreed that the United States can bring suit in other circumstances, six of seven district courts which have considered the question of the non-statutory authority of the United States to bring suit to enforce 13th and 14th Amendment rights have denied the government such authority, see, United States v. Solomon, App. at 11-40; United States v. Mattson, Civ. No. 74-138 Bu (D. Mont. Butte Div. Sept. 29, 1976), a copy of which is attached hereto

as Addendum E; United States v. School District of Ferndale, Michigan, 400 F. Supp. 1122 (E.D. Mich. S.D. 1975), 400 F. Supp. 1131 (E.D. Mich. S.D. 1975), 400 F. Supp. 1135 (E.D. Mich. S.D. 1975), 400 F. Supp. 1141 E.D. Mich. S.D. 1975)(4 opinions); United States v. County School Board of Prince George County, Va., 221 F. Supp. 93 (E.D. Va. 1963)(Butzner, J.); United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S.D. Miss. S.D. 1963); United States v. Madison County Board of Education, 219 F. Supp. 60 (N.D. Ala. 1963) both aff'd on other grounds, 326 F. 2d 237 (5th Cir.) cert. den. 379 U.S. 929 (1964). But see, United States v. Brand Jewelers, 318 F. Supp. 1293 (S.D. N.Y. 1970).

Justice Northrop's scholarly opinion in the instant case very clearly indicates the lack of authority on the part of the United States to maintain this action. The State would also call the court's attention to the Ferndale cases. Judge Kennedy analyzed the Civil Rights statutes and determined that they authorized civil actions by the United States in some, not all, circumstances. The Court noted that: "If the construction urged by the United States is correct, the provision of several civil rights acts authorizing actions by the Attorney General, frequently under limited circumstances, would be superfluous." 40 F. Supp. at 1130. Recognizing the absurdity of this conclusion, Judge Kennedy dismissed the suit.

In only one case, United States v. Brand Jewelers, supra, has a non-statutory right to sue under the 13th or 14th Amendments been recognized. An analysis of Brand Jewelers, which has been heavily criticized, [6] will demonstrate that Brand Jewelers was wrongly decided.

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[6] See United States v. Solomon, App. at 23-29; United States v. School District of Ferndale, supra at 1129-30. See also, Note, "Nonstatutory Executive Authority to Bring Suit," 85 Harv. L. Rev. 1566 (1972); Recent Decision, "Constitutional Law: The United States Government Has Standing to Sue For the Violation of Fourteenth Amendment Rights of an Individual," 37 Brooklyn L. Rev. 426 (1971); Recent Decision, "United States v. Brand Jewelers, Inc.," 84 Harv. L. Rev. 1930 (1971); Note, "Constitutional Law-United States Government's Standing to Sue - A New Approach to Legal Assistance for Ghetto Residents or An Invitation to Executive Lawmaking?" 17 Wayne L. Rev. 1287 (1971).

Suit was brought by the Attorney General against Brand Jewelers, one of a group of retailers engaging in a practice, known as sewer service, in an effort to obtain injunctive relief and to obtain restitution of illegally collected funds. Sewer Service was a practice by which unscrupulous merchants would obtain default judgments against customers by arranging to have private process servers dispose of suit papers by throwing them down a sewer rather than serve process on the customer. The practice affected many thousands of persons in New York City. The Defendants attacked the standing of the Attorney General to bring the action. The court, in reliance upon In re Debs, supra and its progeny, see Sullivan v. United States, supra; Sanitary District of Chicago v. United States, supra; United States v. Arlington County, supra; United States v. City of Jackson, supra; United States by Katzenbach v. Original Knights of Ku Klux Klan, supra; United States v. City of Shreveport, supra; United States v. Lassiter, supra; United States v. City of Montgomery, supra; and United States v. United States Klans, supra; held that the United States had standing to sue both under the interstate commerce clause of the Constitution, and alternatively under the due process clause of the 14th Amendment. However, an analysis of Debs and the line of cases following Debs lends no support to Brand Jewelers.

In re Debs was an action brought by the Attorney General against the leadership of various railroad unions to enjoin acts of violence resulting from the Pullman Strike of 1894. The case was appealed to the Supreme Court on grounds that the Attorney General did not have the authority to bring the action.

The rationale of Debs is unclear, and in light of modern conditions it is problematical whether the Supreme Court would arrive at the same

conclusion today if such a case again were to be presented. The Supreme Court began its analysis by noting that the power to regulate interstate commerce rested with Congress, and that Congress had made use of that power by legislation. The national government therefore had the authority to prevent obstructions to interstate commerce. Although Congress had the power to prevent obstruction by the use of criminal penalties, the Court stated that, in cases of emergency, authority clearly existed to maintain order by the use of federal troops if necessary. The Court then asked rhetorically why, if troops could be used, a peaceful alternative, i.e. an injunction, could not be used to equal effect.

The Court analyzed in great detail the common law powers of a Court of equity to abate public nuisances at the request of governmental agencies. The Court defined the difference between a public nuisance and a private as that the "one affects the public at large and the other simply the individual." Equitable powers had frequently been invoked to prevent interference with commerce on navigable rivers which are the property of the government as custodian of the rights of the public at large. Since railroads were analogous to rivers as the great highways of commerce, the government had the same duty and power to maintain the free flow of commerce on the railroads as on the rivers.

The test for authority to bring suit was stated as follows:

> ". . .While it is not the province of the government to interfere in any matter of private controversy between individuals, or to use its great powers to enforce the rights of one against the other, yet, whenever the wrongs complained of are such as affected the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens securing them their common rights, then the mere

> fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those Constitutional duties." Id. at 586 (emphasis added)

Thus, three factors must be present to authorize suit. (1) The wrongs complained of must affect the public at large. (2) The wrongs must be in respect of matters entrusted by the Constitution to the care of the national government. (3) The national government must owe to all citizens the duty of securing them their common rights.

The language of Debs clearly refers to wrongs comparable to public nuisances, e.g., obstructions of navigable waterways, in which the injury is to the community as a whole and not to individuals. The Court in Debs quoted approvingly language from its earlier decision in United States v. San Jacinto Tin Co., 125 U.S. 273 (1888): "...if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances," 125 U.S. 273, 285 quoted at 158 U.S. 564, 584-585. Thus, In re Debs, despite the expansiveness of its ruling lends no support to the concept that federal power may be invoked without the aid of a statute for the redress of individual rights.

The successors to In re Debs, with the exception of Brand Jewelers, have consistently applied the Debs doctrine to cases either involving burdens on interstate commerce, usually in the nature of a public nuisance, or to cases directly involving an interest of the United States. The early successors to

Debs involved specialized situations. In Sanitary District of Chicago v. United States, supra, the United States sought an injunction to prevent a water project which would reverse the flow of a navigable river. Robbins v. United States, 284 F. 39 (8th Cir. 1922) involved an injunction to prevent the unauthorized carriage of passengers for hire in national parks. Although the commerce clause was not involved, a proprietary interest of the United States was affected.

The greatest use of In re Debs was made in the early 1960's. In a line of cases arising out of efforts to desegregate public accomodation facilities, it was held that the violation of 14th Amendment equal protection rights in public transportation facilities constituted a burden on interstate commerce. See United States v. City of Jackson, supra; United States v. City of Shreveport, supra; United States v. Lassiter, supra; United States v. City of Montgomery, supra; United States v. United States Klans, supra; United States v. State of Mississippi, 229 F. Supp. 925, (S.D. Miss. 1964), (3 judge court,Brown, J. dissenting), rev'd, 380 U.S. 128, (1965). An additional group of cases held that violations of the 14th Amendment constituted burdens on the national defense. See United States v. Arlington County, supra; United States v. Brittain, supra.

Of special interest is United States v. City of Jackson, supra, (heavily relied upon in Brand Jewelers)in which Judge Wisdom made the often-quoted comment:

> "When the action of a state violative of the 14th Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause the United States has a duty to protect the 'interest of all.' The Courts offer the first avenue for counteraction by the Nation. Such thinking may take us down the road to recognition of Government standing to sue under the 14th Amendment or under any clause of the Constitution."

However, he went on to say:

> "The Issue here is framed by the Commerce Clause. Under that clause there is authority for the United States to sue without specific congressional authorization." 318 F.2d at 14.

Rehearing was requested and denied in United States v. City of Jackson, supra. Because of the potentially expansive reading which could have been given to the case due to Judge Wisdom's treatment of the non-statutory standing issue, the other two judges specifically dissociated themselves from his opinion and found instead that sufficient statutory authorization existed. As Judge Northrop noted, City of Jackson represents no real expansion of the Debs principle. United States v. Solomon, App. at 11-12.

In applying In re Debs to a 14th Amendment case, the District Court in Brand Jewelers not only gave a more expansive reading of the case than has any other court, but also gave a more expansive interpretation than the language of the original decision permits. A careful analysis of Brand Jewelers shows how this was done. After holding that the widespread deprivations of due process involved in "sewer service" constituted a burden on interstate commerce, a holding tenuously within the Debs principle, but see, United States v. Solomon, App. at 22-27, the court held in the alternative that standing existed under the 14th Amendment itself. The court achieved this result in an interesting manner. At 1299 of the opinion, the Debs test (quoted herein supra. at 32-33) is paraphrased rather than quoted as:

> "an obstruction of broad impact, sufficient in its dimensions to be thought 'public' rather than 'private', causing or threatening injury of such moment as to bring fairly into play the National Government's 'powers and duties to be exercised and discharged for the general welfare...'" (emphasis added)

By its paraphrase, the court effectively changed the test. Debs required that a wrong affect the "public at large," not that it be "of broad impact, sufficient in its dimensions to be thought 'public' rather than 'private'." A

small scale impact on interstate commerce would be a wrong against the public at large for the purpose of Debs, and conversely, a large scale deprivation of other rights may not be a wrong against the public at large.

Furthermore, in Debs, federal action was justifiable when (1) the wrong is in "respect of matters which by the Constitution are entrusted to the care of the Nation" and (2) "the Nation owes the duty to all citizens of securing them their common rights." The test as stated in Brand Jewelers focused on the quantity of the wrong and asked if the injury was of such moment as to bring federal power into play and whether the injury touched upon powers and duties exercised for the public interest. Debs focused on the quality of the wrong, and required that the wrong be in an area in which citizens have common rights and in which the Nation owes a duty to all citizens.

Having misstated the test, the District Court proceeded to the 14th Amendment analysis. The court stated that it could see no basis for distinction between the "authority of the Attorney General to protect against large scale burdens on interstate commerce from his authority to protect against large scale denials of due process." 318 F. Supp. 1300. There would be no such distinction if Debs were read as referring only to the scale of such deprivations. However, Debs and the cases following it have consistently followed a public nuisance interpretation of federal authority, and have therefore distinguished between burdens on interstate commerce however small and other types of constitutional violations.

The lack of statutory authority in Brand Jewelers was disposed of handily by the comment that "the failure of Congress to take positive action, sometimes a matter of moment, is hardly the equivalent of a negation." 318 F. Supp. at 1300. However, Congress has clearly acted to negate any such power

in the Attorney General. See discussion, supra. There is no indication that the court in Brand Jewelers took any notice of the legislative history of the civil rights acts.

Brand Jewelers is an anomaly, probably motivated by the judge's sympathy for the victims of a vicious scheme, rather than by consideration of the fine legal questions involved. The case is legally unsound, and contrary to the overwhelming weight of authority. Judge Northrop properly rejected the authority of Brand Jewelers as should this court.

C. The Right To Bring A Civil Action On Behalf Of The United States Cannot Be Inferred From The Criminal Civil Rights Statutes.

The Attorney General in reliance upon dicta appearing in that portion of the opinion to which Judge Tuttle alone subscribed in In re Estelle, 516 F.2d 480, 486-87 (5th Cir. 1976) cert. den. 96 S. Ct. 2637 (1976), (Rehnquist, J. dissenting), argues that the United States has a civil cause of action to redress 14th Amendment violations, inferrable from the criminal civil rights statutes, 18 U.S.C., Section 241 and 242.

Judge Tuttle's dicta is clearly inapplicable to the instant case and is in any event legally incorrect. Section 241 addresses itself to conspiracies to violate civil rights. There is no conspiracy alleged in this matter. Section 242 addresses itself solely to violations based on alienage, race or color. There is no such discrimination alleged in this case.

Even if the instant case were analogous to the situation described in the criminal statutes, no civil action can reasonably be inferred. The lack of a comparable statutorily authorized civil action on behalf of the United States was no accident. A private right of action does exist under the Civil Rights laws, see, 42 U.S.C., Section 1983, but Congress has consistently rejected any extension of such powers to the Attorney General. The government brief at 32 notes that under the criminal statutes the United States would have to prove criminal intent and such an element of proof would make the government's task more difficult. The Defendant would note that the necessity of a jury trial, the higher burden of proof, and the entire panoply of constitutional protections for the rights of the criminally accused would also come into play and would also complicate the government's task. These complications may well be the reason why Congress has chosen to confine the United States to criminal actions, rather than extending the Attorney General's authority to the more easily

conducted civil action. See 103 Cong. Rec. 85th Cong., 1st Sess. 12530-12565. Cf. 42 U.S.C., Section 2000h.

Wyandotte Transportation Co. v. United States, supra, upon which Judge Tuttle relies, clearly explains the circumstances in which a civil action can be inferred from a criminal statute on behalf of the United States or any other party. (1) The interest of the plaintiff must fall within the zone of interests that the statute was intended to protect. (2) The harm which occurred must be of the type which the statute was intended to forestall. Clearly, the United States was not intended to be the beneficiary of Sections 241 or 242, nor has the United States alleged that it was harmed in any manner contemplated by Sections 241 and 242. Both sections seek to protect individuals against the denial of equal protection. By comparison, the statutes in Wyandotte sought to protect the United States from injury to interstate commerce. In any event, a civil action could hardly be inferred from a criminal statute when Congress had expressly rejected the civil action sought to be inferred. See discussion, supra.

In conclusion we would note Justice Rehnquist's comments in dissent in In re Estelle, supra, at 2639, in which he was joined by Chief Justice Burger and Justice Powell:

> "But the United States surely has no claim of its own under the Fourteenth Amendment which it may assert against petitioners, and the rather pallid brief of the United States in opposition to certiorari is discreetly silent as to the source of any such 'claim.' 42 U.S.C. Section 2000h-2, which authorizes intervention by the Attorney General in an action seeking relief from the denial of equal protection of the laws 'on account of race, color, religion, sex or national origin. . .,' clearly affords no basis for intervention by the Government on the pleadings before the District Court. The Solicitor General's brief also refers to the fact that the

United States has statutory responsibility for enforcing 18 U.S.C. Sections 241 and 242, 'the criminal counterpart to 42 U.S.C. Section 1983,' but it would seem unlikely that respondent or any other District Court could grant intervention for the reason that the proposed intervenor wished later to institute criminal proceedings against one of the parties to a civil action. In its memorandum in support of its motion to intervene in the District Court, the United States urged that it had 'inherent standing to sue to enjoin widespread and severe deprivations of constitutional rights. In re Debs, 158 U.S. 564 (1895).' If Debs, which held that a federal court had authority to issue an injunction against an armed conspiracy that threatened the interstate transportation of the mails, is to be extended to the situation presented by this case, I think the decision to do so should be made by this Court."

II. THE UNITED STATES HAS FAILED TO ALLEGE THAT IT HAS SUFFERED INJURY TO A LEGALLY PROTECTED INTEREST SO AS TO ESTABLISH ITS STANDING TO BRING THIS ACTION.

As the United States has brought this action without the benefit of a statute, the United States must, like any other litigant, justify its standing to sue.

As was stated in United States v. San Jacinto Tin Co., 125 U.S. 273 (1888):

> ". . .If it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public or any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

An analysis of standing must begin with a review of the allegations which appear in the United States' s petition. See, Sierra Club v. Morton, 405 U.S. 727 (1972). Paragraphs 11, 12 and 13 of the Petition set forth the allegations upon which the Petitioner must rely to establish its standing to bring suit in this action. Paragraph 11 states that the proper treatment and habilitation of the mentally retarded is "a matter of direct concern to the United States." As evidence of such concern, the Petition cites the President's statement on Mental Retardation of November 16, 1971, the Social Security Act, 42 U.S.C., Section 1396(c) and (d)(relating to Medicaid payments for certain services), the Education of the Handicapped Act, 20 U.S.C. Section 1401 et. seq. (relating to federal appropriations to the States for the establishment of educational programs and facilities for the education of handicapped persons) and the Developmental Disabilities Services Facilities Construction Act, 42 U.S.C. Section 2661-2666, 2670-2677c (relating to appropriations to the States for the

establishment of programs and facilities for the developmentally disabled).

In addition to the allegations of the complaint the United States additionally has argued that under 18 U.S.C. Sections 516-519, mention of which does not occur in the petition, the Attorney General is appointed the officer with the authority to conduct litigation for the United States in those cases wherein the United States has an "interest." See Brief for the United States at 10. As Sections 516-519 serve only to appoint a lawyer rather than to define what cases may be brought, see, United States v. Daniel, Urbahn, Seelye and Fuller, 357 F.Supp. 853 (N.D. Ill. E.D. 1973), the United States attempts to demonstrate an "interest" in mental retardation sufficient to establish standing.

Three "aspects" of the case are cited which, it is argued, "in combination, give rise to a litigable interest on the part of the United States." Brief for the United States at 14. These aspects are: (1) statutory enactments of Congress establishing a national policy regarding the protection of the mentally retarded, (2) federal tax funds spent in programs for the mentally retarded at Rosewood, which are conditioned upon certain standards of treatment, and (3) the interest of the federal government to vindicate systematic deprivations of 13th and 14th Amendment rights. The third aspect has been treated fully in this brief already, see, discussion supra. The amicus curiae brief of the Mental Health Law Project generally supports the interest of the United States and further states that the treatment of the mentally retarded nationally is poor, and that there are insufficient legal resources available privately to vindicate the rights of the retarded.

Upon analysis, all of the various grounds alleged by the United States as to its "interest," with exception of the enforcement of the

terms of the receipt of federal funds, fail utterly to meet even minimal standards for the recognition of standing. See e.g. Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, supra; Association of Data Processing Services Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

The one exception, the enforcement of the terms of federal grants, might justify standing, see Defendants' Brief, supra, at 28. However, unless the government's brief on appeal is to be construed as an amendment to the petition in this matter, the petition itself is utterly lacking in references to state violations of the terms of any contract or grant with the federal government. Indeed, paragraph 1 of the complaint simply states:

> "The United States alleges as follows:
>
> "1. This is a civil action commenced by the Attorney General of the United States for the purpose of enjoining serious and widespread violations of the rights secured to residents and potential residents of the Rosewood State Hospital, Owings Mills, Maryland, by the Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction over this action under 28 U.S.C. 1345 and the Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution."

The discovery, negotiation and argument in this case have not focused on violations of federal regulations, or contractual obligations. Furthermore, as Judge Northrop points out in his opinion, such violations of regulations are more properly redressed by the Department of Health, Education and Welfare than by the Attorney General. See, United States v. Solomon, App. at 34.

Quite clearly, if standing is to be found it must be found

within the four corners of the petition in the allegations that Congress and the President have declared a national interest or policy in the mentally retarded and that no other enforcement mechanism exists.

The test for standing as it has been repeatedly stated is whether the complaining party has "alleged such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, supra at 204. The "personal stake" specified in the Baker v. Carr test has come to refer to some concrete injury to the protected interests of the specific complainant. See Sierra Club v. Morton, supra. Generalized complaints as in a bare allegation of injury to "federal policy and the national interest" are insufficient.

Indeed, the Court in Schlesinger v. Reservists to Stop the War, supra, indicated that:

> "Concrete injury, whether actual or threatened is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution . . . This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. . . moreover. . . the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily . . . First, concrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party . . .Second, the discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the Court's ruling would be applied. This is especially important when the relief sought produces a confrontation with one of the coordinate branches of the Government; . . ." Id. at 220 - 222

A necessary corollary of the requirement of a concrete injury is that a party may not sue to redress the violations of the rights of third parties, see Warth v. Seldin, 422 U.S. 490, (1975). Although the standing of third parties has sometimes been recognized to protect the interests of their memberships, such parties were required to have some immediate nexus with the interests of the membership. See Barrows v. Jackson, 346 U.S. 249 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Such a nexus is necessary to insure proper representation of the interests of the parties whose rights have been violated.

The policy is well illustrated in this case. No resident of Rosewood nor any family member of a resident nor any organization to which a resident or family member belongs is a party in this matter. No resident or family member or organization for the retarded has any control over the conduct of the suit, the relief requested, the definition of issues, possible terms of settlement, trial strategy and tactics. Yet the residents of Rosewood will have to live with any changes wrought by an order issued by the District Court, or by any settlement agreement between the Justice Department and the Defendants.

The position of the United States in this litigation is similar to that of the Sierra Club in Sierra Club v. Morton, supra. The Supreme Court said of the Club: "The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's heritage from man's depradations." Id. at 739. Yet the Sierra Club was dismissed because the mere existence of "special interest" in an area did not suffice to establish standing.

Nothing the Attorney General has alleged in this matter amounts to more than a subjective "special interest" of the United States in the rights of the retarded.

The reliance of both the United States and the Mental Health Law Project on the "Bill of Rights for the Mentally Retarded," 42 U.S.C. Section 6010, to establish more than subjective interest is misplaced. The conference report, House Conference Report No. 94-473, 1975 U.S. Code Cong. and Admin. News at 961, quoted by the United States, Brief of the United States at 19, and by the amicus curiae, Brief of Amicus Curiae, at 22, does indicate that the rights of the retarded set forth in 42 U.S.C. Section 6010 must be protected "by the Congress and the courts." Reference to 42 U.S.C. Section 6012, enacted as part of the same legislation as the "Bill of Rights for the Mentally Retarded," will serve to explain the ambiguous reference to the courts in the conference report. Section 6012 reads as follows:

> "The Secretary shall require as a condition to a state receiving an allotment...that the State provide the Secretary satisfactory assurances that not later than such date (1) the State will have in effect a system to protect and advocate the rights of persons with developmental disabilities and (2) such system will (A) have the authority to pursue legal, administrative and other appropriate remedies to insure that protection of the rights of such persons who are receiving treatment, services

> or habilitation within the State, and (B) be independent of any State agency which provides treatment services, or habilitation to persons with developmental disabilities....(b)(1). To assist states in meeting the requirements of subsection (a), the Secretary shall allot to the States the sums appropriated under paragraph (2)."

Far from supporting the government's position, this federal statute makes clear the Congressional policy that the States must enforce the rights of the retarded through State advocacy agencies. The federal role is to finance the State advocacy program. There is clearly no expression in this legislation of an "interest" of the United States which the Attorney General is to enforce by way of suit. On the contrary, the expressed interest of the United States is to permit State authorities to serve as advocates for the mentally retarded.

The cases relied upon by the United States in support of its contention that it may bring suit where federal policy has been established through legislation are inapposite. United States v. Sanitary District of Chicago, supra; United States v. Republic Steel; supra, and Wyandotte Transportation Co. v. United States, supra, were all based upon the United States' power to regulate interstate commerce and upon the Rivers and Harbors Act of which the United States, as owner of all navigable waterways, is the primary beneficiary. See, Wyandotte Transportation Co. v. United States, supra. United States v. Rock Island Centennial Bridge Commission, supra, was brought to enforce the conditions of a federal construction grant. United States v. Ira S. Bushey & Sons, Inc., 346 F.Supp. 145 (D. Vt. 1972) was based upon the power of the federal government under federal common law to abate a public nuisance affecting navigable waterways. In each of these cases, proprietory or governmental interests of the United States were injured by the alleged wrongdoing.

One final point to be addressed is the contention of the amicus curiae that standing should be granted because there would be inadequate resources available to the mentally retarded to protect their rights should Judge Northrop's opinion be sustained. The law is clear that the lack of alternative remedies does not confer standing to sue. See, United States v. Richardson, supra. at 179. This is true even if the counsel for the party seeking standing is capable of presenting able argument and briefing. See, Schlesinger v. Reservists to Stop the War, supra, at 225. However, even if the lack of resources could confer standing, it is clear that at least in Maryland the mentally retarded have been ably represented in a number of suits. See, Maryland Association for Retarded Citizens, Inc. v. Solomon, Civ. No. N-74-228 (D. Md. filed March 6, 1974); Maryland Association for Retarded Citizens v. Maryland, Civ. No. 72-733-M (D. Md. filed July 19, 1972); Bauer v. Mandel, Docket 30, Folio 61, File 22871 (Cir. Ct. of Anne Arundel County, filed September 11, 1975); Maryland Association for Retarded Citizens v. Department of Health and Mental Hygiene, Docket 100, Folio 182, File 77676 (Cir. Ct. for Baltimore County, decided for plaintiff, May 3, 1974). Furthermore, the implementation of federally funded state advocacy programs under 42 U.S.C. Section 6012 will go far towards securing adequate resources for the representation of the mentally retarded. Accordingly, there is no need for the United States to exercise the role it has claimed for itself in this area.

CONCLUSION

For the reasons herein stated, the decision of the District Court should be affirmed.

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ADDENDUM A

Office of the Attorney General
Washington, D.C. 20530

2581

February 18, 1976

H.R. 12230

The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal "To improve the administration of State institutions holding persons involuntarily confined, and for other purposes."

The draft bill would authorize the Attorney General to bring suit to prohibit a State or its agents from pursuing a "pattern or practice" of denying the constitutional rights of persons involuntarily confined. However, that power could not be exercised unless the State, after notice, had failed to correct the alleged constitutional violations within a reasonable time. The Attorney General would also have authority to intervene in cases of public importance challenging the constitutionality of conditions in state institutions occupied by involuntarily confined persons.

This proposed legislation would operate to upgrade state prison conditions. It would thereby help to eliminate the current distortion in the sentencing process and the breeding of career criminals which result from inhumane penal institutions. As the President observed in his Crime Message of June 19, 1975:

> When a defendant is convicted, even for a violent crime, judges are too often unwilling to impose prison sentence, in part because they consider prison conditions inhumane. Moreover, a cruel and dehumanizing penal institution can actually be a breeding ground for criminality. In any case, a civilized society that seeks to diminish violence in its midst cannot condone prisons where murder, vicious assault, and homosexual rapes are common occurrences.

The draft bill would also require individuals involuntarily confined in state institutions to exhaust any available

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"plain, speedy, and efficient state administrative remedy" before bringing a civil rights suit in federal district court under 42 U.S.C. 1983. The Supreme Court has interpreted section 1983 to preclude federal courts from requiring exhaustion of state administrative remedies. See Steffel v. Thompson, 415 U.S. 472, 473 (1974); Wilwording v. Swenson, 404 U.S. 248 (1971).

A major purpose of the draft bill is to encourage States to adopt effective inmate grievance procedures. Under current law, States have little incentive to establish such procedures because inmates can bypass them in filing section 1983 suits.

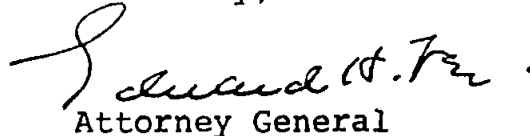
Another purpose of the draft bill is to reduce the burden on the federal judiciary of prisoner suits brought under section 1983. Such suits are currently being filed at an annual rate exceeding 6,000, or approximately 5% of the civil caseload of all federal district courts. The overwhelming majority of these suits are frivolous and many of the underlying disputes could be satisfactorily resolved through adequate grievance machinery. The Federal Bureau of Prisons has had inmate grievance machinery in operation since April, 1974. Approximately 40% of the grievances filed have been resolved in favor of the inmate.

In addition, section 1983 suits filed after an unsuccessful administrative hearing would be considerably easier to decide than is typically the case now. The record created during the proceeding would sharpen the issues in dispute.

It should be stressed that the exhaustion requirement does not deny prisoners access to federal courts in section 1983 suits. It requires only the "plain, speedy and efficient" state administrative remedies be exhausted before bringing such suits. A prisoner unsatisfied with the administrative decision would be permitted to file a section 1983 suit.

The Office of Management and Budget has advised that there is no objection to the submission of this proposal and that it would be in accord with the program of the President from the standpoint of the Administration's program.

Sincerely,



Attorney General

Enclosure

94TH CONGRESS
2D SESSION

H. R. 12230

IN THE HOUSE OF REPRESENTATIVES

MARCH 2, 1976

Mr. RODINO (by request) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To improve the administration of State institutions holding persons involuntarily confined, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That, as used in this Act, "institution" means—
4 (1) any jail, prison, or other correctional facility,
5 or any pretrial detention facility;
6 (2) any facility in which juveniles are held awaiting
7 trial or to which juveniles are committed for purposes
8 of receiving rehabilitative care or treatment;
9 (3) any mental hospital;
10 (4) any institution or treatment facility for mentally
11 retarded persons;

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1 (5) any facility for the chronically physically ill
2 or handicapped; or
3 (6) any nursing home where persons are involun-
4 tarily held.
5 Whenever the Attorney General has reasonable cause to
6 believe that a State or its agents are subjecting persons
7 *involuntarily confined in an institution to conditions* which
8 deprive them of any rights, privileges, or immunities secured
9 or protected by the Constitution or laws of the United
10 States, and that such deprivation is pursuant to a pattern
11 or practice of resistance to the full enjoyment of such rights,
12 privileges, or immunities, the Attorney General is authorized
13 to institute a civil action for or in the name of the United
14 States in any appropriate district court of the United States
15 against such parties and for such relief as he deems necessary
16 to insure the full enjoyment of such rights, privileges, or
17 immunities.
18 SEC. 2. Prior to the institution of a suit under section 1,
19 the Attorney General shall certify that he has notified ap-
20 propriate officials of the institution of the alleged depriva-
21 tions of rights, privileges, or immunities secured or protected
22 by the Constitution or laws of the United States; that he is
23 satisfied that the officials have had a reasonable time to cor-
24 rect such deprivations and that such a suit by the United
25 States is in the public interest.

1 SEC. 3. Whenever an action has been commenced in any
2 court of the United States seeking relief from conditions
3 which deprive persons involuntarily confined in State institu-
4 tions of any rights, privileges, or immunities secured or
5 protected by the Constitution or laws of the United States,
6 the Attorney General for or in the name of the United States
7 may intervene in such action upon timely application if the
8 Attorney General certifies that the case is of general public
9 importance. In such case the United States shall be entitled
10 to the same relief as if it had instituted the action.
11 SEC. 4. Relief shall not be granted by a district court
12 in an action brought pursuant to section 1979 of the Revised
13 Statutes (42 U.S.C. 1983) by an individual involuntarily
14 confined in any State institution alleging deprivation of
15 any rights, privileges, or immunities secured or protected by
16 the Constitution or laws of the United States, unless it
17 appears that the individual has exhausted such plain, speedy,
18 and efficient State administrative remedy as is available:
19 *Provided*, That exhaustion shall not be required if it appears
20 that there exist circumstances rendering such administrative
21 remedy ineffective to protect his rights.
22 SEC. 5. It shall be unlawful to coerce, intimidate,
23 threaten, or interfere with any person on account of his
24 having pursued an administrative remedy or having made a
25 complaint, testified, assisted, or participated in an investiga-

1 tion, proceeding, or hearing pursuant to this Act. This sec-
2 tion may be enforced in an appropriate civil action by such
3 person or by the Attorney General.

94TH CONGRESS
2D SESSION

H. R. 12230

A BILL

To improve the administration of State institutions holding persons involuntarily confined, and for other purposes.

By Mr. Rodino

March 2, 1976

Referred to the Committee on the Judiciary

I believe this is what you want.

ADDENDUM C

94TH CONGRESS
2D SESSION

H. R. 12008

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 19, 1976

Mr. RAILSBACK introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To reduce the burden on the Federal courts of prisoners' suits brought under section 1983 of title 42, United States Code, to improve the administration of State institutions holding confined persons, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That, as used in this Act, institution means—
4 (1) any jail, prison or other correctional facility, or
5 facility, or any pretrial detention facility;
6 (2) any facility in which juveniles are held await-
7 ing trial or to which juveniles are committed for purposes
8 of receiving rehabilitative care or treatment;
9 (3) any mental hospital;

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1 (4) any institution or treatment facility for men-
2 tally retarded persons;
3 (5) any facility for the chronically physically ill or
4 handicapped; or
5 (6) any nursing home where persons are involun-
6 tarily held.
7 Whenever the Attorney General has reasonable cause to
8 believe that a State or its agents are subjecting persons
9 involuntarily confined in an institution to conditions which
10 deprive them of any rights, privileges, or immunities se-
11 cured or protected by the Constitution or laws of the United
12 States, and that such deprivation is pursuant to a pattern
13 or practice of resistance to the full enjoyment of such rights,
14 privileges, or immunities, the Attorney General is author-
15 ized to institute a civil action for or in the name of the
16 United States in any appropriate district court of the United
17 States against such parties and for such relief as he deems
18 necessary to insure the full enjoyment of such rights, priv-
19 ileges, or immunities.
20 SEC. 2. Prior to the institution of a suit under section 1,
21 the Attorney General shall certify that he has notified ap-
22 propriate officials of the institution of the alleged depriva-
23 tions of rights, privileges, or immunities secured or pro-
24 tected by the Constitution or laws of the United States; that
25 he is satisfied that the officials have had a reasonable time

1 to correct such deprivations and that such a suit by the
2 United States is in the public interest.

3 SEC. 3. Whenever an action has been commenced in
4 any court of the United States seeking relief from condi-
5 tions which deprive persons involuntarily confined in State
6 institutions of any rights, privileges, or immunities secured
7 or protected by the Constitution or laws of the United
8 States, the Attorney General for or in the name of the
9 United States may intervene in such action upon timely
10 application if the Attorney General certifies that the case
11 is of general public importance. In such case the United
12 States shall be entitled to the same relief as if it had insti-
13 tuted the action.

14 SEC. 4. Relief shall not be granted by a district court in
15 an action brought pursuant to section 1979 of the Revised
16 Statutes (42 U.S.C. 1983) by an individual involuntarily
17 confined in any State institution alleging deprivation of any
18 rights, privileges, or immunities secured or protected by the
19 Constitution or laws of the United States, unless it appears
20 that the individual has exhausted such plain, speedy, and
21 efficient State administrative remedy as is available: *Pro-*
22 *vided*, That, exhaustion shall not be required if it appears
23 that there exist circumstances rendering such administrative
24 remedy ineffective to protect his rights.

1 SEC. 5. It shall be unlawful to coerce, intimidate,
2 threaten, or interfere with any person on account of his
3 having pursued an administrative remedy or having made a
4 complaint, testified, assisted, or participated in an investiga-
5 tion, proceeding, or hearing pursuant to this Act. This section
6 may be enforced in an appropriate civil action by such per-
7 son or by the Attorney General.

94TH CONGRESS
2D SESSION

H. R. 12008

A BILL

To reduce the burden on the Federal courts of prisoners' suits brought under section 1983 of title 42, United States Code, to improve the administration of State institutions holding confined persons, and for other purposes.

By Mr. RAILSBACK

FEBRUARY 19, 1976

Referred to the Committee on the Judiciary

ADDENDUM D

94TH CONGRESS
1ST SESSION

H. R. 2323

A BILL

To authorize actions for redress in cases involving the violation of the constitutional rights of inmates in State or local correctional facilities or jails.

By Mr. KASTENMEIER, Mr. EDWARDS of California, Mr. CONYERS, Mr. EILBERG, Mr. SEIBERLING, Mr. DRINAN, Ms. HOLTZMAN, Mr. BADILLO, Mr. DIGGS, Mr. ROSENTHAL, Mr. PEPPER, Mr. MURPHY of New York, Mr. HELSTOSKI, Mr. BRASTER, Mr. ECKHARDT, Mr. HARRINGTON, Mr. KOCH, Mr. STOKES, Ms. ABZUG, Mr. ASPIN, Mr. METCALFE, and Mr. RANGEL

JANUARY 29, 1975

Referred to the Committee on the Judiciary

94TH CONGRESS
1ST SESSION

H. R. 2323

IN THE HOUSE OF REPRESENTATIVES

JANUARY 29, 1975

Mr. KASTENMEIER (for himself, Mr. EDWARDS of California, Mr. CONYERS, Mr. EILBERG, Mr. SEIBERLING, Mr. DRINAN, Ms. HOLTZMAN, Mr. BADILLO, Mr. DIGGS, Mr. ROSENTHAL, Mr. PEPPER, Mr. MURPHY of New York, Mr. HELSTOSKI, Mr. BIESTER, Mr. ECKHARDT, Mr. HARRINGTON, Mr. KOCH, Mr. STOKES, Ms. ABZUG, Mr. ASPIN, Mr. METCALFE, and Mr. RANGEL) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To authorize actions for redress in cases involving the violation of the constitutional rights of inmates in State or local correctional facilities or jails.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. An inmate under this Act is any person
4 confined in a State or local correctional facility or jail.
5 SEC. 2. Every person, including a unit of government,
6 who, under color of law, causes any inmate to be deprived
7 of any rights, privileges, or immunities secured by the

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1 Constitution and laws of the United States shall be liable
2 to the inmate in an action for redress, including an applica-
3 tion for a permanent or temporary injunction, restraining
4 order, or other order for preventive relief.
5 SEC. 3. The Attorney General may, upon timely
6 application, intervene in the name of the United States in
7 any action commenced by an inmate under section 2 if he
8 certifies that the case is of general public importance. In
9 such action the United States shall be entitled to the same
10 relief as if it had instituted the action.
11 SEC. 4. Whenever the Attorney General has reasonable
12 cause to believe that any person or group of persons, includ-
13 ing a unit of government, is engaged in a pattern or practice
14 of resistance to the full enjoyment by an inmate of any
15 rights guaranteed by the Constitution or laws of the United
16 States, and that such denial of rights raises an issue of gen-
17 eral public importance, he may bring a civil action in any
18 appropriate United States district court by filing with it a
19 complaint setting forth the facts and requesting such pre-
20 ventive relief, including an application for a permanent or
21 temporary injunction, restraining order, or other order
22 against the person or persons responsible for such pattern
23 or practice or denial of rights, as he deems necessary to
24 insure the inmate the full enjoyment of his rights.

1 SEC. 5. In any action commenced pursuant to section
2 2 or 4, the court, in its discretion, may allow the prevailing
3 party a reasonable attorney's fee as part of the costs, and
4 the United States shall be liable for costs the same as a
5 private person.

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ADDENDUM E

FILED

SEP 29 1976

JOHN E. PEDERSON, CLERK
By [signature]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) CV 74-138-BU
v.)
ROBERT MATTSON, et al.,) ORDER
Defendants.)

The setting of this cause for trial on October 4, 1976, is vacated.

On the authority of United States v. Solomon, (D.C.Md., No. N-74-181, July 8, 1976), this cause is dismissed for the reason that the United States has no standing to sue.

Let judgment be entered accordingly.

DATED this 27th day of September 1976.

[signature]
Russell E. Smith
United States District Judge

United States of America } SS
District of Montana }
I, the undersigned, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such Clerk.
Witness my hand and Seal of said Court this 4th
day of October, 1976
JOHN E. PEDERSON
Clerk
By [signature]
Deputy Clerk,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on December 30, 1976, copies of the foregoing Brief of Defendants-Appellees were mailed by first class mail, postage prepaid, to the counsel listed below:

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