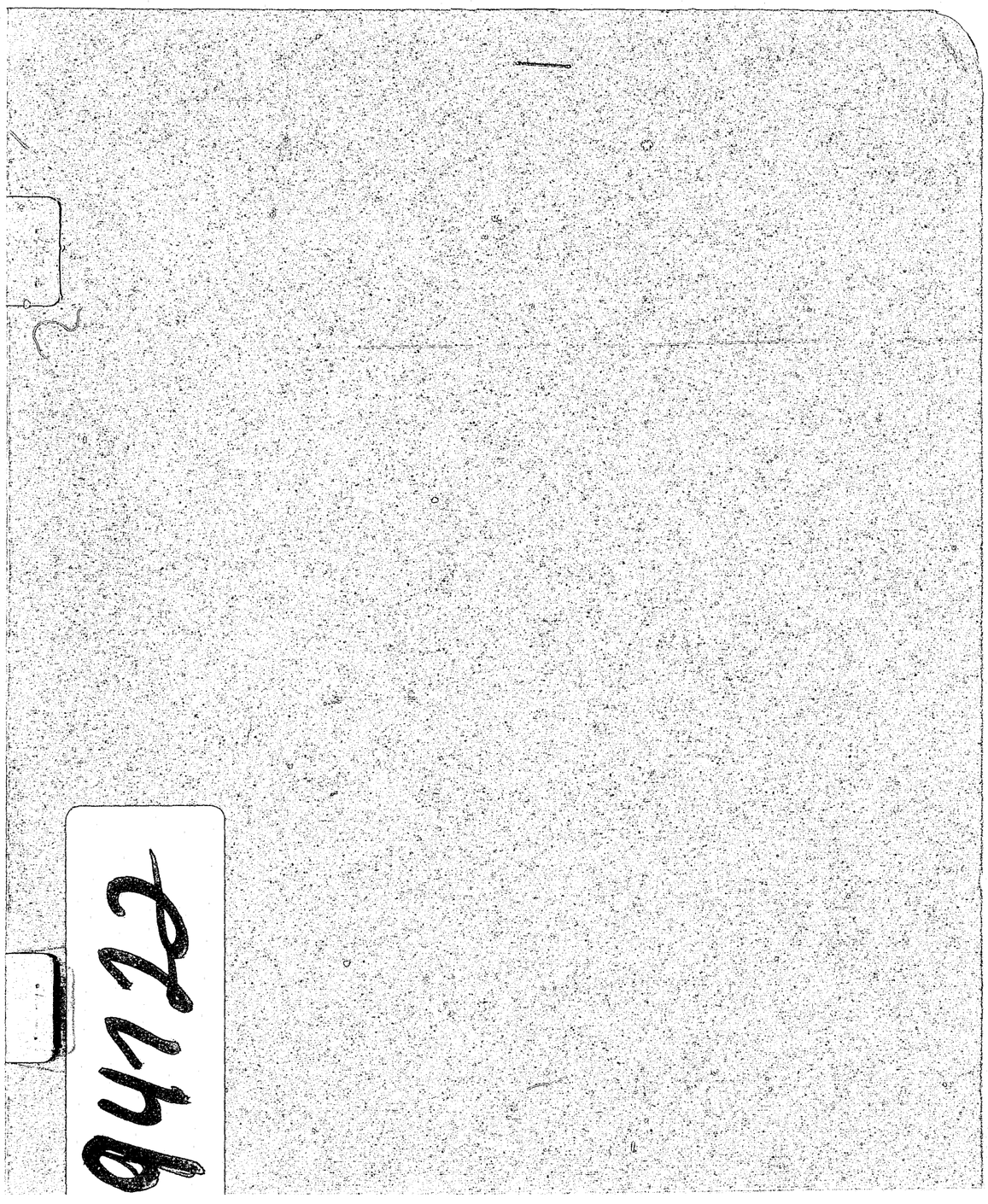

Department of Justice

STATEMENT

OF

ALFRED S. REGNERY
ADMINISTRATOR
OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION

BEFORE

THE

SUBCOMMITTEE ON THE CONSTITUTION
SENATE COMMITTEE ON THE JUDICIARY

CONCERNING

S. 520 AND S. 522

ON

JUNE 14, 1984

Thank you very much, Mr. Chairman, for inviting the Department of Justice to testify this afternoon on S. 520 and S. 522. As the Administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP), I am here to present the views of the Department of Justice.

The Department of Justice opposes the enactment of these bills. Our views are based on several factors, both substantive and procedural.

S. 520 and S. 522 would amend Chapter 21, 42 U.S.C., to provide that certain actions pertaining to juveniles constitute violations of civil rights. The purpose of these two bills parallels concepts contained in the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, as amended. Under that Act, funds are provided to state and local governments for programs designed, among other things, to provide for the deinstitutionalization of status offenders and for the separation of juveniles from adults in secure detention facilities. States participating in the Act's formula grant program are required to take specific steps toward those goals.

S. 520 would establish that the placement of juvenile non-offenders, including status offenders, in secure detention, treatment, or correctional facilities, is a violation of the constitutional rights of such juveniles. S. 522 declares that the confinement of any person under eighteen in any adult jail or lockup is, with certain limited exceptions to be established by federal regulation, a violation of the constitutional rights of juveniles. Both bills would be enforceable, through civil actions for damages and equitable relief, by private parties and would have the effect of assigning personal liability to the public official responsible for the violation of such rights.

Although we generally support the goals of deinstitutionalization of status offenders and the separation of adults and non-criminal juveniles in jails, the problems which S. 520 and S. 522 seek to address have been vastly reduced over the past decade without such legislation. To attempt to deal with these problems with the unconditional and inflexible approach which S. 520 and S. 522 propose, would be an over-reaction in light of the relative insignificance of the problem and would result in impractical and unintended consequences. Indeed, such consequences are presently a problem, even with the current regulations which permit a degree of flexibility. In recent testimony before the Juvenile Justice Subcommittee, I discussed some of those problems and consequences as they developed from the deinstitutionalization requirement of the current JJDP Act and which are clearly applicable to S. 520.

The JJDP Act places major emphasis on deinstitutionalization, under the assumption that it will reduce criminality among juveniles. However, a recent study by the American Justice Institute, done at our request, produced some startling findings. It showed that comparisons of deinstitutionalized status offenders and institutionalized status offenders generally show no differences in recidivism. Of the fourteen programs in which recidivism rates could be compared, no differences were found in eight; in three, the deinstitutionalized status offenders did better, and in three, they did worse. Despite many attempts to measure the impact of deinstitutionalization on criminality, in other words, there is virtually no empirical evidence to indicate that there is a relationship.

Although hard data is scanty and difficult to find, in at least one area it appears that the deinstitutionalization requirement may have done more harm than good. That area involves runaway behavior -- one of the

most frequently committed of the status offenses.

In many jurisdictions, deinstitutionalization has encouraged and even forced authorities to neglect runaway and homeless children. In this country's toughest urban centers, deinstitutionalization has meant, not transferring youths from reform schools to caring environments, but releasing them to the exploitation of the street.

S. 520 would make it virtually impossible for state and local authorities to detain status offenders in secure facilities. In the case of runaways -- particularly those who are chronic runaways -- that prohibition is too extreme. In some situations, secure settings -- not jails -- are necessary to protect these children from an environment they cannot control and often are unable to resist. The costs of a blanket policy prohibiting the protective holding of those children are far greater than any benefits which might flow from the legislation.

A study recently conducted of runaway girls in Wisconsin found that 54% needed to steal in order to survive and 70% had to resort to prostitution. Many runaways are arrested and enter the judicial system no longer as status offenders, but as criminal offenders -- often for crimes that they were virtually forced to commit in order to survive. In many cases by providing services to them at an early stage, the law enforcement system could help these children return home, thereby preventing subsequent criminality. Yet the effect of the deinstitutionalization movement on law enforcement has been to remove its services, in many cases, from status offenders. As The Wall Street Journal said in a recent editorial on the subject, "...the police don't want to deal with runaways at all, even though many kids would be quite willing to stay put in custody and go home again."

The effects of S. 522 requirements for removal of juveniles from jails and lockups for adults would be different from, but no less serious than, those produced by the S. 520 because of the extreme financial burden it would thrust on state and local governments in comparison to the small numbers of people it would benefit. S. 522 would prohibit any person under the age of eighteen from being detained or confined in any jail or lockup for adults. This provision ignores the fact that each state defines who is a juvenile in terms of age, and in many states, the seriousness of the presenting offense. S. 522 would, for example, prohibit the use of adult jails or lockups for sixteen-year-olds in New York -- a state which holds such youth to be adults under the exclusive jurisdiction of the criminal courts. Further, the JJDP Act requirement for removal of juveniles from adult jails and lockups excludes juveniles who have been waived or transferred to the criminal justice system or for whom the criminal court has otherwise assumed jurisdiction. To apply the prohibition across the board would not only disrupt state law and practice, it would force the placement of young adults (sixteen and seventeen year olds in many states) and juveniles who have committed serious and violent crimes and are under criminal court jurisdiction, into juvenile detention and correctional facilities. There, juvenile delinquent offenders would be their prey. Also, it should be noted that the resulting need by S. 522 to place sixteen- and seventeen-year-old adults in juvenile facilities with delinquents would have the ironic effect of violating the existing JJDP Act separations requirements and would result in the states being declared ineligible for participation in the JJDP Act formula grant program.

By participating in the JJDP Act formula grant program and submitting a plan for the removal of juveniles from adult jails and lockups,

the states have committed themselves to an orderly, planned, and good faith effort to achieve the removal of juveniles from adult jails and lockups. Because of the relatively small amount of federal money involved in the juvenile justice program, the states have not begun to comply with the jail removal requirement because of federal money but because they believe it is the right thing to do. And there is every reason to believe they will continue their jail removal efforts without the coercive mandates of S. 522.

Perhaps of greater significance to the discussion of deinstitutionalization and jail removal and the provisions of S. 520 and S. 522 is the fact that these objectives have been largely accomplished, at least to the extent that juvenile status offenders are now only rarely held in secure detention facilities. Forty-six states and the District of Columbia now participate in the JJDP Act by, among other things, deinstitutionalizing their status offenders in order to qualify for federal funding. Each of these states has submitted a plan and submits annual reports to my office containing a review of its progress to achieve deinstitutionalization. Our information shows that the number of status offenders and non-offenders held in secure facilities has been reduced by 88.5% over the past five to seven years. Similarly, the number of juvenile delinquents and non-offenders, including status offenders, held in regular contact with incarcerated adults has decreased 71.8% since 1979.

Our data show that the number of status offenders in secure facilities on any given day has been almost cut in half since 1977. According to figures from the Bureau of the Census, there were 2050 status offenders in secure facilities on one day in 1977, 1175 on one day in 1979, and only 1100 on one day in 1983.

It is significant to note that, while the number of status offenders in secure facilities has declined drastically, the total number of incarcerated juveniles rose by more than 10,000 during the same period -- from 25,676 on a given day in 1977 to 36,545 in 1983. These figures reveal two important facts. First, the number of status offenders in detention is very small in relation to the total number of incarcerated juveniles. Second, with all emphasis on deinstitutionalization of status offenders and the hundreds of millions of dollars devoted to that purpose by all levels of government, the actual number of juveniles in secure detention has increased -- partly because of "relabeling." Additionally, surveys in individual jurisdictions consistently show that a large percentage of delinquents in secure detention have previously been held for status offenses, and that a large percentage of status offenders have previously been held for delinquent acts. If the objective of the bills under discussion today is to reduce the rate of juvenile incarceration, the experience of the past six years strongly suggests that they are unlikely to succeed.

In summary, we believe that state and local efforts toward deinstitutionalization and jail removal will continue without federal legislative mandate and will be able to accomplish more without the unyielding requirements of S. 520 and S. 522, which do not recognize that each state operates under a different set of conditions and circumstances.

In addition to the problems I have just mentioned, Mr. Chairman, S. 520 and S. 522 have a number of serious constitutional shortcomings. Both bills purport to be based on authority granted to Congress by the Fourteenth Amendment. Both bills declare that "the constitutional rights of juveniles" guaranteed by that Amendment "shall be enforced" by prohibiting the detention of juveniles held for noncriminal offenses. In

essence, S. 520 and S. 522 provide for congressional protection, by statute, of constitutional rights of juveniles that Congress itself has independently defined, without reference to clear judicial establishment of such rights. To do so is clearly contrary to our scheme of government.

It is far from clear that juveniles have a constitutional right either to be held separately from adults or to be free of secure detention. That is, there is a serious question, from a constitutional perspective, whether a state's decision to hold such juvenile offenders in the same facility as adults or in a secure facility violates whatever due process rights juveniles have under the Fourteenth Amendment. In the absence of such a right, it is questionable whether Congress has sufficient authority under Section 5 of the Fourteenth Amendment to enforce a constitutional right that it, rather than the courts, has articulated -- i.e., to regulate the states' detention of juveniles in order to protect a juvenile's presumed, though yet undetermined, civil rights.

The latitude which Congress has in modifying or expanding Fourteenth Amendment rights by statute remains in a state of flux. It is unclear whether Congress possesses, under Section 5 of the Fourteenth Amendment, substantive power to articulate what rights are constitutional (and therefore enforceable) based upon mere legislative findings of fact or upon attempts to resolve competing values and to delineate substantive constitutional rights, independent of the courts. Some cases suggest that Congress may reach beyond its remedial powers and make the value choices typically involved in judicial "strict scrutiny" interpretations of Fourteenth Amendment rights; however, other, more recent cases, have either imposed or implied the existence of limits on such powers. S. 520 and S. 522 not only impinge on states' rights to decide state questions, but also risk a

congressional undercutting of the Court's traditional role in delineating the content of constitutional rights. In short, there is no ultimately persuasive case for the constitutionality of S. 520 and S. 522. These bills would be an attempt to enforce a right, the existence of which, as a matter of constitutional law, is still speculative.

Though the application of due process to juveniles has been increasingly recognized by the courts,[1] what is actually required to assure fundamental fairness, and Congress's actual ability to articulate what rights are constitutional and therefore enforceable, are far from definite. Neither the Supreme Court nor any federal court of appeals or state court has addressed the issue of whether holding non-offenders, including status offenders, in an adult facility violates their rights under the due process clause. There is one federal district court case we have found which deals with this question. D.B. v. Tewksbury, 545 F.Supp. 896 (D. Ore. 1982). It is important to note that the Tewksbury court based its opinion, for the most part, on its admitted use of pre-adjudication detention for the purpose of "punishment" a clear violation of the due process clause. The court acknowledged that not every disability imposed in pre-adjudication detention of juveniles amounted to "punishment" and that special conditions within the jail had to exist for detention to be tantamount to "punishment" under the Fourteenth Amendment. The basis upon which the court determined that detention in this instance was indeed punishment -- including the extraordinary conditions within the jail in question -- clearly limit the application of this case. Furthermore, the court's statement that any confinement in jails of juveniles accused of committing crimes violates

[1] In re Gault, 387 U.S. 1 (1967) and In re Winship, 397 U.S. 358 (1970).

their Fourteenth Amendment rights is mere dicta. Ours is a government of limited powers and Congress should be reasonably secure in its basis for legislative acts before legislating. This single case, decided at the district court level, cannot reasonably serve as a solid foundation upon which to base the broad constitutional rights embodied in S. 520 and S. 522 or the congressional authority to enforce them.

Besides the important question of Congress' authority to enact these bills, S. 520 and S. 522 are based on the erroneous assumption that Congress is better equipped to make decisions involving juvenile detention (a state and local concern) than are the state legislatures and state courts. The issue of juvenile detention has traditionally been addressed by the state and local jurisdictions, and to attempt to force states to comply with federal directives in matters which are primarily within the purview of the states does violence to the concept of federalism. These bill would interfere with, and in some instances, supplant state and local policy decisions which are protected under the Tenth Amendment.

Juvenile justice policy, state prison policy and, in fact, state justice policy are matters about which the federal government, to be sure, may be concerned, but which are far better handled in the states themselves. The Supreme Court acknowledged this fact and recognized the limits which the Tenth Amendment places on federal regulation of traditional state governmental functions in National League of Cities v. Usery, 426 U.S. 833 (1976). The presumption that the federal government has superior capabilities in regulating state and local jurisdictions on state and local functions -- the concept upon which S. 520 and S. 522 is based -- is contrary to the position which the courts have taken and are likely to uphold in the event the states challenge the constitutionality of these bills

under the Tenth and Fourteenth Amendments.

Even if one were to apply a balancing test to weigh the utility of S. 520 and S. 522 -- whether the federal interest in regulating juvenile detention is demonstrably greater than the states' interest -- it is clear that the bills interfere substantially with the states' administration of their own laws. For example, to provide that the mandate may be enforced by litigants in the judicial system is yet a further intrusion into state policy by the federal government, not to mention a substantial fiscal and administrative burden on many states. We fail to see how the federal interest in protecting an unresolved constitutional right of juveniles would be "demonstrably greater" than the states' interest in carrying out law enforcement policies as mandated by the state legislatures.

Finally, Mr. Chairman, it must be noted that the federal government itself has not complied with the JJDP Act. Because it has not done so, as far as deinstitutionalization of non-offenders, including status offenders, and separation of juveniles and adults in jails is concerned, we find it totally inappropriate for it to mandate that the states do what the federal government is unable or unwilling to do. Specifically, in a GAO report dated March 22, 1983, entitled Improved Federal Efforts Needed to Change Juvenile Detention Practices, GAO found several federal agencies in noncompliance with the Act, and inconsistent with the mandates established by the JJDP Act. In addition, GAO found that, of the federal agencies examined, only one could completely account for the juveniles they had taken into custody. In addition, none could provide GAO with information on the number of juveniles detained or on lengths of stay. The GAO found that the Immigration and Naturalization Service, the National Park Service, the U.S. Park Police, the U.S. Marshals Service, and the

Bureau of Indian Affairs detained status offenders and mixed juveniles and adults in jails from time to time. For the Congress to mandate that the states do what the federal government cannot do, under the penalty of being sued, but without providing such remedies against those abused by the federal government, strikes us as, at best, inconsistent, and at worst hypocritical.

The JJDP Act does provide some flexibility to the states in the areas mandated by S. 520 and S. 522. Not only do we think such flexibility is entirely appropriate, we also believe that the exceptions may not be broad enough. Accordingly, we note that the Senate Judiciary Committee, on May 10th, in reporting the reauthorization of the JJDP Act to the full Senate (S. 2014), included an amendment which permits an additional exception to the secure detention provisions without bringing the state into noncompliance. That amendment to Section 223 (a)(12)(A) states as follows:

> "(ii) juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses which do not constitute violations of vaild court orders shall not be placed in secure detention facilities or secure correctional facilities except that the short-term emergency placement in a public or private secure juvenile residential facility of certain of these juveniles may be ordered by the court if the court finds based on clear and convincing evidence that: (a) the physical safety of the juvenile is in serious danger; and (b) there is no less restrictive alternative placement available which would adequately safeguard the welfare of the juvenile, provided that a judicial determination is held within 24

hours and that the juvenile is either released or diverted to a non-secure community-based alternative within 5 calendar days;"

That amendment would have the effect of allowing states to hold status offenders for short periods of time in secure detention facilities, pursuant to a court order, to protect the physical safety of the status offender. We believe that such an amendment is wholly appropriate and, in fact, a necessary addition to the mandates of the JJDP Act. We would also note, however, that S. 520 takes a much more extreme and wholly inconsistent view which permits none of the flexibility permitted by the proposed amendment. If, in fact, the Judiciary Committee recognized the need to amend the JJDP Act, as it apparently did, we fail to see how it could also find a need to strengthen the provisions of the Act by S. 520.

Because of each of these concerns, Mr. Chairman, and particularly because of these concerns taken in the aggregate, we urge the Committee to reject these bills.

END