

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (CRIPA)

Response to National Governor's Association's Proposed Resolution regarding CRIPA

1. Require DOJ to develop standards and rules.

- DOJ is presently working with the National Association of Attorneys General (NAAG) to help NAAG develop a better understanding of the Department's role under CRIPA and, consistent with directives of the Attorney General, to develop further, additional cooperative approaches in this area. Our experience indicates that we can achieve our goals by working cooperatively with States. Our ongoing conversations with NAAG will address their concerns wherever possible and contribute to better working relationships. Our cooperative approach has been successful thus far, and the Department works directly with the states.

- The development of standards of care is presently prohibited by CRIPA. There is no need for federal regulations in this area because a significant body of law developed in the courts since 1971 provides adequate guidance as to the pertinent legal standards for care and other conditions of confinement. CRIPA cases address myriad issues; professional standards in these areas are well established, and it makes little sense to repeat them elsewhere. Our goal has been to reduce Federal regulations.

2. Require complaints prior to an investigation, disclose identity of complainants to state officials so they might investigate the veracity of the complaint.

- In all cases, the Department initiates investigations based on complaints or other information in the public domain. There is no credibility to the notion that the Department initiates investigations absent any basis. Not all of the complaints received by DOJ are based on a written complaint. DOJ must be able to address all legitimate allegations irrespective of their source. Moreover, mentally disabled individuals and juveniles whose conditions of confinement are covered by CRIPA are, in many instances, unable to write complaints.

- The general nature of the allegations to be investigated is disclosed to State officials in the notice of intent to investigate and discussed at a meeting which is held prior to the actual conduct of the investigation. This has been consistent DOJ practice since the passage of the statute and precludes the need for a statutory amendment.

- The Department does not disclose the identity of complainants because such information is protected from disclosure by law and to do so would potentially subject such individuals to retaliation -- not by high level officials but by

others whose conduct is difficult to regulate (e.g., the subject of the complaint). The identity of complainants has historically been deemed to be privileged and confidential because individuals will not complain if their identities are not protected.

- The notion that states ought to conduct investigations of individual complaints mistakes the role of the Federal government under CRIPA. The Department's task is to investigate and remedy systemic, institution-wide deficiencies -- not individual complaints. States want to investigate the individual complaints. However, such investigations may hamper ongoing federal institution-wide investigations. Even if individual complaints were addressed by the states, systemic deficiencies of the kind CRIPA was intended to address would remain, and such systemic problems are more suitable for federal government review.

3. Require narrow relief

- CRIPA already specifies that relief should be framed in terms of "minimum remedial measures," obviating any need to develop a standard for relief or a different limiting principle. Moreover, most CRIPA cases have been resolved by agreement where States have agreed to necessary remedies. In large, systemic CRIPA cases where courts have had to act, they have deferred to State choices of remedies in the first instance. There is no need to address this issue by a CRIPA amendment.

4. Require DOJ to allege and prove harm

- All of the Department's CRIPA activities already focus on egregious conditions resulting in significant harm and injury. The case law is clear that harm or undue risks of harm are required to make out constitutional claims. The clarity of the law in this area makes an amendment unnecessary.

5. Require weight be given to public safety and operation of the institution.

- DOJ orders give appropriate deference to institutional administrators and other significant factors as required by law. Present Federal Rules of Civil Procedure provide that special masters and other outside monitoring devices should be the "exception" and not the rule. The law already protects the authority of States to operate their own institutions.

- The Department has never requested courts to enter orders resulting in the release of prisoners. Historically, the Department has not endorsed the release of prisoners as a means of addressing prison crowding.

- Courts should be relied upon, as they historically have been, to properly balance the rights of the individuals whose rights have been denied and other factors such as public safety.

6. Require consent decrees to have termination provisions and relief which is narrowly drawn and not intrusive.

- All CRIPA consent decrees already contain termination provisions and reflect current legal principles regarding the scope of relief. All settlements should be addressed on a case by case basis. A standard timetable for termination of consent decrees would not be appropriate since each institution has case specific problems and resolving these is done per case with each state individually. Also this standardized approach would detract from our collaborative working approach with the states.

- Consent decrees involving 22 of the 78 facilities subject to CRIPA decrees have been terminated when deficiencies were corrected. This track record reflects the Department's continuing policy of terminating court orders where appropriate

7. "DOJ has entered some states and preempted their authority to operate institutions."

- This statement boldly misstates DOJ policy and practice. During the approximately 15 year history of enforcement activities pursuant to CRIPA, it has been the Department's experience that improving conditions in institutions and protecting the rights of this nation's institutionalized population requires the cooperative efforts of both State and Federal governments.

- More than half of the Justice Department's 138 completed investigations of facilities for persons with mental disabilities, nursing homes, juvenile facilities, jails, and prisons under the Civil Rights of Institutionalized Persons Act (CRIPA) have been resolved voluntarily or with no finding of a violation, disproving the notion that consent decrees are sought in all instances, that the Department's actions are arbitrarily preempting state operations, and that guidance to the courts is needed at this time. Each of these projects is evidence that the Department has worked and continues to work cooperatively with states to improve institutions.

- Very few CRIPA cases are actually litigated -- in fact, after 138 investigations and over 100 findings of systemic violations, there have been only four trials since the law was enacted by Congress in 1980 in response to numerous, heartbreaking reports of life-threatening and substandard conditions. Contrary to the suggestion that the Department customarily goes to federal court to resolve these issues in an

adversarial manner, the Department's enforcement activities have been constructive and reasonable, following both the procedural steps and the spirit of cooperation with the states required by CRIPA.

- The paucity of litigation belies the need for court guidance by statutory amendment. The Justice Department's record of CRIPA enforcement reflects a strong commitment to protecting the legal rights of all citizens in institutions consistent with a record of cooperation with states in protecting these rights.

- Given the above stated grounds, the entire NRA resolution is unnecessary.



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

TELEFACSIMILE COVER SHEET

DATE: 1/29/96 TIME: 1235 pm
TO: Steve Warnath

PHONE: 456-5874
FAX: 456-7028

FROM: Juanita C. Hernandez
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
FAX NUMBER: 202-307-2839
PHONE: 202-514-3653

COMMENTS: Steve, Here is our
response to WGA resolution
on CRIPA. Please call for
Q and let me know what
happened. Thanks.

NUMBER OF PAGES TRANSMITTED (INCLUDING THIS SHEET) 4
(max. 30 pages)

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CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT

I. Introduction

The purpose of the Civil Rights of Institutionalized Persons Act (CRIPA) is to vindicate the rights of citizens confined in the nation's myriad public institutions and to improve conditions and services provided to them consistent with legal requirements. Congress enacted CRIPA in 1980 amidst a continuing crisis of deplorable conditions in our nation's public institutions.

CRIPA's requirements reflect an appropriate balance between State's proper role in operating public institutions and the Federal role of ensuring the rights of institutionalized persons are protected. For example, the statute requires notice to state officials of the Department of Justice's intent to investigate, further notice of any violations identified in the course of an investigation, the supporting facts, and recommended remedial measures. Further, the statute promotes voluntary compliance agreements as to needed remedial measures, and reserves litigation to be a matter of last resort. During the approximately 15 year history of enforcement activities pursuant to CRIPA, it has been the Department's experience that improving conditions in institutions and protecting the rights of this nation's institutionalized population requires the cooperative efforts of both State and Federal governments.

II. Comments on the Proposed NGA Resolution

The resolution offered by the National Governor's Association is misguided and does not accurately portray the Department of Justice's (the "Department") activities under CRIPA. The proposed resolution criticizes consent decrees, alleges that "DOJ has entered some states and preempted their authority to operate institutions," and provides purported guidance to courts as to the granting of relief.

First, more than half of the Justice Department's 138 completed investigations of facilities for persons with mental disabilities, nursing homes, juvenile facilities, jails, and prisons under the Civil Rights of Institutionalized Persons Act (CRIPA) have been resolved voluntarily or with no finding of a violation, disproving the notion that consent decrees are sought in all instances, that the Department's actions are arbitrarily preempting state operations, and that guidance to court is needed at this time. Each of these projects is evidence that the Department works cooperatively with states to improve institutions. Also, the Department always takes into

consideration the public safety and the operation of the state institution at issue.

Second, consent decrees involving 22 of the 78 facilities subject to CRIPA decrees have been terminated when deficiencies were corrected. This track record reflects the Department's continuing policy of terminating court orders where appropriate and shows that the proposed requirements of the review of decrees, termination, and the like are unnecessary. Indeed, all CRIPA consent decrees already contain termination provisions and have done so since the early days of the CRIPA enforcement program.

Third, very few CRIPA cases are actually litigated -- in fact, after 138 investigations and over 100 findings of systemic violations, there have been only four trials since the law was enacted by Congress in 1980 in response to numerous, heartbreaking reports of life-threatening and substandard conditions. Contrary to the suggestion that the Department customarily goes to federal court to resolve these issues in an adversarial manner, the Department's enforcement activities have been constructive and reasonable, following both the procedural steps and the spirit of cooperation required by CRIPA. The Department's focus is to bring about systemic changes that will protect and promote the fundamental rights of institutionalized people, not as the resolution suggests, to preempt state governments. The paucity of litigation belies the need for court guidance by statutory amendment. As to the suggestion that an amendment is needed requiring a demonstration of harm before any relief can be granted, all of the Department's CRIPA activities already focus on egregious conditions resulting in significant harm and injury. Moreover, CRIPA also specifies that relief should be framed in terms of "minimum remedial measures," obviating any need to develop a standard for relief or a different limiting principle.

The requirements for the receipt of a complaint, identifying complainants to governmental authorities, and the suggested need for states to resolve such complaints absent a Federal investigation are all misguided notions. In all cases, the Department initiates investigations based upon complaints or other information in the public domain. There is absolutely no credibility to the notion that the Justice Department initiates investigations absent any basis.

The general nature of the allegations to be investigated by the Justice Department are disclosed to State officials in the notice of intent to investigate and discussed at a meeting which is held prior to the actual conduct of the investigation. Other information regarding the basis for the investigation is provided as appropriate.

The Department does not disclose the identity of complainants because such information is protected from disclosure by law and to do so would potentially subject such individuals to retaliation -- not by high level officials but by others whose conduct is difficult to regulate. The identity of complainants has historically been deemed to be privileged and confidential because individuals will not complain if they are not protected. The notion that states ought to conduct investigations of individual complaints mistakes the role of the Federal government under CRIPA. The Justice Department's task is to investigate and remedy systemic, institution-wide deficiencies -- not individual complaints.

Finally, the Justice Department is presently working with the National Association of Attorneys General (NAAG) to develop a better understanding of the Department's role under CRIPA and, consistent with directives of the Attorney General, to develop further, additional cooperative approaches with the states in this area. These discussions are ongoing. Under these circumstances, formal guidelines of the kind contemplated by the proposed NRA resolution appear quite unnecessary.

In sum, the Justice Department's record of CRIPA enforcement reflects a strong commitment to protecting the legal rights of all citizens in institutions consistent with a record of cooperation with states in protecting these rights. Given the above stated grounds, the entire NRA resolution is unnecessary.

HR-32. CIVIL RIGHTS ENFORCEMENT AND CONSENT DECREES

THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (CRIPA) WAS ADOPTED BY CONGRESS TO SECURE THE RIGHTS OF INDIVIDUALS WHO ARE INSTITUTIONALIZED IN GOVERNMENT INSTITUTIONS. THE GOVERNORS BELIEVE THAT THE CIVIL RIGHTS OF ALL INDIVIDUALS, INCLUDING THE CIVIL RIGHTS OF INDIVIDUALS WHO ARE INSTITUTIONALIZED UNDER SPECIAL CIRCUMSTANCES, MUST BE RESPECTED BY ALL GOVERNMENTS. THEY ALSO FIRMLY BELIEVE THAT STATES PROVIDE INSTITUTIONAL CARE THAT EQUALS OR EXCEEDS THE REQUIREMENTS OF THE FEDERAL AND STATE CONSTITUTIONS AND THAT STATES ARE INDEPENDENTLY CAPABLE OF PROVIDING APPROPRIATE CARE FOR INSTITUTIONALIZED PERSONS.

UNDER CRIPA, THE DEPARTMENT OF JUSTICE (DOJ) HAS THE AUTHORITY TO LITIGATE ALLEGED CIVIL RIGHTS VIOLATIONS AND TO ENTER INTO CONSENT DECREES WITH STATE GOVERNMENTS AS AN ENFORCEMENT MECHANISM OF THE ACT. AS WRITTEN, CRIPA APPEARS TO PLACE STRINGENT LEGAL BURDENS OF PROOF UPON DOJ IN ORDER TO PROTECT THE CONSTITUTIONALLY MANDATED DEFERENCE OWED TO A STATE'S OPERATION OF ITS OWN INSTITUTIONS. DOJ HAS ENTERED SOME STATES AND PREEMPTED THEIR AUTHORITY TO OPERATE INSTITUTIONS.

TO ENSURE RESPECT FOR A STATE'S STRONG INTEREST IN INDEPENDENTLY OPERATING ITS INSTITUTIONS, THE GOVERNORS URGE CONGRESS TO ENACT INTO LAW THE FOLLOWING PRINCIPLES TO GUIDE DOJ IN ITS CRIPA INVESTIGATIONS OR ACTIONS.

- REQUIRE DOJ TO DEVELOP STANDARDS AND PROMULGATE RULES IMPLEMENTING CRIPA UNDER THE FEDERAL ADMINISTRATIVE PROCEDURES ACT.
- REQUIRE THAT ANY DOJ PRELITIGATION INVESTIGATION INTO A STATE INSTITUTION BE PRECEDED BY COMPLAINTS, WHICH PROVIDE A FACTUAL BASIS TO ESTABLISH A THRESHOLD FOR CRIPA INVESTIGATION WITH RESPECT TO THE FACILITY. IN ADDITION, THE IDENTITY OF THE COMPLAINANTS SHOULD BE PROVIDED TO THE STATE'S LEGAL AUTHORITIES. THESE VERIFIED FACTS, ALONG WITH THE IDENTITY OF THE COMPLAINANTS, SHOULD BE PROVIDED TO THE STATE PRIOR TO LITIGATION SO THAT THE ACCURACY OF THE

ALLEGATIONS CAN BE INVESTIGATED AND ANY APPROPRIATE REMEDIAL ACTION CAN BE TAKEN WITHOUT THE NEED FOR LITIGATION.

- CLARIFY THAT THE ONLY RELIEF THAT A COURT MAY ENTER, OR THAT DOJ MAY SEEK UNDER CRIPA, IS THAT WHICH IS NARROWLY DRAWN, EXTENDS NO FURTHER THAN IS NECESSARY TO CORRECT THE VIOLATION OF THE FEDERAL CIVIL RIGHT, AND IS THE LEAST INTRUSIVE MEANS NECESSARY TO CORRECT THE PROVEN VIOLATION OF A FEDERAL RIGHT. THESE STANDARDS SHOULD APPLY ACROSS THE BOARD TO ALL CRIPA INVESTIGATIONS AND ACTIONS.
- CLARIFY THAT DOJ, IN ORDER TO MAINTAIN AND SUBSEQUENTLY PREVAIL IN A CRIPA ACTION IN FEDERAL COURT, MUST FIRST ALLEGE AND THEN PROVE ACTUAL HARM TO INSTITUTIONALIZED PERSONS AS A RESULT OF THE ALLEGED UNCONSTITUTIONAL CONDITIONS WITHIN AN INSTITUTION.
- PROVIDE THAT IN ALL CRIPA ACTIONS, DOJ AND THE COURTS MUST GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ANY RELIEF MIGHT CAUSE ON THE PUBLIC SAFETY AND THE OPERATION OF THE INSTITUTION AT ISSUE.
- REQUIRE THAT ANY CONSENT DECREE ENTERED UNDER THE AUTHORITY OF CRIPA MUST CONTAIN A REASONABLE DATE FOR REVIEW, RECONSIDERATION, AND TERMINATION OF ANY AGREEMENT IN CONSENT ENTERED UNDER THE DECREE. ALL CONSENT DECREES SHOULD ALSO BE SUBJECT TO THE REMEDIAL RELIEF STANDARDS DESCRIBED UNDER THIS POLICY—THE RELIEF MUST BE NARROWLY DRAWN, EXTEND NO FURTHER THAN IS NECESSARY TO CORRECT THE VIOLATION OF THE FEDERAL CIVIL RIGHT, AND BE THE LEAST INTRUSIVE MEANS NECESSARY TO CORRECT THE PROVEN VIOLATION OF A FEDERAL RIGHT.

Time limited (effective Winter Meeting 1996-Winter Meeting 1998).