

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 2697 and 2770

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House Judiciary Committee
Subcommittee on Courts

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Room 140, Majority Caucus
Main Capitol Building
Harrisburg, Pennsylvania

Tuesday, August 27, 1996 - 1:00 p.m.

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BEFORE:

Honorable Daniel Clark, Chairman of Subcommittee
Honorable Jere Birmelin
Honorable Patrick Browne
Honorable Scot J. Chadwick
Honorable Timothy Hennessey
Honorable Jere Schuler

Honorable Thomas Caltagirone, Minority Chairman
of Judiciary Committee
Honorable Andrew Carn
Honorable Gregory Fajt
Honorable Michael Horsey
Honorable David Mayernik

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ALSO PRESENT:

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Counsel for Minority Committee

C O N T E N T S

WITNESSES	PAGE
Opening remarks by Chairman Clark	4
The Honorable David Mayernik Representative - 29th Legislative Dist.	4
The Honorable Patrick Browne Representative - 131st Legislative Dist.	7
Honorable Thomas Corbett, Jr. Attorney General	12
Francis R. Filipi, Sr. Deputy Atty. Gen. Litigation Section	12
Robert F. Bershad, Deputy Atty. Gen. Office of Legislation and Policy Development	12
Angus Love Pennsylvania Prison Society	42
Sarah Vandenbraak, Chief Counsel Department of Corrections	56
Emily Zimmerman, Chief of Civil Litigation Philadelphia District Attorney's Office	81

1 CHAIRMAN CLARK: Good afternoon. This
2 is the time and place that was advertised and
3 publicized for public hearings on House Bill
4 2770 and House Bill 2697. House Bill 2770 was
5 introduced by the prime sponsor, Representative
6 Mayernik, and House Bill 2697 was introduced by
7 its prime sponsor, Representative Browne.

8 Initially, what we will do is hear from
9 each spousor of those pieces of legislation. We
10 will begin, this afternoon, with Representative
11 David Mayernik and his House Bill 2770.

12 Representative Mayernik.

13 REP. MAYERNIK: Thank you, Mr.
14 Chairman. It is a pleasure to testify in front
15 of my own committee here today.

16 CHAIRMAN CLARK: Maybe you can get a
17 vote.

18 REP. MAYERNIK: I get to testify and
19 vote, that's even better.

20 Just briefly, the House Bill 2770,
21 states that a state correctional institution or
22 a county correctional institution shall draw
23 from the inmate's salary or the inmate's
24 account, as much as practicable, any filing fee
25 associated with the lawsuit filed by an inmate.

1 The purpose of drafting this
2 legislation, introduce it, is to cut down and
3 eliminate the frivolous lawsuits that are issued
4 in Pennsylvania or filed in Pennsylvania by
5 inmates.

6 I don't have the exact number of
7 lawsuits that are filed in Pennsylvania, but my
8 understanding is somewhere in the thousands.

9 In other states that have passed
10 legislation dealing with frivolous lawsuits,
11 there have been an estimated cost reduction of
12 50 percent. And some of the lawsuits that have
13 been filed, I would just like to share with you,
14 an example would be: in California, there was a
15 lawsuit, a death row inmate sued the state
16 because of broken cookies; as a result, before
17 that case was thrown out of court by a judge,
18 the cost to the taxpayer was \$4500.

19 Also, an inmate thought his brain waves
20 were being broadcast on the prison loudspeakers;
21 the cost of that suit to the taxpayers before it
22 was dismissed, \$18,500.

23 Also, an inmate filed suit because he
24 had eaten chilly and his stomach hurt; the cost
25 of that suit, \$2,000.

1 In California alone, they spend
2 \$25 million on inmate lawsuits.

3 In New Hampshire, it recently passed
4 legislation similar that we have proposed today.
5 They had seen a reduction of 50 percent of
6 lawsuits. They only had a hundred and fifty
7 cases filed. Now it is down to 75 and they
8 estimate their savings was a hundred and
9 sixty-four thousand dollars.

10 Now, one of the arguments against this
11 legislation is that not all lawsuits are
12 frivolous. And, granted, I agree with that. We
13 have to give the inmates their right to file
14 suits.

15 We have a constitution in this state
16 and this nation and people have that right and
17 they should continue to have that right. But,
18 this General Assembly also has to deal with the
19 issue of the frivolous lawsuits and that of cost
20 containment to the taxpayers for the frivolous
21 suits.

22 What this legislation would do is
23 require that when frivolous suits are filed that
24 money is taken out of the inmate's account or
25 taken from their salary if they have a salary at

1 the institution. And, in most cases, the states
2 that have existing law found that the prisoners
3 would rather have their cigarette money instead
4 of filing the lawsuit. As a result, the cases
5 have been reduced.

6 The legislation is very basic, very
7 straightforward. I appreciate the committee
8 taking time to look at it. This is not the only
9 piece of legislation, as you well know, in front
10 of the committee today. There are three other
11 problems to it. One is introduced by
12 Representative Pat Browne and is more extensive
13 than the piece that I put forward and deals with
14 the different aspect. Also, Senator Fisher has
15 introduced legislation, as well as, Senator
16 Greenleaf.

17 I believe it is necessary to combine
18 all pieces and all aspects of the legislation or
19 legislation that has been introduced to have a
20 bill that eliminates the frivolous lawsuits and
21 saves taxpayers' dollars.

22 Thank you, Mr. Chairman. I will now
23 yield to Representative Browne, who is with me
24 at the table, to testify.

25 CHAIRMAN CLARK: Representative Browne.

1 REP. BROWNE: Thank you, representative
2 Mayernik, Representative Clark and Members of
3 the House Judiciary Committee. It is a pleasure
4 for me to have my first piece of legislation
5 considered before the Judiciary Committee.

6 On behalf of the taxpayers in my
7 district and Representative Mayernik's district
8 and the rest of the Commonwealth, it is a
9 pleasure to have this legislation considered
10 that will stop some of the current abuses that
11 exist in our correctional system in regards to
12 the adjudication and administration of civil
13 complaints of prisoners against our
14 Commonwealth.

15 Having gone through another budget
16 session, we all understand the amount of
17 resources that go into our correctional system
18 to the tune of \$900 million. And if we want to
19 continue to the prioritize resources and
20 education and economic development, we have to
21 find areas to provide efficiency; and, I think
22 one area is the area of prison condition and
23 that is litigation.

24 Currently, in our Pennsylvania Code,
25 the state prisoners have no restriction on the

1 type and content of complaint that any of them
2 would bring against the Commonwealth to remedy
3 prison conditions, even though their efforts are
4 purely taxpayer funded.

5 Unfortunately, similar to other
6 jurisdictions throughout the country, this has
7 led to an open season on our judicial system by
8 our inmates. As many lawsuits are filed with
9 little or no merit.

10 An example of frivolous claims abounds
11 which range from the ridiculous to the bizarre:
12 one Pennsylvania inmate has filed over 70
13 lawsuits saying that he has been systematically
14 poisoned by prison officials; another one has
15 been filed because the state issued underwear
16 which was apparently too tight; and still
17 another, a death row inmate, has filed suit
18 against a guard which confiscated his electronic
19 game from him.

20 The State Attorney General's Office
21 reports that it spends more than \$2 million a
22 year in defense against frivolous claims, and
23 the Office uses 21 attorneys, alone, to spend
24 half of their time on inmate lawsuits. One
25 thousand frivolous lawsuits are being considered

1 right at one time. House Bill 2697, that I have
2 introduced, along with Representative Mayernik's
3 legislation, aims to address these abuses, by
4 reporting the method, manner, and practice of
5 instituting a disposing of lawsuits which deal
6 with prison conditions.

7 Its goal, the goal of both bills, is to
8 give courts leeway in dismissing of frivolous
9 and malicious suits, requiring the inmate's
10 financial responsibility for filing fees, and
11 limit remedies for prison conditions, to those
12 that are narrowly drawn, to address the
13 violation at hand.

14 That last category is specific to my
15 bill which is, which, together with
16 Representative Mayernik's bill, would make a
17 very strong package.

18 This legislation is not about removal
19 of legitimate rights. There are protections in
20 the bill to ensure this. Rather, it is about
21 separating the ridiculous from the valid in
22 prison lawsuits. In fact, the less time the
23 system and the courts are tied up with frivolous
24 suits, more time it will be to devote to acting
25 on valid complaints and improving conditions

1 that require remediations. It will foster
2 accountability and the expense of Commonwealth
3 resources and improve the Commonwealth's overall
4 direction program for the betterment of all our
5 constituents.

6 Again, I want to thank the committee
7 for considering this bill. And I believe that
8 the package, my legislation, as well as
9 Representative Mayernik's legislation, will be
10 given broad support by the General Assembly.
11 Thank you.

12 CHAIRMAN CLARK: Thank you,
13 Representative Browne. I believe what we will
14 do is hold our questions for you gentlemen until
15 a little later, and what I would like to do is
16 have the members of the committee introduce
17 themselves and then we will hear from our
18 Attorney General, Thomas Corbett. So if we
19 start on my left with the introduction of the
20 members.

21 REP. BIRMEIN: Representative
22 Birmelin, Wayne County.

23 REP. SCHULER: Representative Jere
24 Schuler, Lancaster County.

25 REP. CALTAGIRONE: Representative

1 Caltagirone, Berks County.

2 REP. CHADWICK: Representative Scot
3 Chadwick, Bradford and Susquehanna Counties.

4 REP. CARN: Representative Andrew Carn,
5 Philadelphia County.

6 REP. HORSEY: Representative Mike
7 Horsey, Philadelphia County.

8 CHAIRMAN CLARK: Representative Browne,
9 if you would like to join us up here for the
10 remainder of the session, why, you are certainly
11 welcome.

12 And next to testify in front of the
13 committee in regard to House Bills 2697 and
14 2770, I am pleased to welcome our Attorney
15 General, the Honorable Thomas Corbett, Jr., and
16 along with him is Attorney General Filip; he is
17 a Senior Deputy Attorney General in the
18 Litigation Section.

19 Attorney General Corbett.

20 ATTORNEY GENERAL CORBETT: Thank you.

21 And thank you for inviting us here this
22 afternoon. I would say, it has been an eventful
23 trip coming in here on the Pennsylvania
24 Turnpike. I don't know whether Representative
25 Mayernik came in today or not, but there was

1 about a 45-minute wait on the Turnpike. So we
2 just got here 45 minutes ago, so please excuse
3 our delay for getting over here to you. I want
4 to thank you also for the opportunity to testify
5 in support of House Bill 2697.

6 A lawsuit alleging that a prison nurse
7 laced a prisoner's coffee with what the prisoner
8 called hepatitis incubis; a lawsuit by a smoking
9 prisoner who claims that he has a right to be
10 housed in a smoke-free environment; a lawsuit to
11 compel taxpayers to pay for sex change surgery
12 for two prisoners: these are some of the types
13 of lawsuits that our office receives. These are
14 wasteful, unproductive litigation that my office
15 must deal with on behalf of the Commonwealth and
16 the Department of Corrections on a regular
17 basis. It is because of this kind of wasteful
18 and unproductive litigation that will be ended
19 if you would pass and the Senate would pass
20 House Bill 2697. For that reason, our office
21 supports it wholeheartedly.

22 These lawsuits would be funny, when you
23 read them. It made Top 10 lists, just like the
24 Letterman list. It would be funny if it wasn't
25 for the money and the resources they extract

1 from state taxpayers was not so great. Every
2 time a prisoner files a lawsuit, civil
3 litigation attorneys, such as my Deputy here
4 with me, must spend hours drafting a response;
5 depending upon the type of suit, it could take
6 an entire day. Often, this simple act is very,
7 very time-consuming and expensive.

8 And that is only the beginning of the
9 process. For those of you who understand the
10 process, who may be lawyers, or who, because of
11 your role on the committee and the subcommittee,
12 understand the process, we have numerous
13 pre-trial motions and often cases, many times,
14 full blown hearings. Especially egregious is
15 the fact that these lawsuits almost always cost
16 the prisoner nothing. Let me repeat that:
17 especially egregious is the fact that these
18 lawsuits almost always cost the prisoner
19 nothing. There is no consequence to their
20 filing of this lawsuit.

21 When they enter prison, prisoners do
22 not lose all of their rights guaranteed under
23 the State and Federal Constitution. One of the
24 rights that they do retain is the right to the
25 due process under the law. If a prisoner's

1 constitutional rights are compromised by prison
2 officials or prison conditions, then the
3 prisoner has good reason to seek redress from
4 our courts. This is the principle that House
5 Bill 2697 does not change.

6 What House Bill 2697 will change is the
7 ability of prisoners to abuse this right, which
8 unfortunately many prisoners seem to make their
9 life's work. The Commonwealth of Pennsylvania,
10 in my mind, cannot tolerate frivolous claims
11 concerning sex change operations and coffee
12 laced with fictitious disease. Common sense --
13 and I want to stress that -- common sense says
14 something is terribly wrong if taxpayers must
15 pay for this senseless overloading of our
16 already strained judicial system. Common sense
17 also demands change and it is common sense that
18 I believe is the foundation of this bill.

19 The first and the most important point
20 in House Bill 2697 is that it nears parts of the
21 Federal Prison Litigation Reform Act of 1995,
22 which was recently passed, which was the federal
23 government's effort to end these kinds of
24 lawsuits in federal court. Preliminary reports
25 indicate that federal courts have already seen a

1 noticeable decrease in the number of frivolous
2 cases. Litigious prisoners, ever resourceful,
3 we believe, will likely see no choice now but to
4 file their frivolous claims in state court.
5 This will force attorneys from my Civil
6 Litigation Section to file motions in response,
7 to make arguments in response, and in some cases
8 to conduct trials in response, to travel in
9 response to these motions. The Commonwealth may
10 seek to remove these cases to federal court,
11 where the party petitioning for removal, the
12 Commonwealth, would have to pay filing fees. In
13 either scenario, the burden on state taxpayers
14 absent the state prisoner litigation reform will
15 be tremendous. In my opinion, Pennsylvania must
16 enact prisoner litigation reform legislation in
17 order to stem what we believe could be a tidal
18 wave of frivolous prisoner litigation lawsuits
19 in the state courts.

20 I know you also have a copy of my
21 testimony, but I would like to add in here: when
22 you are thinking of costs in this litigation,
23 when the prisoners file their lawsuits, they are
24 going to file them in the county in which they
25 are located, whether that be SCI-Somerset,

1 Western Penitentiary in Pittsburgh, Albion up in
2 Erie County; in each case, in addition to just
3 the cost to the Office of Attorney General in
4 representing the Commonwealth, if there are
5 hearings, if there is a trial in front of a
6 judge, there is travel required in that, not
7 just for the attorneys but for the prisoners.
8 In addition to the prisoners, you know, they are
9 not going to walk out there and go to the
10 courtroom themselves; you are going to have
11 security implications in those cases.

12 I could tell you, as a former United
13 States Attorney, sitting in the United States
14 Courthouse in Pittsburgh, we often times saw
15 many of these cases that were coming down from
16 Western Penitentiary in the federal court
17 system. And it was seen as a day out. It was a
18 field trip for the prisoners. And that's why
19 they filed it: it was a day out of the prison
20 system. They got taken over to the federal
21 courthouse, it was a day away from whatever
22 routine they had there. In my mind, it was also
23 an opportunity for security breaches. So there
24 are other implications beyond just the cost to
25 the taxpayers.

1 Under House Bill 2697, the prisoner
2 must pay a filing fee before filing a complaint.
3 As it is now, prisoners do not have to pay if
4 they claim indigency, which is a privilege that
5 they enjoy and which law abiding citizens and
6 taxpayers do not. If any member of this
7 committee or her constituents would file a
8 lawsuit, you would have to pay a filing fee.
9 Common sense says that the prisoner must also
10 pay. A financial commitment will make a
11 prisoner think twice before indulging in a
12 frivolous claim. A financial commitment will
13 make a prisoner think twice before asking for a
14 field trip and is often times what this is.

15 It is important to note that if a
16 prisoner lacks the means to pay the filing fee,
17 then this bill will allow the prisoner to file
18 anyway. But first the prisoner must prove to
19 the court that he is unable to pay. I believe
20 this a fair arrangement because nobody wants to
21 shut out an indigent prisoner who is truly
22 indigent and who has a legitimate grievance.

23 This bill does give the court the
24 option to require an able prisoner to earn the
25 filing fee before hearing the complaint. But

1 the court cannot delay a prisoner's request for
2 a restraining order or injunctive relief where
3 the prisoner is in imminent danger of serious
4 bodily harm. This is an important point because
5 part of the Commonwealth's responsibility is to
6 protect its prisoners. Our notions of justice
7 and fair play require this.

8 Because of these notions of justice and
9 fair play, I have a number of minor suggestions
10 regarding the bill which will strengthen the
11 balance between stopping frivolous claims and
12 guaranteeing due process to prisoners with
13 legitimate grievances.

14 These suggestions focus on Section 3
15 subsection (d), which requires the court to
16 summarily dismiss a prisoner's lawsuit in
17 certain situations.

18 Section 3 (d) (1) requires the court to
19 dismiss a prisoner's lawsuit if the prisoner's
20 claim of indigency is untrue. While there is
21 little sympathy for prisoners who make false
22 indigency claims, there may be times when a
23 prisoner makes a false claim but does so
24 innocently. For example, a visiting relative
25 may leave money for the prisoner without the

1 prisoner's knowledge. Depending on the size of
2 the institution, sometimes it takes time for the
3 prison to post the money in the prisoner's
4 account. If during that time the prisoner were
5 to file a lawsuit claiming indigency, he risks a
6 summary dismissal even though he was acting at
7 the time in good faith. I I support a
8 technical amendment that would ensure that such
9 innocent mistakes are not unduly penalized.

10 Section 3 (d) (3) requires the court to
11 dismiss a case when the named defendants are
12 reasonably likely to be immune from lawsuits
13 under state law. But if a court determines that
14 a defendant is reasonably likely to be immune,
15 and it turns out that the defendant is not
16 immune, then the prisoner has been wrongly
17 foreclosed from making a claim. Not only is
18 this an injustice to the prisoner, it is
19 potentially costly to the state. The prisoner
20 will appeal and, if he is particularly
21 litigious, sue the judge as well as everybody
22 else who made the ruling. A suit against a
23 judge is the kind of suit that is barred by
24 immunity, but that may not stop a prisoner from
25 filing a claim anyway and requiring our office

1 to defend it. This language may need some fine
2 tuning to prevent this problem while still
3 ensuring that government officials are
4 guaranteed the full protections under the
5 immunity doctrines.

6 Finally, Section 3 (d) (4) requires the
7 court to dismiss a prisoner's complaint against
8 a named defendant if in a prior suit against
9 that defendant, the prisoner acted in bad faith
10 or presented false evidence during a hearing or
11 trial. After all, a bad faith litigator -- or
12 litigant -- is not welcome in our courts. I
13 would support an adjustment to this section that
14 would nonetheless enable such a prisoner to
15 bring the court's attention to a legitimate
16 claim of imminent serious bodily injury.

17 Further review of these minor technical
18 changes will fine tune this bill to ensure that
19 the Commonwealth deals with prisoners fairly but
20 firmly. I emphasize, however, that I fully
21 support the purpose of this bill: to restore
22 rationality, through common sense, to prisoner
23 litigation law. Prisoner litigation reform is
24 an issue of such a compelling importance at this
25 point that it should be addressed by the

1 legislature now.

2 I want to thank the members of this
3 committee for this opportunity to testify, and
4 welcome any questions that you may have that I
5 can answer or my Deputy can answer.

6 CHAIRMAN CLARK: Thank you very much,
7 Attorney General. Are there any questions?

8 Representative Birmelin.

9 REP. BIRMELIN: Thank you, Attorney
10 General Corbett. It is good to see you here.

11 ATTORNEY GENERAL CORBETT: It is good
12 to see you.

13 REP. BIRMELIN: Glad you made it.
14 Through the Turnpike, made it.

15 Representative Mayernik will correct
16 that on his way back home, I am sure.

17 ATTORNEY GENERAL CORBETT: We wish we
18 had that power.

19 REP. BIRMELIN: One of the statements
20 that you made -- and I am not sure whether or
21 not Representative Mayernik made it or not -- is
22 that the federal government has passed
23 legislation in 1995 ending these frivolous
24 lawsuits by doing what we are attempting to do
25 in these two pieces of legislation.

1 Are there any other states that have
2 done this already?

3 ATTORNEY GENERAL CORBETT: I believe
4 there are a number of other states that are in
5 the process, through the National Association of
6 Attorneys General. They, NAG, supported the
7 federal reform because it was NAG's, its
8 Attorneys General, that go in and defend these
9 -- prosecute these cases in federal court. They
10 supported that. I don't know the names of the
11 states. I do know that there was discussion and
12 I heard it the last time I was at a NAG
13 conference. We would have to see additional
14 statutes in all the states to do the same thing
15 that we are asking you to do here in
16 Pennsylvania.

17 REP. BIRME LIN: So, to the best of your
18 knowledge, you don't know any other states that
19 have done that?

20 ATTORNEY GENERAL CORBETT: I know they
21 were in the process of planning. I don't know
22 the states. We can get that for you. We can
23 put a call in to NAG.

24 REP. BIRME LIN: I would assume, as with
25 other legislation of this type, this will, if it

1 has not already, be challenged in court as being
2 unconstitutional. Do you know whether or not
3 that has been done by anyone?

4 MR. FILIPI: Yes, Representative. It
5 has been done at a number of jurisdictions. The
6 Federal Act happens to cover not only the areas
7 of the focus of this bill, but also much broader
8 area in consent decrees and prior court orders
9 and actions and, therefore, the Federal Act is
10 under challenge in a number of jurisdictions.
11 Some district judges haven't found it
12 constitutional, others have not. It is still in
13 various levels of review at this time. However,
14 I know of no case where the issue dealing with
15 the filing fees or the requirement that an
16 individual had to pay a fair share cost of the
17 filing fee requirements under challenge as a
18 constitutional question.

19 REP. BIRMELIN: Thank you very much.
20 That's all I have.

21 CHAIRMAN CLARK: Representative
22 Schuler.

23 REP. SCHULER: Thank you, Mr. Chairman.
24 Good afternoon, Mr. Attorney General.

25 ATTORNEY GENERAL CORBETT: Good

1 afternoon.

2 REP. SCHULER: Two questions. When
3 these suits are filed, do these prisoners have
4 attorneys or do they act as their own attorney?

5 ATTORNEY GENERAL CORBETT: I am going
6 to answer this without talking to Francis on
7 this. I am going to say the vast majority,
8 probably 99 percent of the cases with the
9 frivolous lawsuits that we are talking about,
10 they are filed on their own. They are acting as
11 their own attorney.

12 The attorneys have a requirement, when
13 they file a lawsuit. They know that they are
14 bringing the lawsuit in good faith. They have
15 taken an oath when they become lawyers that they
16 will file in good faith. In Federal Court, they
17 are civil sanctions that can be issued against
18 an attorney who brings an action without good
19 faith. That there is a true belief that there
20 is a meritorious claim.

21 REP. SCHULER: Well, let's explore that
22 a minute. Some of the examples of this
23 fictitious disease. When I went to an attorney,
24 an inmate went to an attorney, and he would say
25 I don't even know what that is but files a suit,

1 is that in good faith?

2 ATTORNEY GENERAL CORBETT: No, no. The
3 attorney has a requirement to --

4 REP. SCHULER: I am trying to clarify
5 the rule.

6 ATTORNEY GENERAL CORBETT: Right. No,
7 the attorney has the requirement. And the
8 inmate has the attorney come and visit him in
9 the prison and says this is my disease. Well,
10 the attorney is going to, in addition to the
11 inmate swearing to everything in there being
12 true, the attorney has to vouch for it being
13 true so he has to make a good faith examination
14 of the facts on his own before he makes that
15 statement. When the disease doesn't exist, if
16 -- and I am not saying that attorneys don't do
17 that in some cases where they just file
18 anything, but, you know, if an attorney is doing
19 his job.

20 But, with an attorney, there is a
21 disciplinary procedure you take them through if
22 a determination is that they are filing
23 pleadings with no good faith at all.

24 REP. SCHULER: Well, maybe both of
25 them, then the inmate and the attorney, should

1 pay all the legal fees, if it is declared
2 frivolous and the person knew at the time that
3 they filed this that there was no such disease.

4 ATTORNEY GENERAL CORBETT: That is
5 something that I think you could put into the
6 bill, that the inmate, if he has the
7 wherewithal, could end up paying the legal fees
8 for the Commonwealth required. I don't see --

9 REP. SCHULER: But the attorney also
10 who is part of this charade.

11 ATTORNEY GENERAL CORBETT: Well, I can
12 guarantee, if an attorney is part of that
13 charade, my Deputies better be going in there,
14 not only asking for this to be dismissed but in
15 bringing this to the attention of the court and
16 taking whatever disciplinary procedures should
17 be taken.

18 REP. SCHULER: But my concern is that,
19 and I am sure most of the attorneys would not do
20 this, but if you have a case like this and I am
21 an attorney and I know it is crazy and I go in
22 and file a lawsuit on this person's behalf, I
23 think I have some responsibilities there. Now,
24 whether the courts will discipline me or whether
25 we should say that you also have to pay the

1 bill, too, to the attorney, but that's another
2 ...

3 ATTORNEY GENERAL CORBETT: I could tell
4 you, it would not be opposed to the ability to
5 recoup our time.

6 REP. SCHULER: All right. The other
7 question I have deals with: would you make any
8 recommendation? I noticed in the bill, there is
9 really no set fee. Do you have a recommendation
10 how we would determine that, based on the
11 locality of the institution and what the fees
12 are there or would there be a flat fee?

13 ATTORNEY GENERAL CORBETT: The fees, I
14 believe are set by the Supreme Court.

15 MR. FILIPI: I believe it is actually
16 individual courts.

17 ATTORNEY GENERAL CORBETT: Individual
18 courts?

19 MR. FILIPI: Individual courts of
20 Common Pleas that they file them.

21 ATTORNEY GENERAL CORBETT: Within the
22 county?

23 MR. FILIPI: Yes.

24 REP. SCHULER: In other words, if it
25 was in Lancaster County, you would use the fees

1 that are set in Lancaster County? If the
2 prisoner at the Lancaster County Prison filed
3 the suit, you would use the normal fee?

4 ATTORNEY GENERAL CORBETT: (Nods head
5 affirmatively.)

6 REP. SCHULER: Okay. That answers my
7 question. Thank you.

8 CHAIRMAN CLARK: Representative Fajt.

9 REP. FAJT: Thank you, Mr. Chairman.
10 General, how are you?

11 ATTORNEY GENERAL CORBETT: Good. How
12 are you?

13 REP. FAJT: Good. Thanks. Do you have
14 any idea the number of suits that are pending
15 now in Pennsylvania that you would classify as
16 frivolous?

17 ATTORNEY GENERAL CORBETT: No.

18 REP. FAJT: Okay.

19 ATTORNEY GENERAL CORBETT: The data
20 base that we have, the computerization that I
21 found in the office when I arrived there, would
22 not have really allowed us to gather that. We
23 are, hopefully by the time I leave, will have
24 changed our computerization around, automation
25 around, that we would be able to compile that

1 kind of information. Right now, we are not able
2 to do that.

3 REP. FAJT: That's fine.

4 ATTORNEY GENERAL CORBETT: Not to a
5 point that I would be comfortable in telling
6 you.

7 If you asked me to round it off, I
8 would say, based upon my discussions with the
9 Office, we are talking in the thousands.

10 REP. FAJT: In the thousands, okay.

11 ATTORNEY GENERAL CORBETT: But in
12 Federal Court.

13 REP. FAJT: Right.

14 ATTORNEY GENERAL CORBETT: We have not
15 seen that go to the State Court to a great deal
16 yet. We could say, based upon the new federal
17 reform, for instance. What did you tell me the
18 drop off was here just in the middle district?

19 MR. FILIPI: In the two months,
20 comparing the two months of June and July of
21 1995, with June and July of 1996, under the
22 Federal Act, just getting with the individual
23 cases that are handled by the Middle District
24 Office of the Attorney General, we have seen a
25 drop off from about 50 some to approximately

1 seven that are actually been served. That is,
2 the Federal Prison Litigation Format went into
3 effect April the 26th of 1996. Even though it
4 is named the Act of '95, it actually wasn't
5 passed and signed until this year so it is a
6 little misleading in its title.

7 So actually the first two months what
8 we have seen a real effect that we were able to
9 gather the statistics with those.

10 REP. FAJT: Where I was going with the
11 question was the cost savings that Pennsylvania
12 taxpayers, obviously, would enjoy by institution
13 of some kind of legislation. But needless to
14 say, if we are seeing a drop off from 50 a year
15 ago to seven this year, there will be a
16 significant amount of cost savings and that's
17 really what I was looking at.

18 ATTORNEY GENERAL CORBETT: That is in
19 one office alone. Many more cases over in the
20 Western District. We are in the Western
21 District with Western Penitentiary, or, in the
22 Eastern District with Graterford, greater
23 tendency in those real maximum security prisons
24 ...

25 REPORTER: Excuse me. Greater tendency

1 ...

2 ATTORNEY GENERAL CORBETT: Those kinds
3 of actions in those maximum security facilities.

4 I believe the number of attorneys that
5 I had in the Civil Division, and I don't have my
6 staff book here in front of me, is approximately
7 ...

8 MR. FILIPI: ... 50.

9 ATTORNEY GENERAL CORBETT:
10 Approximately, I am going to ballpark that we
11 could spend 15 people, dedicate full time, just
12 representing these suits that they are not
13 representing other agencies of the Commonwealth,
14 especially PennDOT. You know, litigation that
15 is going on there. So that if they are not
16 working on those cases and they are reacting to
17 these cases that are frivolous and spending --
18 even if they spend one day a week, the cases
19 that have merit end up in the priority behind
20 those that have no merit. And, as you know, as
21 an attorney, when you are trying to marshal your
22 time, you will start settling some cases at a
23 higher number if you are the defendant, or, a
24 lower number if you are the plaintiff, than you
25 would have if you felt that you had the time to

1 put in to those cases if you weren't working
2 these frivolous cases. So it is a, for
3 management, it is a nightmare.

4 REP. FAJT: Thank you very much. I
5 appreciate that.

6 CHAIRMAN CLARK: Representative
7 Chadwick.

8 REP. CHADWICK: Thank you, Mr.
9 Chairman.

10 General Corbett, a long time ago in a
11 prior life, I was a criminal prosecutor and an
12 assistant district attorney and I was the victim
13 myself of a frivolous lawsuit filed by a
14 prisoner. I understand that is something of an
15 occupational hazard for prosecutors, that that
16 sort of thing happens all the time. And like
17 so, many of those cases, after incurring a few
18 thousand dollars in legal fees, the case was
19 ultimately dismissed with prejudice, as so many
20 are. But my recollection -- and my recollection
21 is a little hazy after all of this -- my
22 recollection is that the prisoner who filed the
23 suit had a preprinted form of some kind and that
24 all he had to do was check a few boxes and fill
25 in a few blanks. Do you know, is it still that

1 easy for a prisoner to file a lawsuit?

2 ATTORNEY GENERAL CORBETT: Well, in
3 Federal Court now, under the federal reform, I
4 don't believe it is that easy to file. In
5 State Court, I don't believe it was that easy to
6 file it as it was in the Federal Court.

7 REP. CHADWICK: Mine was in Federal.

8 ATTORNEY GENERAL CORBETT: Yes.
9 Because in State Court, if you know, it has been
10 a while since I have tried cases on the civil
11 side, we have to plead with no particular area
12 than they actually have to in Federal Court
13 where it is more of a notice pleading.

14 REP. CHADWICK: Okay. So, to the best
15 of your knowledge, it is not that easy in State
16 Court because they are filing pro se and just
17 file the complaint?

18 ATTORNEY GENERAL CORBETT: There are a
19 lot of jail house lawyers. They sit down, they
20 have plenty of time on their hands to sit and
21 write out the whole scenario. Often times,
22 courts will give them greater deference than
23 even if a pro se person on the outside filed
24 that because they are sitting in prison and
25 that's -- and we have to respond to it. If we

1 don't respond to it, God forbid, that we had a
2 default taken against us.

3 REP. CHADWICK: I see. Thank you very
4 much.

5 CHAIRMAN CLARK: Representative Carn.

6 REP. CARN: Thank you, Mr. Chairman,
7 Mr. Attorney General. Is there a gray area at
8 any time that to differentiate between a
9 frivolous lawsuit and one of merit? Where is
10 that? Is there a gray area at any time?

11 ATTORNEY GENERAL CORBETT: Well, sure.
12 I can't think of the -- off the top of my head,
13 the examples that we have given you are not gray
14 areas.

15 REP. CARN: Right, I am talking about
16 --

17 ATTORNEY GENERAL CORBETT: Are there
18 some? Yes. And I think we -- I don't have the
19 bill in front of me -- I think the bill permits
20 the court to take a look at it and say, yes,
21 this one has. And I think judges will lean more
22 towards the interest of the prisoner; they tend
23 to be, address it that way, rather than see a
24 case go into appeal, come back and be told that
25 you have to try this case. If they believe it

1 is a gray area, they are going to let it go
2 forward. Often times, the gray area is
3 dispelled then by the pleadings that we file in
4 response or by certain motions that are filed a
5 little bit further down the road.

6 I think what this legislation does is
7 addresses the areas that really aren't gray.
8 That really are, when you read it and you know
9 this disease doesn't exist or when the person
10 wants a sex change operation or when I think one
11 of the ones that we had was the underwear didn't
12 fit.

13 REP. CARN: Well, what I am trying to
14 determine is how much subjectively goes into
15 determining what is frivolous and what isn't.

16 ATTORNEY GENERAL CORBETT: Well, I
17 think that depends upon the court who receives
18 it, the judge who receives that.

19 REP. CARN: But doesn't then the system
20 satisfactorily address it?

21 ATTORNEY GENERAL CORBETT: I am sorry,
22 I didn't hear you.

23 REP. CARN: Does not the present
24 structure satisfactory address that concern?

25 ATTORNEY GENERAL CORBETT: No, because

1 under the present structure, the court, until
2 all the preliminary pleadings are filed, cannot
3 look at this and say, yes, there is a cause of
4 action or, no, there isn't a cause of action.
5 You can't do the black and whites until we have
6 responded either through preliminary objections,
7 through an answer, through depositions, and so
8 forth, filing for summary judgment. The court
9 can't just, on its own, look at the lawsuit and
10 say, well, this just isn't there, it doesn't
11 allow us just to file a pleading that says this
12 is a frivolous lawsuit based upon A, B and C;
13 that is not there at this point.

14 REP. CARN: Okay. Thank you, Mr.
15 Chairman.

16 CHAIRMAN CLARK: Attorney General, I
17 have a few. The Federal Reform Act, was that
18 primarily aimed at fees causing federal
19 prisoners to pay fees or was there more involved
20 in that to bring about this dramatic decrease?

21 ATTORNEY GENERAL CORBETT: The Federal
22 Reform Act, I believe, was aimed at the cost to
23 the judiciary of the United States. In the vast
24 majority of the cases that were before the
25 district courts throughout the country, you were

1 involved with state prisoners (some of it were
2 federal prisoners, the vast majority were state
3 prisoners); thousands of cases going in before
4 the bench (let's pick the Western District of
5 Pennsylvania); the cost of 200 cases being filed
6 in front of a court and the court having to take
7 its time to review all the pleadings before it
8 made a decision; the transportation of the
9 prisoner to the courthouse (that cost, I think
10 was taken into consideration, not that it was a
11 cost to the federal government, but a cost to
12 the state); the security implications that were
13 involved.

14 In many instances, ten years ago, the
15 federal magistrates were not used that much in
16 the discovery process. They basically did
17 arraignments and things, preliminary hearings
18 and so forth. They became much more heavily
19 involved in the discovery process in the hearing
20 of these cases. They could see, on their face,
21 from reading it, there is no such disease in
22 this case. A sex change operation isn't a
23 meritorious claim. I think the congress was
24 reacting. I know the Department of Justice, a
25 few years ago, was pushing this. Congress was

1 reacting to the burdening of the system at the
2 same time that the system was receiving
3 thousands and thousands of new meritorious cases
4 and was the frivolousness that required time
5 that judges had to give away from meritorious
6 cases to these frivolous cases.

7 CHAIRMAN CLARK: But the numbers that
8 we have heard are reductions in suits filed,
9 okay? And what you indicated is that, well, the
10 cases could be filed but they could be disposed
11 of quickly and cost effectively. But what has
12 caused the number of cases to decline under the
13 federal system? Now, is that triggered with the
14 requirement fees?

15 ATTORNEY GENERAL CORBETT: One, a
16 financial consequence, I believe. Just as we
17 are asking for a financial consequence. Keep in
18 mind --

19 CHAIRMAN CLARK: My question is: is it
20 as simple as that? If you just put a price tag
21 on this, that that is going to run it along?

22 ATTORNEY GENERAL CORBETT: I believe
23 so.

24 Go back to the point that I talked
25 about that the filing of these lawsuits often

1 times was nothing more than a way of getting out
2 of prison for a day or a couple days, it was a
3 field trip. Even if you went from Western
4 Penitentiary to the Federal Courthouse, which is
5 all about four miles, it was a day out of the
6 system, it didn't cost you anything, not a
7 penny. As soon as it started costing \$5, \$10,
8 \$15, especially if you are commissary account or
9 financial account, whatever the prisoners call
10 it, had \$15 and you wanted to have your smokes
11 and you wanted to have candy or whatever that
12 they can spend their money on, as soon as they
13 had to make a decision themselves to prioritize
14 their own spending, I think, without going out
15 and doing a study, I believe that's what
16 congress was looking at and I really think
17 that's what was successful.

18 CHAIRMAN CLARK: I would like you to
19 comment on another aspect and that is whether
20 this proposed legislation would step on or
21 violate the Supreme Court's rulemaking powers.
22 We have constantly tried to address frivolous
23 lawsuits and we have tried to get it, some
24 things legislatively, only to find out that the
25 Supreme Court feels that we have invaded their

1 domain and we end up going back to square one.
2 And the Attorney General, if this passes and
3 becomes law, the Attorney General's Office will
4 probably be involved in its constitutionality.

5 ATTORNEY GENERAL CORBETT: First off,
6 let me address the second part of that. The
7 Attorneys Generals Office, the Deputy to my
8 right and the Executive Deputy would be happy to
9 defend and attempt to prove that we are
10 successful.

11 I believe you will see a challenge as
12 to the rulemaking authority of the Supreme
13 Court, in that this might be stepping on that
14 rulemaking authority; at the same time, I
15 believe that the General Assembly has the
16 ability to pass legislation regarding the filing
17 of lawsuits where those lawsuits are affecting
18 the budget, basically, and then the
19 appropriation to various departments of the
20 Commonwealth of Pennsylvania. I think: will you
21 see a battle? No doubt.

22 CHAIRMAN CLARK: And my last question
23 is: you defend these suits with the Commonwealth
24 of Pennsylvania, but also legislation like this
25 will also help our local prison systems and our

1 county systems. Because I assume that those
2 suits are defended by insurance carrier
3 attorneys, am I correct there?

4 ATTORNEY GENERAL CORBETT: That's
5 correct. I can't speak for the insurance
6 industry, but hopefully that would reduce some
7 of their --

8 CHAIRMAN CLARK: Premiums.

9 ATTORNEY GENERAL CORBETT: -- premiums.

10 CHAIRMAN CLARK: Any further questions?

11 (No response.)

12 CHAIRMAN CLARK: I certainly want to
13 thank you for your testimony today, and I am
14 sure you will be available if we need any
15 follow-up. Thank you very much.

16 ATTORNEY GENERAL CORBETT: Thank you.

17 CHAIRMAN CLARK: The next individual to
18 testify before the committee on these pieces of
19 legislation would be Angus Love from the
20 Pennsylvania Prison Society.

21 MR. LOVE: Good afternoon. On behalf
22 of the Pennsylvania Society, the nation's oldest
23 prison advocacy agency, I would like to thank
24 Chairman Clark and the committee for this
25 opportunity to provide comment on HB 2697 and HB

1 2770. We share the concerns of this committee
2 not only towards frivolous prisoner litigation
3 but to all frivolous litigation of any sort. We
4 recognize the waste of time and effort that
5 groundless lawsuits cause for the court system
6 and the people who make it work. We must,
7 however, take issue with the methodology
8 utilized by these two bills in addressing our
9 mutual concern. In particular, we believe that
10 certain provisions may not be aimed so much at
11 frivolous litigation, but, instead, appear to
12 impede the very few meritorious claims that
13 arise out of institutional litigation. We are
14 concerned about overstepping the boundaries of
15 the Legislative Branch. Certain provisions
16 could be deemed an unconstitutional intrusion
17 into the province of the judicial branch of our
18 tricameral system of democratic government. We
19 further believe that there are effective
20 mechanisms in place via the federal -- and that
21 should be -- Pennsylvania Rules of Civil
22 Procedure to weed out both frivolous lawsuits
23 and frivolous claims within other lawsuits.

24 And if I might divert from my text for
25 a minute to give you an anecdote in this regard.

1 An inmate filed suit against the Pennsylvania
2 Prison Society last year. Richard Carter
3 (phonetic) filed a suit against a number of
4 state officials and the Prison Society in the
5 name of Michael Hackman, the Assistant Executive
6 Director. Mr. Hackman was alleged to have
7 received state funds for advocacy, yet not done
8 anything that Mr. Carter felt warranted an
9 advocacy position.

10 I have looked at the lawsuit. The
11 Pennsylvania Prison Society does not receive any
12 state funds, never has, and probably never will
13 for doing advocacy; so, it was fairly obvious
14 that we were confronted with this very
15 particular problem that we are talking about
16 here today.

17 I had a variety of options. I was
18 President of the Board of Directors at the time
19 and it was my opinion, rather than alert the
20 carrier or the solicitor, that we do a quick
21 preliminary objection motion in the nature of a
22 demurrer to the allegations. We did that and it
23 took maybe five minutes, typed it up, sent it in
24 and, sure enough, the first legal scholar that
25 looked at the case recognized the frivolity of

1 it and we were dismissed without any
2 difficulties.

3 So I think there is some merit to
4 allowing the current procedures to work their
5 way through on these particular problems.

6 We must view this problem also in the
7 proper context of our current prison
8 environment. While inmate lawsuits may have
9 risen dramatically, prison populations have
10 soared to record levels. Almost any study
11 undertaken in this area will show that the
12 actual percentage of inmate lawsuits filed when
13 compared to the percentage increase in
14 population show there was actually less
15 litigation per inmate than a decade ago. In
16 Pennsylvania, there were only 8,000 inmates
17 confined in the Pennsylvania State Corrections
18 system in 1980. Today, the system has more than
19 quadrupled to over 33,000 inmates, with last
20 year seeing the largest increase in the history
21 of our Commonwealth (14.6 percent), and I
22 believe also the sixth largest increase of all
23 the states in the United States. So any
24 increase in lawsuits filed by inmates is largely
25 attributable to the many more inmates in the

1 system.

2 We should proceed with caution in
3 shutting down a potential safety valve to the
4 tensions and frustrations behind our walls of
5 our prisons and jails. We should remember the
6 old adage that the pen is mightier than the
7 sword. We should recognize the value of an
8 aggrieved individual seeking redress through our
9 judicial system rather than taking matters into
10 his or her hands. While frivolous litigation
11 may cost us time and money, it is a minor
12 inconvenience compared to the mayhem that can
13 and has resulted behind the bars of our prisons
14 and jails. Unlike our neighboring states of
15 Ohio and New York, we have been fortunate in not
16 having any staff fatalities resulting from
17 violence within our system for many a year.

18 The current efforts of these
19 legislative initiatives and comparable
20 legislation already passed in Washington,
21 greatly alter the landscape of oversight of our
22 prisons and jails. As Justice William Brennan
23 noted in the landmark decision of Rhodes v.
24 Chapman, inmates are a voteless, powerless,
25 socially threatening minority that will never

1 hold sway in the legislative arena. Thus, it
2 falls upon the courts in our Constitutional
3 framework to be the final arbitrator of
4 conditions in prison that allegedly fail to
5 provide the basic necessities of life the Eighth
6 Amendment requires. If we strip the court
7 system of this power, what mechanisms are left
8 to seek redress to the cruel and barbarious
9 practices that history tells us can and do
10 reoccur?

11 Several provisions in HB 2697, in
12 particular, raise additional difficult issues.
13 Limitations on remedies, prospective relief,
14 time limits on settlements, damage issues,
15 clearly are designed to alter not frivolous but
16 meritorious litigation. Similar provisions in
17 the federal Prisoner Litigation Reform Act have
18 already run afoul of the United States
19 Consitution.

20 And I list a few cases where judges
21 have found certain provisions of that Act to be
22 unconstitutional.

23 The challenges under the separation of
24 powers doctrine will continue for years to come.
25 For these reasons, it is the position of the

1 Pennsylvania Prison Society that neither of
2 these bills will advance our mission of assuring
3 humane conditions in the Commonwealth's prisons
4 and jails.

5 I might just add one or two remarks, in
6 light of Attorney General Corbett's statements.
7 I agree entirely with his technical amendments,
8 and I believe they are very important because I
9 think, clearly, those particular issues that he
10 mentioned will clearly fall, for a variety of
11 reasons, knowing the case law in those areas.

12 I would also like to set the record
13 straight on one case that's been kicking around
14 in this matter for some time and that is the
15 case that the Attorney General alluded to, the
16 inmate who wanted a smoke-free environment,
17 although he smoked. When the Washington Federal
18 legislation was introduced, Warren Hatch
19 (phonetic) sent a Judiciary Committee chair,
20 brought forth his Top 10 frivolous lawsuit list.
21 I believe that Attorney General Corbett also
22 brought forth his Top 10 frivolous lawsuit list
23 at the same time. I assume these were patterned
24 after David Letterman. And this Smith-Bey case
25 was mentioned at that time and mentioned again

1 by the Attorney General today. I feel it is
2 incumbent upon me to set the record straight
3 because I was the counsel in that case.

4 I was appointed by the court when the
5 attorney for Wolf, Bloch, Shor, Solis and Cohen
6 in Philadelphia withdrew from the case and was
7 asked to pick up representation of Mr.
8 Smith-Bey. He was an asthmatic at Graterford
9 and the suit was about allegations of deliberate
10 indifference to his medical needs, i.e., the
11 chronic asthmatic condition that he suffered.

12 He alleged a number of things, such as
13 that he didn't have access to the asthmatic
14 clinic, that he was held in his cell during the
15 dead of winter that had a broken window; that,
16 as a result of these problems, he suffered
17 numerous asthmatic attacks, he was not allowed
18 to keep his inhaler. The record speaks for
19 itself: Smith-Bey versus Vaughn (phonetic). And
20 the court issued an injunction in that case.
21 Finally, the treatment at Graterford to be
22 violative of the Eighth Amendment and attorneys
23 fees were awarded to myself. So I think that we
24 should be clear when we talk about what is
25 frivolous and what is not.

1 The claim that was alluded to was an
2 additional throw-in claim that Wolf, Bloch had
3 thrown in about a smoke-free environment, as
4 there were several cases (Helen versus McKinney)
5 in the Supreme Court at that time, inmates
6 alleging that they wanted a smoke-free
7 environment. Mr. Smith-Bey was an individual
8 who had tried to quit smoking many times and had
9 been so unsuccessful, and I am sure that people
10 who have smoked know the addictive powers of
11 nicotine. So I think that that case has been
12 mischaracterized and I just wanted to take this
13 opportunity to set the record straight.

14 Thank you.

15 CHAIRMAN CLARK: Thank you, Mr. Love.

16 Are there any questions of Mr. Love?

17 REP. HORSEY: Let me ask one question.

18 CHAIRMAN CLARK: Representative Horsey.

19 REP. HORSEY: One question. So there
20 is a possibility -- well, not a possibility,
21 probably is so -- a conflict for us as
22 legislators, you might perceive as a conflict
23 for us as legislators to be impeding a
24 prisoner's rights of access to the courts when
25 prisoners cannot vote for us. They don't have

1 access to these hearings.

2 MR. LOVE: Right.

3 REP. HORSEY: You know. And we are
4 talking about impeding, you know, whether we
5 would agree with it or not, we are trying to
6 slow the numbers of suits in the court.

7 MR. LOVE: Right.

8 REP. HORSEY: We can all agree on that.
9 But us as a legislative branch, prisoners don't
10 have access to us and we are talking impeding
11 their access to be another branch --
12 (inaudible).

13 MR. LOVE: Right, that's correct. And
14 I think that is the concerns that Justice
15 Brennan mentioned in Rhodes versus Chapman.
16 That, he realized that in the legislative arena
17 where votes and money carry weight, the
18 prisoners would never have any standing, it
19 would always be at the end of the train for
20 better or worse; whereas, the court system is
21 better equipped to handle allegations of abuse
22 in the prisons, and that's where the United
23 States Supreme Court has found that these
24 allegations should be brought to.

25 REP. HORSEY: One other quick question.

1 CHAIRMAN CLARK: Sure.

2 REP. HORSEY: A simple yes or no would
3 suffice. Would you consider, regardless of who
4 brought the suit, would you consider the case,
5 concerning overcrowding prisons, would you
6 consider that a frivolous suit?

7 MR. LOVE: Absolutely not.

8 REP. HORSEY: Thank you.

9 CHAIRMAN CLARK: Mr. Love, what about
10 the cost provisions of local lawsuits that
11 require a prisoner to pay the filing fee to file
12 a complaint if his or her account indicates that
13 that individual can afford that fee?

14 MR. LOVE: Well, I think that there is
15 some legitimacy to that. The two bills, I think
16 think that the 2770 does speak to the issue of
17 frivolity; whereas, I think the larger bill
18 speaks to a whole bunch of issues that go way
19 beyond frivolity.

20 Clearly, as you suggest, that is an
21 attempt to get at individuals who file frivolous
22 lawsuits, by making sure that there is some
23 price to pay if there is no merit to the claim.

24 The way the courts look at it is: under
25 the First Amendment, an inmate has the right of

1 access to the courts. As a legal aid attorney,
2 I think this is a very important principle in
3 our society, that any individual, regardless of
4 their station in life, have the ability to
5 access the court system (the court system should
6 not just be for those who can afford the ways
7 and means to get involved in the courts) so they
8 have to leave this door open for indigents, and
9 prisoners come within that definition of
10 indigents.

11 And I think that it was said earlier
12 that only prisoners have the right to go in
13 forma of pauperis. Any prisoner has the right
14 to go in forma pauperis. Prisoners happen to be
15 the ones that utilize this avenue of accessing
16 and, obviously, they abuse it from time to time.
17 I clearly recognize that. And my office gets a
18 ton of these requests, and as does the Prison
19 Society, and we are sick of them, too. But we
20 just haven't figured out a way that we believe
21 would balance the safeguards that the First
22 Amendment allows to figure out a way beyond what
23 is already in place in the court system to get
24 this proper.

25 CHAIRMAN CLARK: Okay. So but your

1 concern is not if an account with a prisoner can
2 be used to pay the cost, forcing that prisoner
3 to make a decision as to whether the suit means
4 enough to him to forego some money from his
5 accounts?

6 MR. LOVE: I think that it can't be a,
7 I think you still have to retain some in forma
8 pauperis --

9 CHAIRMAN CLARK: Well, you can always
10 -- (inaudible).

11 MR. LOVE: -- standing. A lot of
12 people in prison don't work. County jails,
13 there aren't enough jobs. In the state system,
14 it has been proven that there aren't enough jobs
15 to keep pace with the population increases.
16 Consequently, you have maybe a third idol
17 (phonetic). So some folks don't have any income
18 at all. Some folks are mentally ill.

19 And I think that another of these
20 characterizations of lawsuits, some of these
21 people are clearly, clearly mentally ill.
22 People get signals from Mars and what not and
23 file suits and allege these wild conspiracies.
24 I think these folks are mentally ill, more than
25 litigious inmates.

1 But I think you have to leave the door
2 open for indigency filings. If you can put a
3 limit and a payment plan at some level, I don't
4 have a problem with that. But I think you still
5 have to leave the door open for indigents to
6 file legitimate claims.

7 CHAIRMAN CLARK: You indicated in your
8 testimony that you, and hopefully the Prison
9 Society, also is concerned with frivolous
10 litigation, etc. Would you have any suggestions
11 to the committee on how to rein those in or
12 discourage those?

13 MR. LOVE: Well, I think that, as I
14 said, I think the court systems do have
15 mechanisms in place that deal with this issue.
16 Maybe they are overburdened with suits and don't
17 have enough money and personnel. Beyond that, I
18 think that perhaps a payment plan for fees,
19 above a certain level of income, is probably a
20 fair way. I think also that people that
21 continually abuse the system should be reined
22 in, and I have seen judges do that, say we will
23 accept no more lawsuits from this individual
24 that has already filed 70 suits or whatever.
25 There are ways. I just don't know if this is

1 the way that I would choose to address the
2 problem.

3 CHAIRMAN CLARK: Any additional
4 questions?

5 (No response.)

6 CHAIRMAN CLARK: All right. I thank
7 you very much.

8 MR. LOVE: Thank you.

9 CHAIRMAN CLARK: The next individual to
10 testify is Chief Counsel of the Department of
11 Corrections, Sarah Vandebraak. Feel free to
12 help me out on that pronunciation.

13 MS. VANDENBRAAK: That is one of the
14 better pronunciations I have heard, so. But I
15 use Vandebraak. But thank you very much.

16 The Chief Counsel's Office of the
17 Department of Corrections, we handle litigation.
18 In addition to the Attorney General's Office, we
19 defend lawsuits filed in State Court, filed in
20 Federal Court and in fact do the bulk of the
21 State Court litigation.

22 Before I begin, I would like to say
23 that I appreciate very much the opportunity to
24 come here and speak with you today about this.
25 Commissioner Horn wanted very much to be here

1 himself, but he had a longstanding prior
2 commitment. But he asked that I convey his
3 regrets to you, as well as his very strong
4 support for the bills that are at issue here
5 today.

6 As I think you all know, frivolous
7 inmate litigation is a really substantial
8 problem. Inmate litigation has been growing by
9 leaps and bounds. Federally, in 1994, there
10 were over 58,000 lawsuits filed by prisoners; 96
11 percent of those were filed without a lawyer,
12 they were filed pro se. In addition, the
13 National Association of Attorneys General
14 estimates that only one-tenth of 1 percent of
15 those pro se filings ever result in any relief
16 for the prisoner who has filed it.

17 The Pennsylvania prisoners have shown
18 that they, like their counterparts, nationally,
19 have found their way to the courthouse doors and
20 filed a lot of lawsuits. In the Middle District
21 Court, the Federal Court, here, for example,
22 half of the civil docket is devoted simply to
23 prisoner litigation. But prisoners not only
24 file these in Federal Court, they file these
25 lawsuits and motions throughout the Courts of

1 the Commonwealth. That means the Commonwealth
2 Court, that means Common Pleas Court, they also
3 file in the Supreme Court. And those lawsuits,
4 even though they don't result in relief for the
5 prisoner, are an incredible burden for the
6 taxpayers.

7 You have heard here today how many
8 lawyers we have defending those suits. That was
9 just the Attorney General's Office. You also
10 have lawyers that defend them in our office.
11 You also have solicitors throughout the state
12 who defend this litigation, too.

13 And even though the litigation may be
14 absolutely preposterous, it still costs
15 Pennsylvania taxpayers a significant amount of
16 money. One case that recently was filed in
17 Cumberland County Common Pleas Court involved an
18 inmate who claimed that we had placed a
19 microchip in his head through the prison food.
20 Now, anybody looking at that would say, well,
21 this is preposterous, you can't control
22 someone's thoughts by microchips, it doesn't
23 happen. But just because that is, on its face,
24 a ridiculous lawsuit, doesn't mean it goes away.

25 In that suit, our lawyer had to draft

1 the pleadings, he had to actually introduce,
2 into evidence, because there was a hearing, an
3 MRI that proved that there was no microchip in
4 this inmate's head.

5 Well, that wasn't the full extent of
6 the cost. The Pennsylvania taxpayers footed the
7 bill for my lawyer, for my secretaries, for my
8 people who did the filing. They also footed the
9 bill for the people who transported the inmate
10 to and from the courthouse. The judge was paid
11 for by our taxpayers, the court stenographer was
12 paid for by our taxpayers, the Clerk's Office
13 that has to file these documents was paid for by
14 our taxpayers. And I think there has got to be
15 a better way to spend that money. It is just
16 too much money to be spending for stuff that
17 goes absolutely nowhere.

18 This is basically, each one these
19 lawsuits, is thousands of dollars for our
20 taxpayers, and it is thousands of dollars for
21 what? There is nothing to show for it.

22 Congress, in passing the Prison
23 Litigation Reform Act, the federal legislation,
24 I would like to point out that our office worked
25 very closely in that legislation, we think it is

1 very important for reducing burdens on the
2 Pennsylvania taxpayers; but, at the same time,
3 there is a loophole here: the federal
4 legislation does not address Pennsylvania
5 lawsuits based on Pennsylvania law. And for
6 that reason, it is especially critical that
7 there be some sort of a counterpart to that
8 federal legislation. And I think that the House
9 Bill 2697 provides substantial counterpart to
10 that federal bill.

11 It is not nearly as expansive as the
12 federal bill. The federal bill, although it
13 contains a lot of provisions that deal with
14 procedural matters involving the Federal Courts,
15 it deals with earned time, good time in the
16 Federal Courts, but the fundamentals of that
17 federal legislation are captured here and I
18 think it is especially important that they be
19 captured in state legislation.

20 House Bill 2697 provides for the prompt
21 review of these lawsuits before they are served
22 on the defendant. This enables the court to
23 have the ability to toss out the junk lawsuits
24 before the taxpayers have to spend all of the
25 money that is involved in defending the suits.

1 In addition to those cases that are
2 facially frivolous, you have to keep in mind
3 that we have inmates here who live for nothing
4 other than to file these lawsuits. We have one
5 inmate in our custody, one of our 33,000
6 prisoners, that we estimate is alone responsible
7 for about 3 percent of the litigation in
8 Pennsylvania. He has filed hundreds of
9 lawsuits.

10 Now, those lawsuits haven't just been
11 filed in the Federal Court. Fifty of them were
12 alone filed in the Commonwealth Court in the
13 last five years. Every single one of those
14 required work from this office and also the
15 Attorney General's Office to defend those.

16 One must keep in mind that inmates are
17 in some ways, in many ways, very different than
18 the average public. Those things that serve as
19 a deterrent for your average citizen that stop
20 him or her from filing a lawsuit simply aren't
21 present when you are dealing with a pro se
22 prisoner.

23 Representative Schuler mentioned
24 earlier that the ability of going after the
25 lawyer and doing financial penalties. When a

1 lawyer is not involved, that's not an option.

2 In this particular case that I was
3 discussing, this inmate is doing a
4 consecutive/double-life sentence, he is in the
5 hole, he is not earning any -- his account is in
6 the hole, he is not earning any money, there is
7 no financial deterrent that you can hold over
8 him. Right now, under the current state of the
9 law, there is absolutely nothing to stop him
10 from filing and filing often. And, frankly,
11 unless there is some legislation that matches
12 the federal counterpart that starts to deal with
13 some of these problems of the repeat filer, or
14 frequent filer, as we often call them, it will
15 continue. And there certainly are inmates who
16 have demonstrated this pattern of abuse.

17 Frequently, these are filed for
18 retaliation, a person who is in jail, is angry
19 at the people who got him there and they are
20 retaliating against the guards. Sometimes it is
21 purely recreation, as the Attorney General
22 mentioned. It is a day to get out of the prison
23 routine, it is hopefully a day that you can get
24 to court.

25 But some of our most abusive filers

1 here are inmates who have been placed in our
2 restrictive housing unit, these are aggressive,
3 abusive inmates who can't even get along with
4 other inmates in the prison. And this is one
5 other way of being abusive, simply by filing
6 lawsuits.

7 House Bill 2697 mirrors some of these
8 provisions that are found in the federal law
9 that protect against these repeat filers, these
10 abusive filers. The partial filing fee, I
11 think, is also absolutely critical.

12 Earlier, there was a question about
13 whether other legislation like this has been
14 tried in other jurisdictions. The federal
15 partial filing fee, which has had such dramatic
16 results, Mr. Filipi described for you, that was
17 based on Arizona legislation that applied to
18 state cases. And, in Arizona, they found that
19 they had a one-third reduction in their prisoner
20 lawsuits, simply by having the partial filing
21 fee. Quite simply, even if the inmate has to
22 pay \$3, \$5, they have to think twice before
23 whether deciding to file a suit.

24 There are other protections here
25 contained in House Bill 2697 that we feel are

1 especially important for prison management.
2 House Bill 2697 provides for the re-evaluation
3 of existing court orders. Often time, someone
4 may enter into a court order -- or a court may
5 enter an order, based on information that may be
6 very good at the time that it is entered, but
7 circumstances change, new information comes
8 forward and, at the later point in time, all of
9 a sudden that earlier order starts to look very
10 unwise.

11 Unfortunately, prison correctional
12 professionals are really wedded to that order.
13 They can't change that order unless they
14 negotiate with the judge or the lawyers
15 involved. The protection in here, allowing for
16 the re-evaluation orders to see whether they are
17 still necessary to protect a violation of
18 Pennsylvania law, we think will substantially
19 enhance management in the prisons in this
20 Commonwealth.

21 In addition, there are other
22 protections in dealing with court orders that
23 can be entered affecting prison management. It
24 contains some common sense requirements that the
25 courts consider the effect that their remedies

1 might have on the court system, as well as
2 public safety.

3 Prior to my tenure here as Chief
4 Counsel, I was a prosecutor in Philadelphia.
5 And, in Philadelphia, we had a prison cap order.
6 Now, that prison cap order was entered in a
7 federal lawsuit, but the identical provisions
8 were also contained in a state court order and,
9 in that particular order, which required the
10 release of pretrial detainees, there was a study
11 done about the crimes that were committed by
12 people released under that order. In one
13 18-month period, these are the figures that it
14 showed: in Philadelphia, there were 9,732 new
15 arrests for people released under that court
16 order: 79 of those were for murder; 2,215 were
17 for drug dealing; 701 for burglary; 2,748 for
18 theft; and 90 for rape. That identical order,
19 although entered by a federal judge, could just
20 as well been entered by a State Court judge
21 because it was contained in an agreement filed
22 in State Court.

23 Now, I think that it is important to
24 emphasize -- and I think this is a key provision
25 of the bill -- if orders are necessary to remedy

1 constitutional violations, nobody disagrees with
2 the idea that judges need to have effective
3 remedies, they need to be efficient and, if
4 conditions are unconstitutional, Corrections
5 people will get hammered for them. This bill
6 does nothing to take that away, but it provides
7 some common sense protections for the public, it
8 also protects the public from wasting money on
9 lawsuits that simply go nowhere, it is good for
10 prison management, it saves tax dollars and it
11 is good for the public safety. And in the
12 Department of Corrections, we strongly urge the
13 enactment of this legislation.

14 If you have any questions, I would be
15 very happy to answer them for you.

16 CHAIRMAN CLARK: I thank you very much.

17 We welcome Representative Hennessey to
18 our panel.

19 REP. HENNESSEY: Thank you, Mr.
20 Chairman.

21 CHAIRMAN CLARK: Are there any
22 questions of this witness?

23 Representative Horsey.

24 REP. HORSEY: Thank you.

25 I personally, my purpose, was not to

1 mention the prison camp but you bring it up. In
2 the provisions regarding, first of all was the
3 prison camp issue, was that a frivolous suit in
4 your mind?

5 MS. VANDENBRAAK: Representative
6 Horsey, was the lawsuit on the face of it, it
7 would not have been dismissed as frivolous,
8 absolutely not. And there is nothing in this
9 statute that would -- if that would have been
10 filed in State Court, that would do that.

11 REP. HORSEY: No.

12 MS. VANDENBRAAK: I am sorry.

13 REP. HORSEY: I am trying to find out
14 from --

15 What is your name, Miss Vandebraak?

16 MS. VANDENBRAAK: Sarah Vandebraak.

17 REP. HORSEY: -- do you consider that a
18 frivolous suit?

19 MS. VANDENBRAAK: Was that on the face
20 of it? No.

21 REP. HORSEY: You were in the
22 prosecutor's office --

23 MS. VANDENBRAAK: No. On the face of a
24 frivolous suit, no, it was not.

25 REP. HORSEY: And there was a

1 provision, you mentioned, released the
2 prisoners, were they actually releasing violent
3 criminals, rapists and murderers?

4 MS. VANDENBRAAK: Yes, they were.
5 People who went on from it, I guess they did.

6 REP. HORSEY: Well, when they released
7 them, were these rapists and murderers?

8 MS. VANDENBRAAK: Some were
9 accidentally released who were rapists. I don't
10 think any murderers. They were charged with
11 crimes such as robbery, burglary often that
12 might have an intent to rape, that would have
13 been released; but, rape and murder, in and of
14 themselves, were not supposed to be released.

15 REP. HORSEY: Oh, okay. Now, going
16 back to this particular bill, once again. There
17 was a suit, implemented in Philadelphia, for
18 example, and some thought it was frivolous and
19 some thought it was not. I am trying to get
20 some clarity relevant to this bill, the impact
21 that it would have on the suits. So my question
22 is: if we implement this legislation, will it
23 impede suits?

24 MS. VANDENBRAAK: Will it impede suits?

25 REP. HORSEY: Yes. Or, excuse me,

1 legal actions.

2 MS. VANDENBRAAK: It will impede legal
3 actions that, in my view, should be impeded,
4 meaning frivolous lawsuits. It will definitely
5 impede that. That's what it is designed to do,
6 and it will do that.

7 REP. HORSEY: You are saying that it
8 would be successful?

9 MS. VANDENBRAAK: I think it would be
10 successful in stopping some of them.

11 Will it impede legitimate lawsuits?
12 No, I don't believe so. It has the protections
13 in there.

14 The frivolousness to the provision, I
15 noticed in your earlier -- I am sorry, it was
16 Representative Carn's earlier question about
17 what is frivolousness. Frivolousness is a
18 standard that has been used in the Federal
19 Courts for long periods of time. Judges are
20 used to applying it. And, in my view, it has
21 really been applied where cases are really
22 facially frivolous. The Federal Courts --

23 REP. HORSEY: It is very accommodating
24 (inaudible) to say that judges have applied the
25 standards, meaning the courts have applied those

1 standards.

2 MS. VANDENBRAAK: That's correct.

3 REP. HORSEY: And make the
4 determination. Now, we as a legislative branch
5 are about to make that determination as to what
6 is frivolous and what isn't. That is the point
7 of this legislation, isn't it?

8 MS. VANDENBRAAK: With all due respect,
9 Representative Horsey, in Federal Courts, it was
10 Congress' legislation that was interpreted by
11 the courts. Congress set the standards of
12 frivolousness, they have been in effect for a
13 long, long time and the courts interpret it.
14 And it always seemed to me that the purpose of
15 the legislature was to write laws for the court
16 to interpret. And, in this particular
17 circumstance, using the term frivolousness is
18 not, I think, particularly contentious since
19 that has already been used in Federal statutes
20 and interpreted by the courts for long periods
21 of time.

22 REP. HORSEY: But the power relative to
23 the wording is, indeed, the ability of the
24 courts to interpret.

25 MS. VANDENBRAAK: Yes, the courts do

1 have the ability to interpret the rules.

2 REP. HORSEY: And that is the bottom
3 line.

4 MS. VANDENBRAAK: Yes, that's right.

5 REP. HORSEY: Power. That's where the
6 bottom line, power, where it lies, is that
7 correct?

8 MS. VANDENBRAAK: On that question,
9 yes.

10 REP. HORSEY: Okay. Thank you.

11 MS. VANDENBRAAK: If I might just -- I
12 am sorry, I didn't mean to interrupt.

13 CHAIRMAN CLARK: You may continue.

14 MS. VANDENBRAAK: There were two other
15 things that came up in the testimony that
16 preceded mine and I thought probably required
17 some discussion. There was a suggestion in Mr.
18 Love's testimony that we somehow needed these
19 lawsuits because they were an escape valve, they
20 allowed these inmates to relieve their tension
21 or aggression by filing lawsuits. And he also
22 alluded to the fact that they were kind of
23 necessary to prevent violence and riots in the
24 prison. I find that really astounding, that we
25 should somehow say that we want people to be

1 able to file lawsuits just to relieve tensions
2 in the prisons.

3 In the Pennsylvania Department of
4 Corrections, we have grievance procedures that
5 allow inmates to raise grievances and get them
6 resolved. And they go through many levels of
7 review, and they are reviewed a lot. And it
8 seems to me that we would much rather encourage
9 that if there are legitimate questions about how
10 things are run that they are best solved in the
11 context of grievance procedures as opposed to
12 litigation that is not meritorious. I am sorry
13 if I interrupted you, Representative.

14 REP. HORSEY: Was she addressing me?

15 MS. VANDENBRAAK: No, I was just --

16 CHAIRMAN CLARK: No, she was just
17 commenting on some things that the previous
18 person had testified to.

19 Representative Hennessey.

20 REP. HENNESSEY: Thank you, Mr.
21 Chairman.

22 Miss Vandenbraak, getting back to the
23 statistics that you gave us, the people, there
24 were 9700 arrests for people who had been
25 released under the Philadelphia prison cap.

1 Just to put it in perspective, how many of these
2 people were released, overall, under the prison
3 cap order?

4 MS. VANDENBRAAK: It was -- I am trying
5 to remember -- at the end of the litigation, it
6 was hundreds in a week. In essence, the prison
7 cap order release mechanism took over all of the
8 other mechanisms for release in Philadelphia.
9 And the additional problem was that many of them
10 remained fugitives for long periods of time
11 because if they failed to appear for court, you
12 still couldn't put them in jail. So the
13 population, who was out under the prison cap,
14 grew tremendously to the point, for example,
15 that the outstanding bench warrants in
16 Philadelphia were up over 50,000, which was the
17 equivalent of a year's worth of criminal
18 prosecutions; when the prison cap had started,
19 there was only 18,000. And that meant a year's
20 worth of crime victims who couldn't have any
21 justice in their case.

22 REP. HENNESSEY: I guess what I am
23 getting at is you told us there were 9700
24 arrests of people who were released under the
25 prison cap order and then what I am trying to

1 connect it to a rather defined 18-month period.
2 Can you just tell us: the 9700 arrests, out of
3 how many people that were released were, you
4 know, several people maybe being released
5 several times?

6 MS. VANDENBRAAK: Out of being
7 released? I don't recall the numbers, how many
8 were actually out at the time that these numbers
9 were done.

10 REP. HENNESSEY: Does this 9700 figure
11 translate into 50 percent of the people who were
12 released or re-arrested or 20 percent or 5
13 percent, do you have that figure?

14 MS. VANDENBRAAK: Well, I can give you
15 an idea, in terms of the homicide statistics.
16 That was roughly a quarter of the homicide cases
17 in Philadelphia at the time. People being
18 arrested for them had previously been arrested
19 under the prison cap order, out on the streets,
20 under their new arrest. So that, I do recall.
21 I cannot recall what the other figures would be.
22 But, certainly, for homicide, it would be that,
23 that amount.

24 REP. HENNESSEY: So we are talking 20
25 murder arrests?

1 MS. VANDENBRAAK: No, that would be 400
2 murders. But approximately 350 to 400 murders.
3 And approximately a quarter of the murder
4 arrests in Philadelphia for that period of time,
5 I believe were -- Oh, wait, it was 18 months so
6 it was probably less than that. Twenty percent
7 were for people who were out under the prison
8 cap.

9 I think that -- Look, I don't mean to
10 imply here that none of this would have
11 happened. Some of these people would have been
12 out under other mechanisms if the prison cap
13 wasn't in effect. But, these numbers are
14 appalling numbers, and all that this legislation
15 requires is that before a judge enter an order,
16 the potential has that kind of impact on the
17 public, the judge has to consider the public
18 safety aspects of that order.

19 I think it is a reasonable piece of
20 legislation to ask the judges to consider that.

21 REP. HENNESSEY: Thank you very much.

22 I don't have any further questions, Mr.
23 Chairman.

24 MS. VANDENBRAAK: Thank you.

25 CHAIRMAN CLARK: We have some more

1 questions.

2 MS. VANDENBRAAK: Oh, I am sorry. I
3 apologize.

4 CHAIRMAN CLARK: That's fine.
5 Representative Mayernik.

6 REP. MAYERNIK: Yes, thank you, Mr.
7 Chairman. A point of information first before I
8 would ask the question of Sarah. A prior member
9 had asked what states have existing statutes. I
10 have information in front of me that Arizona,
11 Missouri, Nevada, Texas, Minnesota and New
12 Hampshire presently have existing statutes
13 regarding frivolous lawsuits, and there is
14 legislation pending in Illinois as well as
15 Pennsylvania.

16 Sarah, I have a question for you -- and
17 I was hoping to ask the Commissioner of
18 Corrections, who is not here today -- idle pay,
19 are you familiar with that term?

20 MS. VANDENBRAAK: Yes, I have heard the
21 term.

22 REP. MAYERNIK: Could you define it for
23 the members of this committee? This is somewhat
24 off base of our hearing, but it is related to
25 Corrections and related to the information that

1 this committee will be hearing at a later date.

2 CHAIRMAN CLARK: Could you run that
3 term by us again?

4 REP. MAYERNIK: The term idle pay, idle
5 pay.

6 CHAIRMAN CLARK: Idle, idle pay.
7 I-d-l-e- p-a-y?

8 MS. VANDENBRAAK: I-d-l-e?

9 REP. MAYERNIK: Yes. Meaning not doing
10 anything, idle.

11 MS. VANDENBRAAK: One thing that I will
12 readily admit to, is, I am not a correctional
13 professional and I am speaking from ignorance on
14 the subject, but I will give you the best answer
15 as I know it.

16 My understanding, kind of a lawyer
17 would, idle pay meant money that went to people
18 who hadn't actually received jobs, were
19 available for jobs but didn't actually have it
20 and there was some money that was paid for that.
21 That's as I understand the term.

22 REP. MAYERNIK: And that is presently a
23 policy of the Department of Corrections, to pay
24 prisoners for -- they are available and ready
25 for work but they are not working, but they are

1 paying the prisoners for not working, is that
2 correct?

3 MS. VANDENBRAAK: I have heard the term
4 used there. I do not know exactly what the
5 policy is. You may be absolutely right, and I
6 don't mean to be evasive, but I think I would be
7 doing a disservice to say absolutely yes without
8 knowing that.

9 I think you are probably right.

10 I would be happy to provide to you, and
11 the members here, a description of what exactly
12 the policy is.

13 But I do know that in the Department of
14 Corrections, approximately 59 percent of our
15 prisoners do work.

16 So I would be happy to provide that
17 information. Because I don't think I am the
18 best person to answer it for you.

19 REP. MAYERNIK: I have been able to get
20 minimum information from the Department of
21 Corrections under the old administration
22 regarding idle pay. And, somewhat from my
23 understanding, idle pay is whenever an inmate is
24 not working, yet there is no job provided for
25 him, they are paid by the Commonwealth of

1 Pennsylvania and taxpayers for not working and
2 that number has increased from 3,000 to 5,000
3 and the taxpayers of the Commonwealth are paying
4 over a million dollars. And I raise this issue
5 to you because I am interested in the
6 information to be given to the members of this
7 committee and the General Assembly, if the
8 taxpayers were aware of this idle pay, that they
9 would be quite upset and disturbed regardless of
10 what the amount is on hourly basis of the
11 prisoners.

12 MS. VANDENBRAAK: I understand your
13 concern here. And I can -- although this is not
14 directly on point for me -- address it somewhat.
15 There are a number of things that this
16 administration inherited from the prior
17 administration. There are many of those issues
18 that are constantly being re-evaluated. Some of
19 them tied at a very same considerate issue in
20 this bill.

21 For example, there was a consent
22 decree, it happens to be a federal one, that was
23 entered with a lawsuit filed over 25 years ago.
24 The claim was that the inmates did not have
25 access to their family members, didn't have

1 phones; and, in that consent decree, it was
2 agreed that they would be provided free postage,
3 a certain amount of free postage and it didn't
4 matter whether they had money. They could have
5 \$50,000 in their account and that agreement said
6 they were entitled to that postage. That
7 accounts to, for almost a million dollars in
8 taxpayer funds.

9 At this point, we are in the process of
10 re-evaluating all of these outstanding orders
11 that affect the Department of Corrections so
12 that we can try and terminate some of them.

13 That case, for example where the
14 inmate's whose expenditure was agreed to, when
15 we had fewer inmates and we had no phones, we
16 have a lot more inmates, many of them have money
17 and they have phones now and it makes no sense
18 for us to be wedded to that type of policy.

19 And I think what you are raising is an
20 important point. Prisoner administrators need
21 to be able to re-evaluate policies as they
22 become aware of new information. Unfortunately,
23 not all policies are addressed the minute you
24 come in.

25 But, I will, in the mean time, try to

1 get you the big answer on your question.

2 REP. MAYERNIK: I appreciate that. I
3 just raised it for the members of this committee
4 so they are aware of such a term. I had
5 discovered it last summer whenever I visited
6 Western Penitentiary for three days and worked
7 in every different position that the guards did
8 and found out of the term idle pay. I was quite
9 appalled that it was happening.

10 MS. VANDENBRAAK: We will make sure you
11 have an answer.

12 REP. MAYERNIK: Thank you very much.

13 MS. VANDENBRAAK: Thank you very much.

14 CHAIRMAN CLARK: Any additional
15 questions?

16 (No response.)

17 CHAIRMAN CLARK: Thank you very much.
18 We will let you go now.

19 The next individual to testify in front
20 of the committee will be Emily Zimmerman, she is
21 the Chief of Civil Litigation at the
22 Philadelphia District Attorney's Office.

23 MS. ZIMMERMAN: Good afternoon.

24 CHAIRMAN CLARK: Miss Zimmerman.

25 MS. ZIMMERMAN: Thank you, members of

1 the Judiciary Committee. I appreciate the
2 opportunity to be here to comment on this
3 important legislation. I am here testifying on
4 behalf of District Attorney Lynne Abraham, as
5 well as the Philadelphia D.A.'s Office, and we
6 all appreciate the opportunity to be able to
7 express our comments and concerns about this
8 bill.

9 One of the responsibilities that I have
10 as Chief of the Civil Litigation Unit at the
11 D.A.'s Office in Philadelphia is to defend the
12 office, the D.A. and also various Assistant
13 D.A.'s that get named as defendants in lawsuits
14 which are brought by inmates who have been
15 convicted in criminal cases in Philadelphia.
16 One of my other responsibilities is to represent
17 the D.A.'s Office in institutional litigation
18 which is brought in Philadelphia. Some of this
19 litigation concerns prison conditions in the
20 City.

21 I should note that the D.A.'s Office is
22 not responsible for the administration or
23 maintenance of Philadelphia prisons so the
24 D.A.'s Office and the D.A. don't typically get
25 named as defendants in prison conditions

1 litigation.

2 So I just want to say that the impact
3 of House Bill 2697, in so far as it would have
4 an impact on the sheer quantity of prison
5 conditions lawsuits or the handling of such
6 litigation would really be felt most directly by
7 the attorneys that represent the City agencies
8 and also the officers and employees of those
9 agencies who are responsible directly for the
10 administration of prisons. In Philadelphia, the
11 City Solicitor's Office acts as counsel to the
12 City, primarily in that regard.

13 Despite this fact, I want to note that
14 the impact of prison conditions litigation can
15 be felt by the entire criminal justice system,
16 not just those agencies responsible directly for
17 the maintenance of prisons.

18 One example of this is the impact of
19 consent decrees which can be entered into by the
20 parties to litigation, and the impact of these
21 consent decrees may stand far beyond the parties
22 themselves who actually entered into those
23 agreements and the resulting consent decrees.

24 Pressures apart from the underlying
25 case itself of which it may be the tremendous

1 financial and non-financial cost of litigation
2 may create an incentive for consent decrees to
3 be entered into even though there hasn't been a
4 showing of unconstitutional prison conditions.
5 These consent decrees may serve control over the
6 admission and release of inmates from local
7 criminal courts based upon a reliance on
8 judicial prisoner release orders.

9 Now, these prisoner release orders take
10 a variety of forms. They may automatically
11 release inmates who have already been committed
12 to the prisons; in addition, they may also limit
13 the arrested individuals who are even eligible
14 for admission to the prisons in the first place;
15 and, as a result of this, arrested individuals
16 may not even have to post bail to be free,
17 pending trial, regardless of what their prior
18 criminal background has been.

19 These defendants may then fail to
20 appear for a scheduled court hearing, which not
21 only causes a glut of undisposed cases in the
22 criminal justice system, but also, and certainly
23 very importantly, a large population of
24 frustrated victims of crime whose rights are
25 never vindicated and, moreover, who show up to

1 court repeatedly missing days from work only to
2 be sent away because the defendants in their
3 cases have failed to appear.

4 House Bill 2697's limitation on the
5 scope of prospective relief and the
6 circumstances in which prisoner release orders
7 may be imposed in prison conditions litigation
8 is an important recognition of the serious
9 impact of such relief on all the players in the
10 criminal justice system, including a recognition
11 of the vital importance of the proper and
12 efficient functioning of the criminal justice
13 system and the rights of crime victims to have
14 their cases disposed of finally.

15 House Bill 2697 recognizes the
16 pervasive impact of prison conditions litigation
17 not only in its limitations on the remedies
18 available in such litigation, but also in the
19 fact that it provides for their right to
20 intervene in prison conditions litigation by
21 interested government parties. Direct
22 intervention in prison conditions litigation
23 enables the interest of prosecutors, as well as
24 criminal court judges, to be heard in these
25 cases.

1 In addition, the knowledge that these
2 parties might have the right to intervene and
3 might even, in fact, do so in prison conditions
4 litigation, can serve to heighten the awareness
5 of the interests represented by not only
6 prosecutors but also the courts, by the initial
7 parties to, and also, the courts presiding over
8 prison conditions litigation.

9 Either way, it is clear that the
10 effective functioning of the criminal justice
11 system cannot be ignored any longer in the
12 course of the prison conditions litigation and
13 its resolution.

14 I do have a few revisions that I might
15 recommend to House Bill 2697's intervention
16 language. Mainly, these revisions are merely to
17 make the right to intervene more clear. They
18 are not substantive changes to the provision to
19 intervene.

20 The first revision that I would suggest
21 deals with the language of Section 6 (b) of the
22 bill. I would revise it to state that any
23 government party with jurisdiction over prisons
24 for the prosecution or custody of persons who
25 may be released from prison as a result of a

1 prisoner released order shall have standing to
2 intervene. Now, currently, the bill as
3 currently drafted to state that "The government
4 party with such jurisdiction shall have standing
5 to intervene. By changing the "The" to "Any"
6 party, it will be more clear that one interested
7 party may intervene or that more than one
8 interested party may intervene in prison
9 conditions litigation, provided that each party
10 that wants to intervene possesses the requisite
11 jurisdiction.

12 The second change that I would
13 recommend deals with the language of line 22 of
14 Section 6 (b) so that it would state that any
15 government party may intervene in the initial
16 and/or any related proceeding. That revision
17 will prevent any misconstruction of the language
18 of the bill to be interpreted to apply only to
19 proceedings ancillary to the original
20 litigation.

21 Another part of House Bill 2697 which I
22 wanted to praise in particular was Section 9 of
23 the bill which requires the payment of any
24 outstanding court orders in criminal cases due
25 from a criminal defendant who was a successful

1 civil plaintiff to be paid out of any monetary
2 reward received by that inmate-plaintiff. All
3 too often, the victims who have incurred
4 significant financial expenses as a result of a
5 crime are never compensated by the defendants
6 who are, in fact, responsible for such injury.
7 House Bill 2697 recognizes the importance of
8 holding inmates accountable for the consequences
9 of their criminal behavior.

10 In addition to the payment of moneys in
11 connection with criminal cases, I would also
12 suggest that House Bill 2697 require the payment
13 of all outstanding child support orders out of
14 any award received by inmate-plaintiff. Just as
15 an inmate-plaintiff should be held accountable
16 for the financial injury which their victims
17 suffer, so too should an inmate-plaintiff be
18 held responsible for the payment of court-
19 ordered support to their children.

20 Prison conditions litigation can have
21 a tremendous impact on the functioning of the
22 entire criminal justice system. However, it is
23 not just prison conditions litigation which
24 takes a toll on our already limited resources in
25 our criminal justice system, but really all

1 litigation. House Bill 2697's scope, as has
2 been commented on previously, is, in fact, more
3 limited than its federal counterpart, which also
4 applies, at least partially, to any civil action
5 which would be brought by a prisoner and not
6 only to prison conditions litigation.

7 Some specific examples of this from the
8 Federal Prison Litigation Reform Account follow:
9 :

10 One is that the Federal Prison
11 Litigation Reform Act requires prompt judicial
12 review of prisoners' civil rights suits seeking
13 redress from a governmental entity or an
14 officer, employee thereof and requires the
15 dismissal of a complaint or portion of that
16 complaint which would be frivolous, malicious,
17 or fails to state a claim upon which relief may
18 be granted; or which seeks monetary relief from
19 a defendant who is immune from such relief.

20 The federal act also allows defendants
21 in prisoner civil rights actions to waive the
22 right to reply to lawsuits without any such
23 waiver constituting an admission of the
24 allegations contained in the complaint.

25 You have already heard from several of

1 the prior individuals who testified here today,
2 the incredible financial cost in responding to
3 such litigation. And I would add that, in my
4 experience, even the most rote reply to a
5 lawsuit takes hours and hours of work, if not
6 only in reading the complaint, in doing research
7 and responding in a valid way.

8 Under the provision that I was just
9 describing, a court also may not grant any
10 relief to a plaintiff unless a defendant has
11 filed a reply to a lawsuit and a court may
12 require a defendant to respond to a complaint if
13 it finds that the plaintiff has a reasonable
14 opportunity to prevail on the merits.

15 Procedures such as these from the
16 Federal Prison Litigation Reform Act are
17 intended to prevent valuable governmental
18 resources from being expended defending
19 meritless lawsuits, while maintaining access to
20 the courts for prisoners who do have valid
21 claims.

22 Once again I would like to thank you
23 for the opportunity to come here today and give
24 input on this important legislation. And to
25 reiterate, once again, that the Philadelphia

1 D.A.'s Office commends House Bill 2697 for the
2 effort that it has taken to address many of the
3 issues facing our criminal justice system today
4 and civil justice system as well.

5 CHAIRMAN CLARK: Thank you very much,
6 Miss Zimmerman.

7 Are there any questions?

8 Representative Hennessey.

9 REP. HENNESSEY: Thank you, Mr.
10 Chairman.

11 Miss Zimmerman, I guess what I am
12 struck by is the fact that the civil law allows
13 for preliminary objections for failing to state
14 a cause for a claim upon which relief can be
15 granted, it allows for a motion to a summary
16 judgment or a judgment on the pleadings. Are
17 these things, are these procedures, simply not
18 working?

19 We have judges out there that simply
20 say that, well, the claim may be -- the damages
21 may be minimal, or de minimus, but we have got
22 to allow the suit to proceed through all the
23 channels before we ever make a decision?

24 Or, is the system breaking down because
25 the judges simply aren't using that tool as a

1 way of getting rid of some of these cases from
2 the system?

3 MS. ZIMMERMAN: Well, I think that as
4 far as prison conditions litigation goes, my
5 office doesn't actually get named as defendants
6 in most of those. So insofar as the frivolous
7 suits that have been mentioned, as far as the
8 quantity goes, that may not directly impact on
9 our office and we may not be directly responding
10 to all of those lawsuits. But I can say that I
11 think the concern, or one of the concerns, is
12 that even doing the preliminary pleadings in a
13 case takes hours and hours of time, it uses up a
14 tremendous amount of resources.

15 And I think that House Bill 2697 is not
16 trying to shut out valid claims -- and certainly
17 nobody would want that to happen -- but what it
18 is trying to do is to provide a screening for
19 initial lawsuits to get filed so that lawsuits
20 where a defendant is clearly immune from suit
21 don't end proceeding. Because even to ascertain
22 that you are a defendant who is immune from suit
23 requires a lot of time and expense, only to have
24 the court say, yes, we agree, you are immune
25 from suit, but you had to go through and file

1 all of these papers to begin with.

2 REP. HENNESSEY: But isn't that the
3 purpose of a preliminary objection, saying that
4 a relief can be granted on this claim?

5 MS. ZIMMERMAN: (No response.)

6 REP. HENNESSEY: Why do we need
7 separate litigation to authorize what I think is
8 already authorized in the civil law, which is,
9 if somebody is immune, you file a motion for
10 judgment on the pleadings or you file a
11 preliminary objection saying that no release can
12 be granted on this claim? Why isn't that
13 available? Does your Department do that?

14 MS. ZIMMERMAN: We definitely do it.
15 We file motions to dismiss.

16 REP. HENNESSEY: Well, when did you
17 ever -- (inaudible). Are they somehow
18 temporizing, allowing the state to take up more
19 time in the system even though the answer is
20 clear that the defendant is immune or is it the
21 claim's meritorious?

22 MS. ZIMMERMAN: Well, this bill would
23 get rid of the cases even before it got to the
24 point of requiring a defendant to respond and I
25 think that that is the important thing to

1 consider, that there is going to be a certain
2 amount of judicial screening of these lawsuits
3 that come in.

4 In Federal Court, for example, to file
5 a motion to dismiss, even to allege the most
6 basic defenses, takes a lot of time. It is not
7 just a matter of submitting a list with 10
8 defenses to a claim. You have to submit a
9 motion and then you also have to submit a
10 memorandum of law in support of that motion and
11 the sheer act of physically going through it and
12 compiling that and reading through a complaint
13 that comes in and trying to parts out the
14 different claims, takes a tremendous amount of
15 time. Whereas, judicial review could look at
16 the complaint and say, all right, it is naming
17 an Assistant D.A., who prosecuted a criminal
18 case against this defendant, the D.A. enjoys
19 absolute immunity from this action, therefore,
20 the case should proceed no further. I think
21 there is a big difference there.

22 REP. HENNESSEY: Okay. But you are
23 expecting the judicial branch to then take the
24 initiative in getting rid of the suit as opposed
25 to asking the person who the claim has been

1 filed against to sell you a reason why they, he
2 had, the claim should be dismissed.

3 MS. ZIMMERMAN: Well, I think, in the
4 Federal Prison Litigation Reform Act, there is
5 provision that does not just deal with the
6 prison conditions litigation, it discusses the
7 procedures to be implemented as far as all
8 complaints filed by prisoners; and that does
9 require prompt judicial review of those
10 complaints; and it explicitly states that the
11 defendant can waive responding to that unless a
12 judge determines that there is some merit to the
13 facial allegation of the complaint and then the
14 defendant can respond. But it would prevent
15 defendants from having to respond regardless of
16 whether the complaint, on its face, has merit or
17 not; and that that's in the Federal Prison
18 Litigation Reform Act currently.

19 REP. HENNESSEY: I guess the concern I
20 have is that if it is an expense to the
21 taxpayers to have the Department, like yours,
22 look at the claim and try to raise defenses or
23 raise motions that would take this out of the
24 system, when you are in a target or your client
25 basically is the target of the claim, is it

1 going to be even more expensive to try to create
2 some judicial bureaucracy to look at these and
3 do the screening when they are not, they don't
4 necessarily have the interest of a client, a
5 direct interest of a client to protect?

6 MS. ZIMMERMAN: No, I don't think so.

7 REP. HENNESSEY: Are we trading one
8 expense for another, and maybe a larger expense,
9 asking the judiciary to handle this rather than
10 the people who are actually the target of the
11 suit?

12 MS. ZIMMERMAN: I don't think it would
13 be, because the judges can issue judicial orders
14 which would dismiss a case, and, in fact, in
15 appeals from Federal District Court cases, the
16 Appellate Courts can dismiss appeals if they are
17 frivolous and they can issue summary orders that
18 do that; whereas, for a defendant to defend a
19 case, we can't just submit one line saying we
20 don't think this claim has any merit or immune.
21 We have to submit a motion, we have to submit a
22 memorandum of law which is, in effect, a brief,
23 explaining the basis for our argument. So I
24 think that the resources that are expended are
25 quite different there.

1 REP. HENNESSEY: Thank you.

2 Thank you, Mr. Chairman.

3 CHAIRMAN CLARK: Representative Horsey.

4 REP. HORSEY: No. No, he asked the
5 questions. Thank you.

6 CHAIRMAN CLARK: Any additional
7 questions?

8 (No response.)

9 MS. ZIMMERMAN: Thank you.

10 CHAIRMAN CLARK: We thank you very much
11 for your testimony today.

12 And that concludes today's hearing and
13 testimony on these two house bills. And I would
14 remind everybody that, tomorrow, we will take up
15 at 9 a.m. and continue testimony on House Bill
16 2697 and House Bill 2770. So anyone interested
17 is certainly welcome to come tomorrow at 9 a.m.,
18 and we have three witnesses for tomorrow
19 morning's session.

20 So with that, why, we will adjourn
21 today's meeting, and we welcome everyone back
22 tomorrow. Thanks very much.

23 (Whereupon, the public hearing was
24 adjourned at 2:50 p.m.)

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