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THE PRISON LITIGATION REFORM ACT OF 1995: A LEGITIMATE ATTEMPT TO CURTAIL FRIVOLOUS INMATE LAWSUITS AND END THE ALLEGED MICRO-MANAGEMENT OF STATE PRISONS OR A VIOLATION OF SEPARATION OF POWERS?

INTRODUCTION

The Prison Litigation Reform Act of 1995¹ ("PLRA") was signed into law on April 26, 1996. The PLRA was an attempt by Congress to remedy two problems allegedly plaguing the federal district courts: the enormous rise in frivolous inmate litigation and the alleged micro-management of state prisons by the federal courts.² Several courts recently have considered whether the PLRA violates the doctrine of separation of powers as enunciated by the Supreme Court of the United States in *Plaut v. Spendthrift Farm, Inc.*³ These courts also have considered whether the PLRA violates another aspect of that doctrine, the rule of *United States v. Klein*,⁴ as laid out by the Court over 100 years ago.⁵

¹ 18 U.S.C.A. § 3626 (West Supp. 1997) [hereinafter PLRA or the Act].

² *Overhauling the Nation's Prisons, Testimony July 27, 1995, Before Senate Judiciary Committee*, 104th Cong. (1995) (statement of Sen. Hatch).

³ 115 S. Ct. 1447 (1995).

⁴ 80 U.S. (13 Wall.) 128 (1871).

⁵ The Act has been challenged on separation of powers, equal protection, and due process grounds. *See, e.g.*, *Benjamin v. Jacobson*, No. 96-7957 (2d Cir. Aug. 26, 1997) (holding the PLRA's automatic termination provision constitutional on separation of powers, due process, and equal protection grounds); *Gavin v. Branstad*, Nos. 96-3746, 96-3748, 1997 WL 434633 (8th Cir. Aug. 5, 1997) (upholding constitutionality of the PLRA's automatic termination provision on separation of powers, equal protection, and due process grounds); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996) (holding the PLRA's automatic termination provision constitutional on separation of powers, equal protection, and due process grounds), *cert. denied*, 117 S. Ct. 2460 (1997); *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996) (holding the PLRA's automatic termination provision unconstitutional on separation of powers grounds); *Hadix v. Johnson*, 933 F. Supp. 1360 (E.D. Mich. 1996) (holding the stay provision of the PLRA unconstitutional on due process and separation of powers grounds); *Hadix v. Johnson*, 933 F. Supp. 1362 (W.D. Mich. 1996) (same); *United States v. Michigan*, No. 1:84 CV 63 (W.D. Mich. July 3, 1996) (same).

To assess the constitutionality of certain provisions of the PLRA, it is necessary to consider what effect the PLRA has on an often used remedy imposed by the courts in prison condition lawsuits—the consent decree. In order to avoid an adjudication by the courts that state prisons were being operated unconstitutionally, prison officials over the years have settled claims made by prisoners and entered into consent decrees.⁶ These consent decrees, approved and sanctioned by the courts, represent a final judgment.⁷ In *Plaut*, the Supreme Court held that Congress violated separation of powers principles by legislatively reopening final judgments of Article III courts.⁸ The PLRA provides for automatic termination and an automatic stay of prospective relief⁹ if such relief was granted without certain findings required by the Act.¹⁰ Thus, the PLRA may

⁶ A consent decree can be broadly defined as "an agreement between litigants to settle a lawsuit on mutually acceptable terms that the court agrees to enforce as a judgment." Bernard T. Shen, Comment, *From Jail Cell to Cellular Communication: Should the Rufo Standard be Applied to Antitrust and Commercial Consent Decrees*, 90 NW. U. L. REV. 1781, 1786 (1996) (citing Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1988)). The PLRA defines a consent decree as "any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements." 18 U.S.C.A. § 3626(g)(1).

⁷ See *Hadix v. Johnson*, 933 F. Supp. 1362, 1368 (W.D. Mich. 1996) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992)).

⁸ *Plaut*, 115 S. Ct. at 1463.

⁹ The PLRA defines prospective relief as "all relief other than compensatory monetary damages." 18 U.S.C.A. § 3626(g)(7).

¹⁰ See 18 U.S.C.A. § 3626. The relevant provisions are as follows:

[Section] 3626. Appropriate remedies with respect to prison conditions

(a) REQUIREMENTS FOR RELIEF.—

(1) PROSPECTIVE RELIEF.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

.....

(b) TERMINATION OF RELIEF.—

(1) TERMINATION OF PROSPECTIVE RELIEF.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or interven-
er—

have the effect of forcing the courts to reopen consent decrees, which in some cases have been final judgments for many years. Additionally, the PLRA may violate the doctrine of separation of powers by unconstitutionally prescribing a rule of decision without changing the underlying substantive law as prohibited by the rule in *Klein*.

The PLRA limits the district court's ability to grant prospective relief. The Act provides, *inter alia*, that if prospective relief is granted, it shall "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff."¹¹ The Act further provides that prospective relief is subject to termination upon motion by any party or intervenor (1) two years after the date the court had previously granted such relief; (2) one year after denial of a motion to terminate; or

- (i) 2 years after the date the court granted or approved the prospective relief;
- (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
- (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

.....
 (2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

.....
 (c) SETTLEMENTS.—

(1) CONSENT DECREES.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

.....
 (e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—

.....
 (2) AUTOMATIC STAY.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

- (A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or
- (ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and
- (B) ending on the date the court enters a final order ruling on the motion.

18 U.S.C.A. § 3626 (West Supp. 1997).

¹¹ 18 U.S.C.A. § 3626(a)(1).

(3) two years after the enactment of the PLRA.¹² Immediate termination of prospective relief is required if the relief was previously approved by the courts without a finding that the relief "is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of a Federal right."¹³ Finally, the Act invites the filing of a motion to stay any prospective relief previously granted.¹⁴ This section provides an automatic stay beginning thirty days after the filing of the motion and ending on the date a final order is issued.¹⁵

This Note focuses on how the PLRA violates two aspects of the doctrine of separation of powers as enunciated by the Supreme Court in *Plaut v. Spendthrift Farm, Inc.* and *United States v. Klein*.¹⁶ Part I discusses the plain meaning of the Act, its legislative history and recent litigation involving the PLRA. Part II analyzes the finality of consent decrees and discusses the doctrine of separation of powers. This Note concludes that the PLRA violates that doctrine by legislatively altering final judgments of Article III courts and by prescribing a rule of decision.

¹² 18 U.S.C.A. § 3626(b)(1).

¹³ 18 U.S.C.A. § 3626(b)(2) [§§ 3626(b)(1); (b)(2), hereinafter the Automatic Termination Provision].

¹⁴ 18 U.S.C.A. § 3626(e) [hereinafter the Stay Provision].

¹⁵ *Id.*

¹⁶ The PLRA has been found unconstitutional on due process grounds. *See, e.g.,* Hadix v. Johnson, 933 F. Supp. 1362, 1369-70 (W.D. Mich. 1996); *United States v. Michigan*, No. 1:84 CV 63, slip op. at 16-17 (W.D. Mich. July 3, 1996); *but see* Benjamin v. Jacobson, No. 96-7957, slip op. at 27-29 (2d Cir. Aug. 26, 1997); Plyler v. Moore, 100 F.3d 365, 374-75 (4th Cir. 1996). The due process challenge to the PLRA is beyond the scope of this note. Plaintiffs also have attacked the PLRA on equal protection grounds. These attacks so far have been unsuccessful. *See Benjamin*, No. 96-7957, slip op. at 25-27; *Plyler*, 100 F.3d at 373-74. The equal protection challenge to the PLRA is also beyond the scope of this note.

I. THE PRISON LITIGATION REFORM ACT OF 1995

A. Plain Meaning

1. Requirements for Relief—18 U.S.C.A. § 3626(a)

Section 3626(a)(1)(A) of the PLRA sets forth three basic requirements for granting prospective relief in prison condition lawsuits: the relief must be narrowly drawn, it must extend no further than necessary to correct the violation of the Federal right [of a particular plaintiff or plaintiffs], and must be the least intrusive means necessary to correct the violation of the Federal right.¹⁷ The PLRA also requires the court to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”¹⁸ The term “substantial weight” remains undefined in the Act; however, “prospective relief” is defined by the PLRA as any relief other than compensatory money damages.¹⁹

As long as the requirements of § 3626(a)(1)(A) are met, a court may grant preliminary injunctive relief for no more than ninety days.²⁰ Section 3626(a)(2), which authorizes this preliminary injunctive relief, also allows a court to enter a temporary restraining order (“TRO”). Either because of an error in drafting or because of the short term nature of a TRO, this section does not, by its own terms, require the three findings set forth in § (a)(1)(A) before a court can grant a TRO. Such an interpretation is logical because § (a)(2) recites the three requirements as a prerequisite to preliminary injunctive relief, but it does not set forth those requirements as a prerequisite to the granting of a TRO. Alternatively, the findings required by § (a)(1)(A) may apply to the granting of a TRO because that section applies to “any civil action with respect to prison conditions.”²¹ The definitional section of the Act broadly defines “any civil action with respect to prison conditions” as any “civil proceeding arising under Federal law with respect to condi-

¹⁷ 18 U.S.C.A. § 3626(a)(1)(A).

¹⁸ *Id.*

¹⁹ 18 U.S.C.A. § 3626(g)(7).

²⁰ 18 U.S.C.A. § 3626(a)(2).

²¹ 18 U.S.C.A. § 3626(a)(1)(A).

tions of confinement."²² Thus, it is possible to interpret the requirements of § (a)(1)(A) as applying to the granting of a TRO.

2. Termination of Relief—18 U.S.C.A. § 3626(b)

Section 3626(b)(1) requires termination of prospective relief, upon motion of a party or intervenor (1) two years after the approval of prospective relief; (2) one year after the denial of a motion to terminate such relief; or (3) two years after the enactment of the PLRA.²³ In cases of unremedied constitutional violations, this section invites relitigation of the issues underlying prison condition consent decrees.

Section (b)(2) mandates the automatic termination of prospective relief, without regard to the time limitations set forth in § (b)(1), if such relief was granted in the absence of the findings required by § (a)(1)(A).²⁴ Unlike § (a)(1)(A), § (b)(2) is retroactive. Section (b)(2) requires findings in accordance with § (a)(1)(A) for any prospective relief previously granted.²⁵

3. Automatic Stay—18 U.S.C.A. § 3626(e)

Regardless of any findings made by the court with respect to continued constitutional violations at a prison operated under a consent decree, upon motion for termination, § 3626(e) requires an automatic stay of any prospective relief beginning thirty days after the filing of such a motion and ending on the date a final order is issued.²⁶ Similar to § (b)(2), § (e)(2) is retroactive. These sections require a federal court to abandon enforcement of a consent decree permanently, in the case of § (b)(2), and temporarily, in the case of § (e)(2).

²² 18 U.S.C.A. § 3626(g)(2). This section notably excludes habeas corpus proceedings from the strictures of the Act.

²³ 18 U.S.C.A. § 3626(b)(1).

²⁴ 18 U.S.C.A. § 3626(b)(2).

²⁵ See 18 U.S.C.A. § 3626(b)(2) (repeating findings required for prospective relief contained in § (a)(1)(A)). Those findings are discussed *supra* notes 17-22 and accompanying text.

²⁶ 18 U.S.C.A. § 3626(e)(2).

B. Legislative History

As early as July 1995, Congress was aware that the PLRA was subject to attack on separation of powers grounds.²⁷ Those concerns, expressed by several Senators in opposition to the Act, were not addressed by the Act's proponents. Instead, these proponents focused their concerns on the enormous rise in frivolous lawsuits filed by prisoners and the alleged micro-management of state prisons by the federal courts.²⁸ Although one might expect legislation with such far reaching effects as the PLRA to be the subject of significant debate, the legislative history of the statute is minimal.²⁹ The PLRA originated in the House of Representatives as H.R. 667, the Violent Criminal Incarceration Act of 1995.³⁰ It was later added to an omnibus appropriations bill, which was vetoed by President Clinton

²⁷ See *Overhauling the Nation's Prisons*, *supra* note 2 (statement of Associate Attorney General John Schmidt warning the committee that the PLRA was subject to attack on separation of powers grounds), reprinted in 142 CONG. REC. S2297-2300 (daily ed. Mar. 19, 1996).

²⁸ See, e.g., 141 CONG. REC. S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl); 141 CONG. REC. S14,316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).

²⁹ *Benjamin v. Jacobson*, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (noting that "a single Senate hearing before the Judiciary Committee, one substantive House Report, and some floor debate is all we can find"), *aff'd in part, rev'd in part*, No. 96-7957 (2d Cir. Aug. 26, 1997). Research has not disclosed much beyond what the district court in *Benjamin* found. See 142 CONG. REC. S3703-04 (daily ed. Apr. 19, 1996); 142 CONG. REC. S2296-2300 (daily ed. Mar. 19, 1996); 141 CONG. REC. H14,105-06 (daily ed. Dec. 6, 1995); 141 CONG. REC. S14,626-29 (daily ed. Sept. 29, 1995); 141 CONG. REC. S14,413-14, S14,417-19 (daily ed. Sept. 27, 1995); 141 CONG. REC. S14,316-17 (daily ed. Sept. 26, 1995); *Overhauling the Nation's Prisons*, *supra* note 2; 141 CONG. REC. S7524-27 (daily ed. May 25, 1995); H.R. REP. No. 104-21 (1995).

³⁰ H.R. REP. No. 104-21 (1995). H.R. REP. No. 104-21 was the report accompanying H.R. 667. See H.R. 667, 104th Cong. (1995). Title II of H.R. 667 covered frivolous inmate litigation and was called the Stopping Abusive Prisoner Lawsuits Act. Title III of H.R. 667 covered limitations on prospective relief and was called the Stop Turning Out Prisoners Act (STOP). Those two titles, with minor modifications, along with other provisions, became what is now the PLRA. The PLRA itself was Title VIII of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

in December 1995.³¹ The President was then presented with another appropriations bill, again including the PLRA, and on April 26, 1996, he signed that bill into law.³²

1. Separation of Powers Concerns

In his testimony before the Senate Judiciary Committee in March 1996, Associate Attorney General John Schmidt expressed concerns about the constitutionality of the PLRA.³³ Schmidt was particularly concerned with the provision requiring immediate termination of prospective relief.³⁴

The application of these restrictions to such relief raises constitutional concerns under the Supreme Court's recent decision in *Plaut v. Spendthrift Farm, Inc.* The Court held in that case that legislation which retroactively interferes with final judgments can constitute an unconstitutional encroachment on judicial authority [T]he application of proposed 18 U.S.C. 3626(b) to orders in pre-enactment final judgments would raise serious constitutional problems.³⁵

Although Schmidt did express doubt as to whether the decision in *Plaut* was fully applicable to prospective long term relief,³⁶ his concerns were clearly identified in the record and were adopted by at least six Senators.³⁷ Interestingly, proponents of the Act did not address the claims made by Schmidt.

³¹ 142 CONG. REC. 3704-05 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham) (noting that President Clinton's veto was not based upon the provisions of the PLRA, but rather that it was based on the ongoing fight between Congress and the President over balancing the federal budget).

³² See *Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir. 1996).

³³ See *Overhauling the Nation's Prisons*, *supra* note 2 reprinted in 142 CONG. REC. S2297-2300 (daily ed. Mar. 19, 1996). Mr. Schmidt's testimony was given during the Senate Judiciary Committee's hearings on what was then the Stop Turning Out Prisoners Act (STOP). For the procedural history of the PLRA, see *supra* notes 30-32 and accompanying text.

³⁴ See 18 U.S.C.A. § 3626(b).

³⁵ 142 CONG. REC. S2299 (daily ed. Mar. 19, 1996) (citing *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)).

³⁶ 142 CONG. REC. S2299 (daily ed. Mar. 19, 1996).

³⁷ See 142 CONG. REC. S2297 (daily ed. Mar. 19, 1996) (letter to Attorney General Janet Reno from Senators Fred Thompson, James M. Jeffords, Edward M. Kennedy, Joseph R. Biden, Jr., and Jeff Bingaman). The Senators suggested that the "Administration negotiate changes in the PLRA that remedy the serious . . . problems outlined by Mr. Schmidt and other experts." *Id.* See also 142 CONG. REC. S2297-2300 (daily ed. Mar. 19, 1996) (statement of Sen. Simon printing in the record the separation of powers concerns of Mr. Schmidt).

2. Proponents' Concerns

a. *Curtailing Frivolous Inmate Lawsuits*

Much of the early legislative history of the PLRA focused on the rise in frivolous inmate litigation.³⁸ Then Senator Robert Dole, one of several sponsors of an earlier version of the PLRA, noted that the number of claims of cruel and unusual punishment had grown from 6,600 in 1975 to more than 39,000 in 1994.³⁹ Senator Dole also cited an analysis conducted by the National Association of Attorneys General, which estimated the financial impact of frivolous inmate litigation to be approximately \$81.3 million annually.⁴⁰ Another sponsor of an earlier version of the PLRA, Senator Jon Kyl, added that more than one out of every four cases filed in federal court were brought by prisoners.⁴¹ He further noted that the "courts have complained about the abundance of such cases[,] and that such cases often are meritless."⁴²

³⁸ See, e.g., 141 CONG. REC. S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl reading into the record an article; see Walter Berns, *Sue the Warden, Sue the Chef, Sue the Gardener . . .*, WALL ST. J., Apr. 24, 1995, at A12, documenting frivolous lawsuits filed by prisoners). In the *Wall Street Journal* article, Berns writes: "Among [a federal appeals court judge's] examples of 'excessive filings': more than 100 by Harry Franklin . . . , 184 in three years by John Robert Demos, and-so far the winning score-more than 700 by the 'Reverend' Clovis Carl Green Jr." *Id.* (internal quotations in original). Mr. Berns describes the PLRA as a reasonable way of cutting down on frivolous prisoner lawsuits. *Id.* Mr. Berns laments prisoners use of 42 U.S.C. § 1983 to "complain of just about anything and everything." *Id.* Such prisoner complaints, according to Mr. Berns, include claims of rape by prison guards and claims that being served the wrong kind of peanut butter has constitutional significance. *Id.* Senator Kyl offered for the record two David Letterman-style "Top Ten" lists. 141 CONG. REC. S14,629-30 (daily ed. Sept. 29, 1995) (offering such examples as an inmate who sued because his Gameboy electronic game was taken away, one who sued because he was not invited to a pizza party, one who sued claiming that being forced to listen to country and western music constituted cruel and unusual punishment, and one who sued 66 corrections officials for implanting mind control devices).

³⁹ 141 CONG. REC. S7524 (daily ed. May 25, 1995) (quoting Berns, *supra* note 38, at A12).

⁴⁰ 141 CONG. REC. S14,417-18 (daily ed. Sept. 27, 1995) (noting that "the vast majority of the \$81.3 million figure is attributable to . . . non-meritorious cases").

⁴¹ 141 CONG. REC. S7526 (daily ed. May 25, 1996). Senator Kyl noted that, according to the Administrative Office of the U.S. Courts, 60,086 of the 238,590 district court cases filed in 1994 were filed by prisoners.

⁴² *Id.*

Opponents of the PLRA did not take issue with the legislation's objective of reducing the number of frivolous lawsuits filed by prisoners.⁴³ Their concern was that the PLRA went much further than necessary to accomplish this goal.⁴⁴ Opponents argued that by drastically limiting the ability of prisoners to file suit, the PLRA also had the effect of limiting the ability of prisoners to remedy genuine constitutional violations caused by prison overcrowding, deficiencies in prison management, and abuses by prison officials and other prisoners.⁴⁵

b. *Stopping the Alleged Micro-Management of State Prisons*

In addition to concerns over the rise in frivolous inmate litigation, proponents of the PLRA argued that the legislation was necessary to curtail district court's micro-management of state run prisons. According to one estimate, the prison systems of more than thirty states are subject to federal court oversight.⁴⁶ Proponents argued that the federal bench has gone too far in managing our nation's prisons, and has over-

⁴³ See, e.g., 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) (expressing discontent with the PLRA because it went much farther than merely reducing the number of frivolous lawsuits); *Id.* at S2297 (statement of Sen. Simon) (describing the PLRA as going much too far).

⁴⁴ *Id.* at S2296-97.

⁴⁵ Opponents cited examples of alleged constitutional violations which were the subject of prison consent decrees and would be affected by the legislation. See, e.g., 141 CONG. REC. S14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Biden) (noting that children located in a juvenile detention facility in Pennsylvania at 160% of capacity were often beaten by staff members using chains and other objects and that such problems were not resolved until a court order was entered). See also 142 CONG. REC. S2297 (daily ed. Mar. 19, 1996) (statement of Sen. Simon) (noting that "[h]istory is replete with examples of egregious violations of prisoners' rights . . . [revealing] abuses and inhumane treatment which cannot be justified no matter what the crime."). Sen. Simon also noted that prison overcrowding creates a serious threat to the public, prison officials, and the prisoners themselves. *Id.* The PLRA, he further noted, makes it nearly impossible for courts to impose population caps because it requires findings that were never made when the litigation was commenced. *Id.* See 18 U.S.C.A. § 3626(a) (text reprinted *supra* note 10).

⁴⁶ See *Overhauling the Nation's Prisons*, *supra* note 2 (July 27, 1995) (statement of Sen. Hatch (citing CRIMINAL JUSTICE INSTITUTE, INC., THE CORRECTIONS YEARBOOK (1994))). As of January 1994, some 244 institutions in 34 jurisdictions were under federal court control. *Id.* 24 of those institutions had population caps. *Id.*

stepped its equitable remedial power by requiring prison officials to comply with consent decrees.⁴⁷ One of the Act's proponents, Senator Spencer Abraham, argued that compliance with federal court consent decrees "undermine[s] the legitimacy and punitive deterrent effect of prison sentences."⁴⁸

In response to charges that states face an enormous fiscal burden in defending prison condition lawsuits, opponents of the Act cited the fiscal impact of the PLRA on the federal court system.⁴⁹ Section 3626(b)(1), which provides for termination of prospective relief one year after denial of a motion to terminate or two years after the approval of such relief, plainly invites continued relitigation of prison consent decrees. The legislation does not appropriate any additional funds to the federal courts to offset the cost of this inevitable litigation.⁵⁰

In his testimony before the Senate Judiciary Committee, Steve J. Martin, a former official with the Texas Department of Corrections, offered some practical reasons why the PLRA's limitation on consent decrees is misguided.⁵¹ Martin noted that prison consent decrees are often the product of endless hours of extensive negotiations between prison officials and inmates, which are "carefully tailored to a particularized set of factual circumstances."⁵² He further testified that the termination of these consent decrees will force corrections officials across the nation to immediately prepare for trial.⁵³ Martin took issue with Congress simply stripping the states of their ability to use consent decrees to remedy constitutional violations.⁵⁴

⁴⁷ See, e.g., *Overhauling the Nation's Prisons*, *supra* note 2 (July 27, 1995) (statement of Sen. Hatch).

⁴⁸ 141 CONG. REC. S14,316 (daily ed. Sept. 26, 1995).

⁴⁹ 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy quoting an estimate by the Administrative Office of the United States Courts that the PLRA would cost the federal court system \$239 million).

⁵⁰ *Id.*

⁵¹ *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of former corrections official Steve J. Martin).

⁵² *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of former corrections official Steve J. Martin).

⁵³ *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of former corrections official Steve J. Martin).

⁵⁴ Mr. Martin urged the committee to leave it up to the states to decide whether to settle this type of litigation or to proceed to trial. *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of former corrections official Steve J. Martin).

The difference of opinion over what effect district court intervention has had on state criminal justice systems is evident from examining the remarks made on both sides of a controversy involving Philadelphia's prison system. Lynne Abraham, the District Attorney of Philadelphia and an early proponent of the Act, testified before the Subcommittee on Crime of the House Judiciary Committee about the effect of a court imposed prison population cap contained in a consent decree at issue in the case of *Harris v. City of Philadelphia*.⁵⁵ According to Abraham, judges in Philadelphia are not able to make individualized determinations of bail.⁵⁶ Instead, the determination of whether to send to jail a defendant who either cannot afford bail or who is denied bail rests upon whether the defendant has been charged with a violent crime.⁵⁷ She further noted that the result of this policy is that the number of bench warrants for defendants who fail to show up for trial has increased from 18,000 to 50,000.⁵⁸ Abraham attributed some 9,732 new crimes in an eighteen month period to the release of prisoners as a result of the population cap.⁵⁹ The micro-man-

⁵⁵ See *Subcommittee on Crime of the Judiciary Committee of the House of Representatives, Testimony January 19, 1995*, 104th Cong. (1995) [hereinafter *Subcommittee on Crime*] (testimony of Lynne Abraham). See also *Harris v. City of Philadelphia*, 47 F.3d 1311 (1995) (discussing the long history of court involvement with the Philadelphia consent decrees since the inception of a prisoner suit in 1982 claiming that overcrowding violated prisoners rights under the First, Eighth, Ninth and Fourteenth Amendments). The consent decrees at issue in *Harris*, referred to by Ms. Abraham in her testimony, were first approved in 1986 and created a prison population cap in the Philadelphia prison system. *Id.* at 1315. Another consent decree was entered into in 1991, because the city was unable to comply with the previous agreement. *Id.* at 1316.

⁵⁶ *Subcommittee on Crime, supra* note 55 (testimony of Lynne Abraham).

⁵⁷ *Subcommittee on Crime, supra* note 55 (testimony of Lynne Abraham). She noted that non-violent crimes include: "stalking, car jacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terroristic threats, [and] gun charges" *Subcommittee on Crime, supra* note 55 (testimony of Lynne Abraham).

⁵⁸ *Subcommittee on Crime, supra* note 55 (testimony of Lynne Abraham). Ms. Abraham noted that the police do not bother looking for these fugitives because they will be released anyway due to the population cap. *Subcommittee on Crime, supra* note 55 (testimony of Lynne Abraham).

⁵⁹ *Subcommittee on Crime, supra* note 55 (testimony of Lynne Abraham) (noting also that the failure to appear rate of prison cap releases exceeds that of traditional bail releases).

agement of the state's prisons by federal courts, she charged, is an "unnecessary [intrusion] into one of the most basic functions of state government—its criminal justice system."⁶⁰

In response to Abraham's criticism of the federal district court's alleged intrusion into the management of Philadelphia jails, David Richman, attorney for the plaintiffs in *Harris*, testified before the Senate Judiciary Committee during its hearings on the PLRA.⁶¹ According to Richman, the decision to settle the lawsuit and enter into the consent decree was made by the Mayor of Philadelphia because it was in the public interest to improve the city's jails and its criminal justice system.⁶² Richman made clear that the prison "cap," as described by Abraham, was actually a "threshold which, when crossed, triggers a moratorium on the admission of persons *charged* with non-violent crimes and lesser drug offenses."⁶³ He asserted that the "cap" does not apply to those *convicted* of crimes.⁶⁴ The proponents of the legislation were persuaded by Abraham's testimony.⁶⁵

The minimal legislative history of the PLRA has two main themes. Proponents argued that the legislation was necessary to curtail frivolous inmate litigation and to end the alleged micro-management of state run institutions. In response, the opposition argued that the PLRA went too far by curtailing

⁶⁰ *Subcommittee on Crime*, *supra* note 55 (testimony of Lynne Abraham). Ms. Abraham stated that Philadelphia is in the process of building new prisons, and that the city is "committed to devoting adequate resources to ensure humane prison conditions." The fact that Philadelphia jails continue to be subject to these consent decrees is largely a result of the city's inability to build jail cells at a quick enough pace in the thirteen years since the consent decrees were entered. *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of David Richman, attorney for the plaintiffs in *Harris v. City of Philadelphia*).

⁶¹ *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of David Richman).

⁶² *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of David Richman).

⁶³ *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of David Richman) (emphasis added). Mr. Richman also noted that the then current prison population in Philadelphia is actually 20% to 40% over the agreed upon capacity. *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of David Richman).

⁶⁴ *Overhauling the Nation's Prisons*, *supra* note 2 (testimony of David Richman) (emphasis added).

⁶⁵ 141 CONG. REC. S14,316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) (citing the same statistics presented by Ms. Abraham in her testimony before the House of Representatives).

courts' ability to remedy genuine constitutional violations. Debate over the constitutionality of the Act was more limited than the debate over the need for such legislation. Separation of powers concerns, raised by Associate Attorney General Schmidt and echoed by several Senators, were never addressed by the Act's proponents.⁶⁶

C. Recent PLRA Litigation

Since the PLRA was enacted in April 1996, there have only been a small number of courts that have passed on the constitutionality of the Act.⁶⁷ Considering the number of states with consent decrees, more decisions addressing the Act's constitutionality are sure to be decided in the near future. To illustrate the division between the courts that have upheld the Act and those that have struck it down as a violation of separation of powers, it is helpful to briefly examine some recent decisions on both sides. Two district courts in Michigan have recently issued a total of four decisions (the

⁶⁶ One commentator recently tried to explain why Congress is apt to ignore warnings of a statute's unconstitutionality. See Paul Reidinger, *Politically Expedient*, 82-Aug A.B.A. J. 79 (1996). Reidinger argues that "[p]artisans invoke the Constitution when it seems to support their argument, and ignore it when it doesn't." *Id.* He cites recent examples from the 104th Congress including the Communications Decency Act, 47 U.S.C. § 223 (West Supp. I 1996). The Communications Decency Act was unanimously struck down by the Supreme Court as violative of the First Amendment. See *ACLU v. Reno*, 117 S. Ct. 2329 (1997). Reidinger also cites the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), which is destined for the Supreme Court if and when the Hawaii Supreme Court determines the legality of gay marriages, see *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding a sex based marriage statute, Haw. Rev. Stat. § 572-1 (1993), violative of Hawaii's Equal Protection Clause).

⁶⁷ See *supra* note 5. Several courts have avoided passing on the constitutionality of the PLRA by interpreting the Act so as to not raise constitutional concerns. See *Benjamin v. Jacobson*, No. 96-7957, slip op. at 7-12 (2d Cir. Aug. 26, 1997) (avoiding separation of powers concerns by distinguishing the term "prospective relief," as used in the Act, from a consent decree containing a provision for prospective relief and recognizing that without such a distinction the Act would raise serious concerns under *Plaut v. Spendthrift Farm, Inc.*); *Inmates of Suffolk County Jail v. Sheriff of Suffolk County*, 952 F. Supp. 869 (D. Mass. 1997) (same); *Madrid v. Gomez*, 940 F. Supp. 247 (N.D. Cal. 1996) (avoiding separation of powers concerns by interpreting the PLRA's limitations on prospective relief as inapplicable to a provision of a consent decree setting the compensation of a special master in a prison conditions lawsuit); *Coleman v. Wilson*, 933 F. Supp. 954 (E.D. Cal. 1996) (same).

"Michigan Decisions") striking down certain provisions of the Act as unconstitutional.⁶⁸ In contrast, the Southern District of New York recently upheld one of the provisions of the Act as constitutional.⁶⁹ On August 26, 1997, the Court of Appeals for the Second Circuit affirmed the opinion of the Southern District of New York with respect to the separation of powers doctrine.⁷⁰

1. The Michigan Decisions

In three decisions involving two different consent decrees, the Eastern and Western Districts of Michigan struck down the stay provisions of the PLRA as unconstitutional.⁷¹ All three opinions, *Hadix-Eastern District I*, *Hadix-Western District*, and *United States v. Michigan*, addressed the narrow issue of whether prospective relief should be stayed pending the outcome of a final determination as to whether the court should terminate the consent decrees.⁷² In a later decision of

⁶⁸ *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996); *Hadix v. Johnson*, 933 F. Supp. 1360 (E.D. Mich. 1996); *Hadix v. Johnson*, 933 F. Supp. 1362 (W.D. Mich. 1996); *United States v. Michigan*, No. 1:84 CV 63 (W.D. Mich. July 3, 1996).

⁶⁹ *Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, No. 96-7957 (2d Cir. Aug. 26, 1997).

⁷⁰ *Benjamin v. Jacobson*, No. 96-7957 (2d Cir. Aug. 26, 1997). The Second Circuit affirmed the district court's decision that the relevant provisions of the Act were constitutional under the separation of powers doctrine. The court, however, disagreed that the PLRA required vacatur of the consent decree. *Benjamin*, No. 96-7957, slip op. at 3. The Second Circuit's decision is discussed more fully *infra* note 139.

⁷¹ See *Hadix v. Johnson*, 933 F. Supp. 1360 (E.D. Mich. 1996) (Feikens, J.) [hereinafter *Hadix-Eastern District I*]; *Hadix v. Johnson*, 933 F. Supp. 1362 (W.D. Mich. 1996, (Enslen, J.) [hereinafter *Hadix-Western District*]; *United States v. Michigan*, No. 1:84 CV 63 (W.D. Mich. July 3, 1996) (Enslen, J.). The consent decree at issue in the *Hadix* litigations, involving conditions at a Michigan prison, was split between the Eastern and Western Districts of Michigan: The *Hadix-Western District* case covered medical and mental health care and access to the courts, *Hadix-Western District*, 933 F. Supp. at 1364, and the *Hadix-Eastern District I* case covered the remaining areas including sanitation, fire safety, overcrowding and protection from harm, volunteers, food service, management, operations, mail, compliance, and inspection. *Hadix-Eastern District I*, 933 F. Supp. at 1360. The transfer was entered by stipulation of the parties and under order of the Sixth Circuit. *Id.* at 1360 n.1. The other consent decree, at issue in *United States v. Michigan*, covered areas, similar to the *Hadix* litigations, at separate prison facilities. *United States v. Michigan*, No. 1:84 CV 63, slip op. at 1-2.

⁷² *Hadix-Eastern District I*, 933 F. Supp. at 1361; *Hadix-Western District*, 933 F. Supp. at 1365; *United States v. Michigan*, No. 1:84 CV 63, slip op. at 17.

the Eastern District of Michigan in the Hadix litigation, the court struck down the automatic termination provision of the PLRA as unconstitutional.⁷³ The two consent decrees in the Michigan Decisions covered similar areas.⁷⁴

a. *Hadix-Western District*

The complaint, which culminated in the consent decree at issue in the Hadix litigations, was filed in 1980 and alleged violations of the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.⁷⁵ The claims were resolved by a consent decree approved by Judge Feikens of the Eastern District of Michigan.⁷⁶ By order of the Sixth Circuit, the areas covered by the Hadix consent decree were split between the Eastern and Western Districts of Michigan.⁷⁷ The Western District retained control over the parts of the consent decree dealing with medical and mental health care and access to the courts.⁷⁸

In *Hadix-Western District*, Chief Judge Richard A. Enslen noted the enormous practical constraint the stay provision of the PLRA puts on the district court.⁷⁹ The court found that, given the thirty day limitation imposed by the stay provision, it is a particularly daunting task to determine whether each of the numerous orders given since the approval of the consent decree in 1985 complied with the requirements of the Act.⁸⁰ Citing the complexity of the issues involved, the court determined that it would be impossible to come to a final decision on the termination of the consent decree before the stay would automatically go into effect.⁸¹

⁷³ *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996) (Feikens, J.) [hereinafter *Hadix-Eastern District II*].

⁷⁴ See *supra* note 71.

⁷⁵ *Hadix-Western District*, 933 F. Supp. 1362, 1364 (W.D. Mich. 1996).

⁷⁶ *Id.*

⁷⁷ *Hadix-Eastern District I*, 933 F. Supp. 1360, 1360 (E.D. Mich. 1996).

⁷⁸ *Hadix-Western District*, 933 F. Supp. at 1364.

⁷⁹ *Id.*

⁸⁰ *Id.* The Act requires that the "relief remains necessary to correct a current or ongoing violation of a Federal right; that any such relief extends no further than necessary to correct the violation of the Federal right; that it is narrowly drawn; and [that it] is the least intrusive means to correct the violation." *Id.* See 18 U.S.C.A. § 3626(a)(1) (West Supp. 1997)

⁸¹ *Hadix-Western District*, 933 F. Supp. at 1364 (noting also that the stay

Before reaching the constitutional arguments against the PLRA, Chief Judge Enslen first considered the only non-constitutional argument presented—namely, that the PLRA is superseded by the Federal Rules of Civil Procedure.⁸² The Rules Enabling Act (“REA”) grants to the Supreme Court the power to prescribe rules of practice and procedure.⁸³ The REA provides, *inter alia*, that any law “in conflict with such rules shall be of no further force or effect after such rules have taken effect.”⁸⁴ The plaintiffs in *Hadix-Western District* argued that the PLRA was in conflict with Rule 60(b), which provides for a motion for relief from judgment “upon such terms as are just,” and Rule 62(b), which provides for a stay of a judgment at the trial court’s discretion.⁸⁵ Chief Judge Enslen rejected the plaintiffs’ argument because he found that the PLRA was not in direct conflict with either rule.⁸⁶ The enforcement of the stay provision did not affect a court’s independent authority to grant relief from judgment under Rule 60(b) or to grant a stay in the court’s discretion under Rule 62(b).⁸⁷

The court then turned its attention to the constitutional arguments against the PLRA. The court held that the stay provision encroached upon the power of the judiciary, and was thus in violation of the doctrine of separation of powers.⁸⁸ According to Chief Judge Enslen, through the stay provision of the PLRA, “Congress automatically grants the movants relief, albeit temporarily, with no provision for a case by case determination.”⁸⁹

would go into effect before the parties finished the briefing schedule required by local court rules).

⁸² *Id.* at 1365. A court must consider non-constitutional grounds for invalidating a statute before reaching constitutional grounds. *Id.* (citing *Jean v. Nelson*, 472 U.S. 846, 854 (1985)).

⁸³ See 28 U.S.C. §§ 2071-2077 (1994). Pursuant to the REA, the Court adopted the Federal Rules of Civil Procedure in 1937.

⁸⁴ 28 U.S.C. § 2072(b) (1994).

⁸⁵ *Hadix-Western District*, 933 F. Supp. at 1365 (citing FED. R. CIV. P. 60(b); 62(b)).

⁸⁶ *Id.* (citing *Griffith Co. v. N.L.R.B.*, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976), *cert. denied*, *Waggoner v. Griffith Co.*, 434 U.S. 854 (1977)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1366-67.

⁸⁹ *Id.* at 1366.

The court distinguished a provision of the bankruptcy code, where Congress can provide an automatic stay.⁹⁰ The court reasoned that since 11 U.S.C. § 362, which provides for an automatic stay against a debtor upon filing of a bankruptcy petition, preserves the status quo and the stay provision of the PLRA reverses the status quo, the two provisions are distinguishable.⁹¹ The stay at issue in the bankruptcy code does not alter the situation affecting the debtor. Conversely, the stay at issue in the PLRA does alter the situation affecting prisons being operated under a consent decree. Additionally, the court noted that the Bankruptcy Clause of the Constitution⁹² "gives Congress special powers to legislate in the area of bankruptcy law."⁹³

Chief Judge Enslen also held that the PLRA violated the doctrine of separation of powers as recently enunciated by the Supreme Court in *Plaut v. Spendthrift Farm, Inc.*⁹⁴ The Court in *Plaut* held that Congress lacks the power to retroactively mandate the reopening of a final judgment of an Article III court.⁹⁵ In *Plaut*, the Court limited its holding to "final judgments wherein the right to appeal has been exhausted, waived or elapsed."⁹⁶

Chief Judge Enslen applied this rule to the PLRA by virtue of another Supreme Court case: *Rufo v. Inmates of Suffolk County Jail*.⁹⁷ In *Rufo*, the Supreme Court held that a consent decree, which in some respects is contractual in nature, "is subject to the rules generally applicable to other judgments and decrees."⁹⁸ According to Chief Judge Enslen, "[o]ne of those rules is the rule relating to finality of judgments."⁹⁹ Since the parties waived the right to appeal the consent decree, the judgment by which it was entered is final within the

⁹⁰ *Hadix-Western District*, 933 F. Supp. at 1367 n.3 (citing 11 U.S.C. § 362 (1994)).

⁹¹ *Id.*

⁹² U.S. CONST. art. I, § 8, cl. 4.

⁹³ *Hadix-Western District*, 933 F. Supp. at 1367 n.3.

⁹⁴ *Id.* at 1367 (citing 115 S. Ct. 1447 (1995)).

⁹⁵ *Plaut*, 115 S. Ct. at 1453.

⁹⁶ *Hadix-Western District*, 933 F. Supp. at 1368 (citing *Plaut*, 115 S. Ct. at 1457).

⁹⁷ 502 U.S. 367 (1992).

⁹⁸ *Id.* at 378.

⁹⁹ *Hadix-Western District*, 933 F. Supp. at 1368.

meaning of the Supreme Court in *Plaut*.¹⁰⁰ The court rejected defendants' argument that a consent decree is not a final judgment.¹⁰¹ Because the rights involved in a prison consent decree are constitutional in nature, and thus private, the court in *Hadix-Western District* held that the decision in *Wheeling Bridge* was distinguishable.¹⁰²

b. *United States v. Michigan*

In *United States v. Michigan*, Chief Judge Enslen came to the same conclusions as he did in *Hadix-Western District*. The consent decree in *United States v. Michigan* allowed partial termination upon a finding that a particular violation has been corrected; the court was forced to address whether such was the case before considering the effect of the PLRA.¹⁰³ The outcome of *United States v. Michigan* illustrates that the federal courts already have the power to terminate a consent decree when the violations complained of are corrected.¹⁰⁴ In addition to striking down the stay provision as unconstitutional, the court also struck from the consent decree several provisions that had been remedied.¹⁰⁵ The court determined, based upon stipulation of the parties and the report of an "independent expert," that provisions regarding "sanitation, safety and hygiene, fire safety, crowding and protection from harm, access to the courts, and legal mail" should be deleted from the consent decree.¹⁰⁶ A provision governing the "placing of high-risk

¹⁰⁰ *Id.*

¹⁰¹ *Id.* That argument was based upon the 1855 Supreme Court decision in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, which held that Congress can retroactively modify the prospective effect of injunctive relief where public rights common to all are at stake. 59 U.S. 421, 431 (1856).

¹⁰² *Hadix-Western District*, 933 F. Supp. 1368. The court also struck down the stay provision on due process grounds. *Id.* at 1369. That argument is beyond the scope of this note.

¹⁰³ *United States v. Michigan*, No. 1:84 CV 63, slip op. at 3 (W.D. Mich. 1996) (noting that "the Court reviews compliance under the [consent decree] and deletes provisions where it finds compliance" and that "the Court considers motions relative to provisions with which defendants have not complied, including arguments that full compliance is not necessary based on relevant constitutional standards"). The *Hadix* consent decree, however, required compliance with all provisions prior to termination. *Id.*

¹⁰⁴ See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992).

¹⁰⁵ *United States v. Michigan*, No. 1:84 CV 63, slip op. at 3-4.

¹⁰⁶ *Id.* at 4.

prisoners with prisoners in lower [risk] classifications and in settings that do not meet the defendants' own standards for their secure confinement" was not terminated pursuant to the court's own authority to modify the consent decree.¹⁰⁷ The court was concerned about the continuing violation of that requirement and its fear that the defendants could not maintain compliance with it.¹⁰⁸

Consistent with his decision in *Hadix-Western District*, Chief Judge Enslen found that there was "no possible way the Court could decide the motion to terminate the Consent Decree" before the stay provision was to take effect in thirty days, pursuant to section 3626(e).¹⁰⁹ The remainder of his opinion in *United States v. Michigan* is nearly identical to his opinion in *Hadix-Western District*. Accordingly, the court came to the same conclusions as were made in *Hadix-Western District*: the stay provision of the PLRA was not superseded by Federal Rules of Civil Procedure 60(b) and 62(b);¹¹⁰ the provision encroached upon the powers of the judiciary in violation of separation of powers;¹¹¹ it altered a final judgment of an Article III court;¹¹² and finally, it violated the due process clause.¹¹³

c. *Hadix Eastern District I*

Judge John Feikens of the Eastern District of Michigan approved the consent decree at issue in the *Hadix* litigations in 1985.¹¹⁴ In 1992 and 1993 certain areas covered by the consent decree were transferred to the Western District of Michigan leaving the following areas behind to be administered by the Eastern District: "Sanitation; Safety and Health; . . . Fire Safety; Overcrowding . . . ; Volunteers; . . . Food Service; Man-

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Michigan*, No. 1:84 CV 63, slip op. at 6.

¹¹⁰ *Id.* at 7-9.

¹¹¹ *Id.* at 9-12.

¹¹² *Id.* at 12-16.

¹¹³ *Id.* at 16-17.

¹¹⁴ *Hadix-Western District*, 933 F. Supp. at 1364.

agement; Operations; Mail; Compliance; and Inspection.”¹¹⁶ In *Hadix Eastern District I*, Judge Feikens struck down the stay provision of the PLRA as violative of separation of powers and due process.¹¹⁶

The court noted that staying the consent decree could have profound effects.¹¹⁷ Judge Feikens explained that the prison was undergoing major structural and organizational changes as a result of the consent decree.¹¹⁸ He further observed that although it was reasonable to assume that the project would not be suspended as a result of the motion to stay, the defendants did have the power to request such relief under the PLRA.¹¹⁹ The court rejected the use of the All Writs Act,¹²⁰ which enables a court to “‘preserve [its] jurisdiction or maintain the status quo’ pending the questions before it.”¹²¹ The court found it unnecessary to resort to using the All Writs Act, as the stay provision was a “palpable constitutional violation in which Congress takes over a court’s docket and intrudes on a court’s final judgment”¹²² Instead of discussing the precedent that led to the court’s conclusion that the stay provision of the PLRA was unconstitutional, the court incorporated by reference the decision in *Hadix-Western District*.¹²³

d. *Hadix-Eastern District II*

In November 1996, Judge Feikens issued a second opinion in the *Hadix* case, striking down the automatic termination provision of the PLRA in *Hadix-Eastern District II*.¹²⁴ Although the plaintiffs argued that the provision also violated

¹¹⁵ *Hadix-Eastern District I*, 933 F. Supp. at 1360.

¹¹⁶ *Id.* at 1361-62.

¹¹⁷ *Id.* at 1361.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 28 U.S.C. § 1651(a) (1994).

¹²¹ *Hadix-Eastern District I*, 933 F. Supp. at 1361 (quoting *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658, 671 n.22 (1963)). The All Writs Act provides: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Hadix-Eastern District I*, 933 F. Supp. at 1361 n.3 (citing 28 U.S.C. § 1651(a)).

¹²² *Hadix-Eastern District I*, 933 F. Supp. at 1361.

¹²³ *Id.* at 1361-62.

¹²⁴ 947 F. Supp. 1100 (E.D. Mich. 1996).

equal protection and due process, the court limited its discussion to separation of powers doctrine. Before addressing the PLRA directly, the court first made it clear that the purpose of the consent decree was to ensure the constitutionality of confinement.¹²⁵ Although the consent decree settled the dispute between the parties, Judge Feikens noted that it would "be improper to conclude . . . that no constitutional violations exist."¹²⁶

The court first addressed the standard for modification of a consent decree in institutional reform cases as recently enunciated by the Supreme Court in *Rufo v. Inmates of Suffolk County Jail*.¹²⁷ The Court in *Rufo* cited three situations where modification is proper: "1) when changed factual conditions make compliance with the decree substantially more onerous; 2) when a decree proves to be unworkable because of unforeseen obstacles; or 3) when enforcement of the decree without modification would be detrimental to the public interest."¹²⁸ The Court held that the proposed modification should conform to the change in circumstances and not be rewritten so that it conforms to the constitutional floor.¹²⁹ Such is required "for a consent decree is a final judgment that may be reopened only to the extent that equity requires."¹³⁰ According to Judge Feikens, the *Rufo* standard for modification of a consent decree is a balancing of competing public and private interests:

The public's right in maintaining control over its institutions is protected through modification of a consent decree when a change in circumstances so requires. The parties' right to rely on a court order is protected by the limitation precluding a court, or Congress, from stripping a consent decree to the constitutional floor.¹³¹

¹²⁵ *Id.* at 1103.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1104 (citing 502 U.S. 367, 384 (1992)). *Rufo* is discussed more fully *infra* notes 191-219 and accompanying text.

¹²⁸ *Rufo*, 502 U.S. at 384.

¹²⁹ *Id.* at 391.

¹³⁰ *Id.*

¹³¹ *Hadix-Eastern District II*, 947 F. Supp. at 1107.

Turning its attention to the PLRA, the court in *Hadix-Eastern District II* took issue with the Act's use of the term "prospective relief."¹³² Injunctive relief, according to Judge Feikens, "affects conditions as they arise. Past injunctive relief cannot be changed as time cannot be turned back."¹³³ The court reasoned that it is not prospective relief that is being altered, but rather it is the consent judgment itself.¹³⁴

Having first resolved the issue of finality of a consent decree by applying *Rufo*, Judge Feikens then held that the rule of *Plaut v. Spendthrift Farm, Inc.* was fully applicable to the automatic termination provision of the PLRA.¹³⁵ In addition to striking down the automatic termination provision as violative of separation of powers, the court denied termination pursuant to Federal Rule of Civil Procedure 60.¹³⁶ Because the defendant prison officials had not yet fully complied with an alternate plan of compliance, the court held that termination "upon such terms as are just"¹³⁷ was not proper.¹³⁸

¹³² *Id.* at 1109.

¹³³ *Id.*

¹³⁴ *Id.* But see *Benjamin v. Jacobson*, No. 96-7957 (2d Cir. Aug. 26, 1997) (avoiding constitutional problems by interpreting "prospective relief" as the relief contained in the consent decree and not as the consent decree itself); *Inmates of Suffolk County Jail v. Sheriff of Suffolk County*, 952 F. Supp. 869 (D. Mass. 1997) (same).

¹³⁵ *Hadix Eastern District II*, 947 F. Supp. at 1109-10.

¹³⁶ *Id.* at 1112-13.

¹³⁷ See FED. R. CIV. P. 60(b).

¹³⁸ *Hadix-Eastern District II*, 947 F. Supp. at 1113.

2. *Benjamin v. Jacobson*¹³⁹

In *Benjamin v. Jacobson*, Judge Harold Baer, Jr. of the Southern District of New York upheld the automatic termination provision of the PLRA as constitutional.¹⁴⁰ Judge Baer rejected plaintiffs' contentions that the automatic termination

¹³⁹ The discussion in the text of *Benjamin v. Jacobson* is based on the district court's opinion in the case. See 935 F. Supp. 332 (S.D.N.Y. 1996). The Second Circuit delivered its opinion on August 26, 1997, just days prior to this Note going to press. Production requirements made it impossible to fully analyze this recent opinion of the Second Circuit. The following brief discussion is included here to help the reader understand some of the differences between the district court's opinion and the opinion of the Second Circuit. See *Benjamin v. Jacobson*, No. 96-7957 (2d Cir Aug 26, 1997).

As discussed more fully in the text, the district court upheld the automatic termination provision of the PLRA on separation of powers grounds and ordered that the consent decrees be vacated. *Benjamin*, 935 F. Supp. at 357. The Second Circuit affirmed the lower court's decision with respect to separation of powers, but reversed the court on the issue of vacating the consent decree. *Benjamin*, No. 96-7957, slip op. at 3.

To avoid striking down the Act, the Second Circuit followed the often cited rule that a court should adopt a construction of a statute "to avoid constitutional questions whenever such a construction is 'fairly possible' ". *Id.* at 11 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The ambiguity in the statute, according to the Second Circuit, comes from the term "prospective relief." See 18 U.S.C. § 3626(b)(2) (West Supp. 1997). The text of § 3626(b)(2) is included *supra* note 10.

The termination of prospective relief provided for under § 3626(b)(2) is subject to two different interpretations:

If "prospective relief" includes the past [consent decrees] themselves, then these are terminated and annulled under the law. If, instead, 'termination of prospective relief' means that no future relief-that is neither future enforcement nor articulation-is available in federal courts under past [consent decrees], then the [consent decrees] remain valid, but no longer subject to federal jurisdiction.

Benjamin, No. 96-7957, slip op. at 8. The Second Circuit adopted the latter interpretation after analyzing the of the statute. *Id.* at 9-10.

By interpreting "prospective relief" to mean the relief contained in the consent decrees and not the consent decrees themselves, the court was able to avoid a construction that it deemed would raise separation of powers concerns under *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995). *Benjamin*, No. 96-7957, slip op. at 21. Essentially, the court viewed the provision as merely restricting the jurisdiction of the federal courts to fashion relief. *Id.* According to the court, the plaintiffs are free to seek enforcement of the decrees in state court. *Id.* at 3. The court also avoided constitutional concerns under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), by adopting the same construction of the term "prospective relief" used to analyze *Plaut*. *Benjamin*, No. 96-7957, slip op. at 22-25.

¹⁴⁰ 935 F. Supp. 332 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, No. 96-7957 (2d Cir. Aug. 26 1997).

provision was superseded by the Federal Rules of Civil Procedure; and that the provision violated the doctrine of separation of powers, the Due Process Clause, and the Equal Protection Clause.

The first consent decree in *Benjamin* was issued in 1978, addressing prison conditions in New York City jails, including Rikers Island.¹⁴¹ The consent decrees covered areas such as environmental health and safety concerns and overcrowding.¹⁴² The City claimed that the consent decrees amounted to micro-management by the federal courts of state institutions. The court noted in response that "each consent decree by definition required [the city's] imprimatur."¹⁴³

The parties in *Benjamin* disagreed about the effectiveness of the consent decrees in remedying alleged constitutional violations. Despite claims by the City that allegations of Eighth Amendment violations were never proven, John Boston, the plaintiffs' attorney, noted that constitutional violations were found with respect to "protracted confinement in receiving rooms and overcrowding."¹⁴⁴ Mr. Boston alleged that the City was in contempt of the consent decrees and that in response, the City created the Office of Compliance Consultants

¹⁴¹ *Benjamin*, 935 F. Supp. at 342.

¹⁴² *Id.* The consent decrees at issue in *Benjamin v. Jacobson* were the result of a settlement agreement after a trial was conducted in 1976-77 in the case of *Benjamin v. Malcolm*. *Id.* at 342.

¹⁴³ *Id.* Michael F. Jacobson, Commissioner of the Department of Correction, suggested that the city was "coerced into signing the Consent Decrees [by] . . . 'court ordered' stipulations." *Id.* The court also noted that New York never accepted the offer by former Attorney General William Barr to use his office to be relieved from the burdens of such consent decrees as had Texas, Michigan, and Philadelphia. *Id.* (citing *Overhauling the Nations' Prisons*, *supra* note 2 (statement of William Barr)).

¹⁴⁴ *Benjamin*, 935 F. Supp. at 342 (citing *Benjamin v. Sielaff*, 752 F. Supp. 140 (S.D.N.Y. 1990); *Benjamin v. Malcolm*, 564 F. Supp. 668 (S.D.N.Y. 1983)). *Benjamin v. Sielaff* and *Benjamin v. Malcolm* were two of several decisions by the court involving the consent decree at issue in *Benjamin v. Jacobson*. See also *Benjamin v. Jacobson*, 923 F. Supp. 517 (S.D.N.Y. 1996) (modifying consent decree to restrict access to prison library because of excessive violence); *Benjamin v. Jacobson*, No. 75 Civ. 3073, 1995 WL 681297 (S.D.N.Y. Oct. 2, 1995) (modifying consent decree in the area of food service); *Benjamin v. Malcolm*, No. 75 Civ. 3073, 1995 WL 378529 (S.D.N.Y. June 26, 1995) (modifying consent decree to restrict the wearing of jewelry associated with gangs); *Benjamin v. Koehler*, 710 F. Supp. 91 (S.D.N.Y. 1989) (denying modification of consent decree to increase the number of detainees in certain facilities).

("OCC") to monitor the consent decrees.¹⁴⁵ Moreover, even after the creation of the OCC, the city was cited for noncompliance with the consent decrees.¹⁴⁶ In response, Commissioner Michael Jacobson of the Department of Corrections asserted that the City had responded to the alleged noncompliance by improving sanitation, maintenance and fire safety.¹⁴⁷ Before the court decided to vacate the consent decrees, Judge Baer noted:

Stripped of hyperbole and taking history into account, the Declarations [of the parties] suggest federal court oversight of prison conditions was valuable [T]he challenge is for the City and the Board of Correction to be vigilant and attentive to those [constitutional] guarantees.¹⁴⁸

Before considering the PLRA's constitutionality, the court in *Benjamin* reviewed the history of reform in prison conditions since colonial times.¹⁴⁹ At the conclusion of this somewhat lengthy review, the court noted that what was truly important was not the constitutionality of the Act, but rather the effect on prisoners' rights and prison conditions as a result of the PLRA.¹⁵⁰ By its own admission, the court's "concerns with this new legislation [were] myriad," but it was "constrained under the law to uphold it."¹⁵¹

¹⁴⁵ *Benjamin*, 935 F. Supp. at 342.

¹⁴⁶ *Id.* at 342 (citing *Benjamin v. Sielaff*, 752 F. Supp. 140 (S.D.N.Y. 1990)). In a report by the OCC in February 1996, non-compliance was evidenced in the areas of "fire safety, maintenance, and sanitation." *Id.*

¹⁴⁷ *Id.* at 343.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 338-40.

¹⁵⁰ *Benjamin*, 935 F. Supp. at 340. This portion of the opinion is quite curious. The court documented horrible prison conditions throughout this nation's history and accredited (in part) the use of consent decrees in reforming prisons and bringing them up to constitutional muster. *Id.* at 338-40.

¹⁵¹ *Benjamin*, 935 F. Supp. at 337 (noting that "It is not within [the court's] authority to determine whether . . . congressional judgment . . . is sound or equitable Our concern here, as often, is with power, not with wisdom.") (quoting *Flemming v. Nestor*, 363 U.S. 603, 611 (1960)). See also Deborah Pines, *City Freed of Consent Decrees on Jails*, N.Y.L.J., July 24, 1996, at 1 (in describing the decision in *Benjamin*, the author describes the decision of Judge Baer as "reluctant").

Judge Baer refused to address the constitutionality of § 802 of the PLRA as a whole,¹⁵² considering only the Act's requirements for prospective relief¹⁵³ and the automatic termination provision.¹⁵⁴ By deciding the defendants' motion to terminate the consent decree before the stay provision was to go into effect (30 days after filing of the motion), the court avoided passing on the constitutionality of the stay provision.¹⁵⁵ The court referred to two of the Michigan Decisions,¹⁵⁶ and while purportedly sharing concerns expressed therein, nevertheless upheld the Act.¹⁵⁷

¹⁵² *Benjamin*, 935 F. Supp. at 343 (noting that defendants based their motion solely on the automatic termination provisions of the PLRA, see 18 U.S.C.A. § 3626(b)(2) (West Supp. 1994), and that the Court would only consider that section along with the more general sections involved, since those were the only sections properly before the court). See 18 U.S.C.A. § 3626(a)(1); (b)(3).

¹⁵³ See 18 U.S.C.A. § 3626(a)(1). See also *supra* note 10.

¹⁵⁴ See 18 U.S.C.A. § 3626(b)(1); (b)(2). See also *supra* note 10.

¹⁵⁵ See 18 U.S.C.A. § 3626(e). See also *supra* note 10. By agreement of the parties, the court extended the date upon which the stay provision was to go into effect for an additional thirty days so that the United States would have "additional time to submit a memorandum of law on the constitutionality of the Act." *Benjamin*, 935 F. Supp. at 358 n.21. The stay provision, 18 U.S.C.A. § 3626(e)(2), does not provide the court with such discretion. That section provides: "Any prospective relief subject to a pending motion shall be automatically stayed during the period . . . beginning on the 30th day after such motion is filed." The Court asserted that the stay provision was not before it because it "disposed of [the] motion within the requisite time period." *Benjamin*, 935 F. Supp. at 358. This is contrary to the plain language of the statute, and therefore, the Court should have decided whether the stay provision is constitutional.

¹⁵⁶ *Benjamin*, 935 F. Supp. at 358 (citing *Hadix v. Johnson*, 933 F. Supp. 1360 (E.D. Mich. 1996); *United States v. Michigan*, No. 1:84 CV 63 (W.D. Mich. July 3, 1996)).

¹⁵⁷ *Benjamin*, 935 F. Supp. at 358. Curiously, the court did not elaborate on what concerns it shared with those opinions. Those courts considered the same precedents as the court in *Benjamin*, in striking down the stay provision, that the court in *Benjamin* used in upholding the automatic termination provision. Compare, e.g., *Hadix v. Johnson*, 933 F. Supp. 1362, 1368 (W.D. Mich. 1996) (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), for the proposition that the distinction between public and private rights is crucial in determining whether or not Congress has the power to modify a final judgment), with *Benjamin*, 935 F. Supp. at 348 (distinguishing *Wheeling Bridge* and holding the distinction between public and private rights irrelevant in separation of powers analysis). For a discussion of *Wheeling Bridge* see *infra* notes 225-35 and accompanying text.

The court quickly raised and disposed of the only non-constitutional¹⁵⁸ argument raised to challenge the PLRA: that it violated the REA.¹⁵⁹ The plaintiffs argued¹⁶⁰ that the automatic termination provision of the PLRA is in direct conflict with Federal Rule of Civil Procedure 60(b), which provides for a reconsideration of a final judgment "upon such terms as are just."¹⁶¹ The plaintiffs also argued that the stay provision of the PLRA was in direct conflict with Federal Rule of Civil Procedure 62(b), which provides that the stay of a final judgment is in the court's discretion.¹⁶² Since the court avoided¹⁶³ the stay provision in its analysis, it was not necessary to consider plaintiffs' argument with respect to Rule 62(b). The court held that the automatic termination provision of the PLRA was not in direct conflict with Rule 60(b).¹⁶⁴ The PLRA merely provides "an alternative mechanism that parties may utilize to modify a final judgment."¹⁶⁵

In contrast to the courts in the Michigan Decisions, the court in *Benjamin* concluded that the Act did not violate the doctrine of separation of powers.¹⁶⁶ In reaching that conclusion, Judge Baer relied upon the 1856 Supreme Court decision in *Pennsylvania v. Wheeling & Belmont Bridge*.¹⁶⁷ Judge Baer

¹⁵⁸ " 'Only when a non-constitutional basis on which a decision may be made cannot be found should the Court reach any constitutional questions.' " *Benjamin*, 935 F. Supp. at 343 (quoting *Jean v. Nelson*, 472 U.S. 846, 854 (1985)).

¹⁵⁹ 28 U.S.C. § 2071 (1994). The REA is discussed more fully *supra* notes 82-87 and accompanying text.

¹⁶⁰ Plaintiffs' Memo in Opposition to Defendants' Motion to Vacate the Consent Decrees at 67-69, *Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996) (75 Civ. 3073).

¹⁶¹ FED. R. CIV. P. 60(b).

¹⁶² Plaintiffs' Memo in Opposition to Defendants' Motion to Vacate the Consent Decrees at 67-9, *Benjamin* (75 Civ. 3073).

¹⁶³ See *supra* notes 152-155 and accompanying text.

¹⁶⁴ *Benjamin*, 935 F. Supp. at 344. The Second Circuit did not address the REA on appeal. See *Benjamin v. Jacobson*, No. 96-7957 (2d Cir. Aug. 26, 1997).

¹⁶⁵ *Benjamin*, 935 F. Supp. at 344. See also *Gavin v. Ray*, Civ. No. 4-78-CV-70062, slip op. at 4 (S.D. Iowa Sept. 18, 1996) (holding that the PLRA does not violate the REA), *rev'd on other grounds*, *Gavin v. Branstad*, Nos. 96-3746, 96-3748, 1997 WL 434633 (8th Cir. Aug. 5, 1997); *Hadix v. Johnson*, 933 F. Supp. 1362, 1365 (W.D. Mich. 1996) (same); *United States v. Michigan*, No. 1:84 CV 63, slip op. at 8 (W.D. Mich. July 3, 1996) (same).

¹⁶⁶ *Benjamin*, 935 F. Supp. at 344-52. The court also upheld the Act on due process and equal protection grounds. Those arguments are beyond the scope of this note.

¹⁶⁷ *Id.* at 345 (citing 59 U.S. (18 How.) 421 (1856)).

held that the rule of *Plaut* was inapplicable to the PLRA because the *Plaut* decision only prohibits Congress from reopening final judgments.¹⁶⁸ According to Judge Baer, a consent decree is not a final judgment, subject to the rule of *Plaut*, because it is an injunction that is equitable in nature.¹⁶⁹

In *Wheeling Bridge*, the Supreme Court held that Congress was acting within its enumerated powers when it passed legislation contravening a previous decision of the Supreme Court.¹⁷⁰ As understood by the court in *Benjamin*, the decision in *Wheeling Bridge* turned upon the equitable nature of the remedy involved.¹⁷¹ In support of this assertion, the court in *Benjamin* relied upon the "historic power of a court of equity to modify its decree in light of changed circumstances."¹⁷² Judge Baer rejected plaintiffs' contention that *Wheeling Bridge* is distinguishable from the consent decrees in *Benjamin* because the underlying rights involved in *Wheeling Bridge* were public in nature while the rights involved in *Benjamin* were private.¹⁷³ The court held that the dispositive issue was the nature of the remedy involved—an equitable injunction as opposed to a remedy at law—and not the nature of the underlying rights—private as opposed to public.¹⁷⁴

The court then rejected plaintiffs' argument that the PLRA violates the rule of *United States v. Klein* that a congressional act prescribing a rule of decision violates separation of powers.¹⁷⁵ The court rejected plaintiffs' contention because it determined that the PLRA "did change the law governing the district courts' remedial powers."¹⁷⁶ As the PLRA effected a change in law rather than commanded a finding under existing law, Judge Baer held that the rule of *Klein* had not been violated.¹⁷⁷ After dispensing with the statutory and constitution-

¹⁶⁸ *Id.* at 344-45.

¹⁶⁹ *Id.* at 345.

¹⁷⁰ *Id.* at 345 (citing *Wheeling Bridge*, 59 U.S. at 431).

¹⁷¹ *Benjamin*, 935 F. Supp. at 345.

¹⁷² *Id.* at 346 (citing *United States v. Swift & Co.*, 286 U.S. 106 (1932); WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2863 at 336 (2d ed. 1995)).

¹⁷³ *Id.* at 347.

¹⁷⁴ *Id.* at 348-49.

¹⁷⁵ *Id.* at 349 (citing *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871)).

¹⁷⁶ *Benjamin*, 935 F. Supp. at 350.

¹⁷⁷ *Id.* The court rejected a number of other constitutional arguments which are beyond the scope of this note.

al arguments, the court held that immediate termination was proper because the findings required by the Act¹⁷⁸ "were not made when the Consent Decrees were enacted in 1978-1979 . .

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II. ANALYSIS: THE PLRA UNCONSTITUTIONALLY VIOLATES THE DOCTRINE OF SEPARATION OF POWERS

Through the PLRA, Congress has unconstitutionally mandated the reopening of final judgments of Article III courts¹⁸⁰ and prescribed a rule of decision¹⁸¹ in violation of the doctrine of separation of powers. This doctrine, evident in the writings of the Framers, was embodied in our Constitution through the creation of three separate coordinate branches of government, each with its own distinct enumerated powers.¹⁸² As early as 1792, the power of the federal judiciary was recognized as a power separate and distinct from the executive and legislative powers.¹⁸³ The 1995 Supreme Court decision in *Plaut v. Spendthrift Farm, Inc.* established the rule that Congress cannot reopen a final judgment of an Article III court without violating the doctrine of separation of powers.¹⁸⁴ Thus, insofar as a consent decree, approved by a federal court to resolve a prison conditions lawsuit, is considered a final judgment,¹⁸⁵

¹⁷⁸ 18 U.S.C.A. § 3626(b)(2) requires:

immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C.A. § 3626(b)(2) (West Supp. 1997).

¹⁷⁹ *Benjamin*, 935 F. Supp. at 357. Although upholding the district court's opinion on separation of powers grounds under both *Plaut* and *Klein*, the Second Circuit reversed the district court's decision to vacate the consent decrees. *Benjamin v. Jacobson*, No 96-7957, (2d Cir. Aug. 26, 1997). The Second Circuit opinion is briefly discussed *supra* note 139.

¹⁸⁰ See *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995).

¹⁸¹ See *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871).

¹⁸² *Hadix-Western District*, 933 F. Supp. 1362, 1366 (W.D. Mich. 1996) (citing *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982)).

¹⁸³ See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

¹⁸⁴ *Plaut*, 115 S. Ct. at 1447.

¹⁸⁵ See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

the automatic termination¹⁸⁵ and stay¹⁸⁷ provisions of the PLRA violate the rule set forth in *Plaut* by retroactively commanding a federal court to reopen a final decision and terminate relief if such relief was granted without the findings required by the Act.¹⁸⁸

The automatic termination and stay provisions of the PLRA violate another long standing aspect of the doctrine of separation of powers. In 1871, the Supreme Court, in *United States v. Klein*, established the rule that Congress may not prescribe a rule of decision in cases pending before the federal courts without a change in conditions or without changing the underlying substantive law.¹⁸⁹ These provisions of the PLRA reflect a change in court procedure that the courts must conform to before granting prospective relief. They command the district court to come to a certain result—termination of the consent decree—not by changing the underlying substantive law or by recognizing changing conditions within the prison, but rather by changing the rules of court procedure. This Congress cannot do without violating separation of powers as interpreted by the Court in *Klein*.

A. A Consent Decree is a Final Judgment

A consent decree, like any other judgment of an Article III court, becomes a final judgment subject to the rule set forth in *Plaut* once the ability to appeal has expired.¹⁹⁰ The Supreme Court, in *Rufo v. Inmates of Suffolk County Jail*,¹⁹¹ had a chance to consider the finality of consent decrees in the context of whether a prison condition consent decree could be modified. In *Rufo*, the parties settled a 1971 inmate complaint, alleging unconstitutional prison conditions at a pre-trial detention facility known as the Charles Street Jail, by entering into a district

¹⁸⁵ 18 U.S.C.A. § 3626(b).

¹⁸⁷ 18 U.S.C.A. § 3626(e)(2).

¹⁸⁸ See 18 U.S.C.A. § 3626(a). The PLRA requires certain findings by the district court before it grants prospective relief. See *supra* notes 17-19 and accompanying text for a discussion of the findings required by the Act.

¹⁸⁹ 80 U.S. (13 Wall) 128 (1871).

¹⁹⁰ *Plaut*, 115 S. Ct. at 1457.

¹⁹¹ 502 U.S. 367 (1992).

court approved consent decree in 1979.¹⁹² Prior to the approval of the consent decree, the court found that the conditions at the Charles Street Jail violated the Due Process Clause and enjoined prison officials from housing more than one pre-trial detainee in a single cell ("double celling") after November 1973 and also enjoined the housing of all pre-trial detainees at the facility after June 1976.¹⁹³ With the problems of the jail still unresolved by 1978, the First Circuit ordered the facility closed by October 1978.¹⁹⁴ Four days before that deadline, prison officials settled with the inmates and agreed to enter into a consent decree, which provided that the Charles Street Jail could remain open until the completion of a new facility that complied with constitutional requirements.¹⁹⁵

In 1989, with construction not yet complete on the new facility and already six years behind schedule, prison officials moved for modification of the consent decree to allow double celling in a portion of the new prison to meet population demands.¹⁹⁶ Officials argued that changes in fact (i.e., an unexpected increase in the pre-trial detainee population) and changes in law (i.e., the Supreme Court decision in *Bell v. Wolfish*,¹⁹⁷ holding that double celling was not per se unconstitutional) required the court to modify the consent decree to allow double celling.¹⁹⁸

Before setting forth the standard for modification of a consent decree in institutional reform litigation, the Court in *Rufo* first discussed the nature of a judgment entered into by consent of the parties:

A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.¹⁹⁹

¹⁹² *Id.* at 372-75.

¹⁹³ *Id.* at 373 (citing *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 691 (D. Mass. 1973)).

¹⁹⁴ *Id.* at 374 (citing *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98, 99-100 (1st Cir. 1978)).

¹⁹⁵ *Id.*

¹⁹⁶ *Rufo*, 502 U.S. at 376.

¹⁹⁷ 441 U.S. 520 (1979).

¹⁹⁸ *Rufo*, 502 U.S. at 376.

¹⁹⁹ *Id.* at 378 (citing *System Federation No. 91, Railway Employees Department*,

The Court held that the consent decree could not be modified by the courts absent the showing of a grievous wrong.²⁰⁰ The *Rufo* Court also held that the district court had misapplied the often quoted "grievous wrong" standard as set forth in *United States v. Swift & Co.*²⁰¹ That standard provides that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" could be the predicate for modification of a consent decree.²⁰² The *Swift* Court, however, distinguished the facts of its case from other cases in which genuine changes required modification of a consent decree.²⁰³ The Court in *Swift* noted, "[t]he consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."²⁰⁴ The Court in *Rufo* further noted that it is essential in institutional reform cases that the terms of a consent decree be modified by the courts where changing conditions warrant such a modification.²⁰⁵ The decision in *Rufo* was made entirely within the context of a court's ability to modify its own decision under the authority of Federal Rule of Civil Procedure 60(b)(5). Rule 60(b)(5) enables a party to seek modification of a final decision when "it is no longer equitable that the judgment should have

AFL-CIO v. Wright, 364 U.S. 642, 650-51 (1961)).

²⁰⁰ *Id.* at 379.

²⁰¹ *Id.* (citing *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)).

²⁰² *Swift*, 286 U.S. at 119.

²⁰³ *Id.* at 114-15. What is clear from *Swift* is that the power of a court to modify a consent decree is self evident where circumstances or the underlying substantive law has changed. What is not clear from *Swift* is whether Congress has the power to order a court to modify a consent decree, based not on a change in circumstances or the underlying substantive law, but rather based on a change in procedure. That issue was simply not before the Court in *Swift*. One can infer, however, that a change in the procedure is not the equivalent of a change in conditions or in the underlying substantive law. See also *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983) (citing *Swift*, 286 U.S. at 114) (noting that the fact that Justice Cardozo was dealing with a consent decree and not a judgment as a result of litigation in *Swift* was not dispositive of whether injunctive relief should be modified).

²⁰⁴ *Swift*, 286 U.S. at 115.

²⁰⁵ *Rufo*, 502 U.S. at 380 (noting the upsurge in institutional reform litigation since *Brown v. Board of Education*, 347 U.S. 483 (1954), and the need to modify consent decrees that remain in force for extended periods of time).

prospective application'²⁰⁶ Modification is not proper under that rule where a party merely determines that it is "no longer convenient to live with the terms of a consent decree."²⁰⁷

According to the Court in *Rufo*, modification of a consent decree in a prison condition lawsuit is proper "1) when changed factual conditions make compliance with the decree substantially more onerous; 2) when a decree proves to be unworkable because of unforeseen obstacles; or 3) when enforcement of the decree without modification would be detrimental to the public interest."²⁰⁸ Ultimately, the Court remanded the case to determine whether changing circumstances warranted modification of the consent decree.²⁰⁹

The Court in *Rufo* also considered the effect upon a consent decree of a change in substantive statutory or decisional law.²¹⁰ The Court first discussed *System Federation No. 91, Railway Employees Department v. Wright*,²¹¹ which involved a consent decree prohibiting discrimination against nonunion employees. The Court in *Wright* allowed modification of a consent decree, when the underlying substantive law was changed to make legal (union shops) what the decree was designed to prevent.²¹²

The Court in *Rufo* then turned its attention to petitioner's argument that the Supreme Court's decision in *Bell v. Wolfish*²¹³ was a change in the underlying substantive law, and required a modification of the consent decree.²¹⁴ In *Bell*, the Court held that double celling in prisons was not per se unconstitutional.²¹⁵ The Court in *Rufo* reasoned that since *Bell* was pending when the consent decree at issue in *Rufo* was signed, it was "immaterial to petitioners that double celling might be

²⁰⁶ *Id.* at 383 (quoting Fed R. Civ. P. 60(b)(5)).

²⁰⁷ *Id.* at 383.

²⁰⁸ *Id.* at 384.

²⁰⁹ *Id.* at 393.

²¹⁰ *Rufo*, 502 U.S. at 388-90.

²¹¹ 364 U.S. 642 (1961).

²¹² *Id.* at 651.

²¹³ 441 U.S. 520 (1979).

²¹⁴ *Rufo*, 502 U.S. at 388.

²¹⁵ *Bell*, 441 U.S. at 541.

ruled constitutional, i.e., they preferred even in that event to agree to a decree which called for providing only single cells in the jail to be built."²¹⁶

After discussing *Wright* and rejecting petitioner's argument based on *Bell*, the *Rufo* Court noted:

To hold that a clarification in the law *automatically* opens the door for relitigation of the merits of every affected consent decree would undermine the *finality of such agreements* and could serve as a disincentive to negotiation of settlements in institutional reform litigation.²¹⁷

Although the decision in *Rufo* concerned the ability of a court to modify a consent decree based upon a change in the underlying circumstances or a change in the underlying substantive law upon which the consent decree was fashioned, the case is illustrative of the Supreme Court's view that a consent decree is in fact a final judgment similar to any other judgment of a court.²¹⁸ Even in a situation where modification is required by a change in constitutional standards, the *Rufo* Court noted:

A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. Once a court has determined that changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for *a consent decree is a final judgment that may be reopened only to the extent that equity requires*.²¹⁹

In *Hadix-Western District* and *United States v. Michigan*, Judge Enslen held that the consent decrees were final judgments.²²⁰ Noting that the Supreme Court in *Rufo* had held that consent decrees are subject to " 'rules generally applicable to other judgments and decrees[,] ' " he held that "[o]ne of these rules is the rule relating to finality of judgments."²²¹

²¹⁶ *Rufo*, 502 U.S. at 388.

²¹⁷ *Id.* at 389 (emphasis added).

²¹⁸ See CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443, at 384 n.9 (1981) (noting that modification of a consent decree is similar to modification of a litigated decree).

²¹⁹ *Rufo*, 502 U.S. at 391 (emphasis added).

²²⁰ *Hadix v. Johnson*, 933 F. Supp. 1362, 1368 (W.D. Mich. 1996); *United States v. Michigan*, No. 1:84 CV 63, slip op. at 14 (W.D. Mich. July 3, 1996).

²²¹ *Hadix-Western District*, 933 F. Supp. at 1368 (citing *Rufo*, 502 U.S. at 378);

Once all "appeals have been exhausted or the time for appeal has elapsed or been waived, consent decrees become final judgments."²²² Since the parties in both the *Hadix-Western District* and *United States v. Michigan* consent decrees were no longer able to appeal the judgment approving those consent decrees, Judge Enslen held that the consent decrees were final and protected from legislative reopening.²²³ In *Hadix-Eastern District II*, Judge Feikens held that "[t]he PLRA completely rewrites the standard for modification in prison litigation, making consent decrees subject to the constitutional floor—in direct contrast to *Rufo*."²²⁴

In holding that a consent decree was not a final judgment, Judge Baer's decision in *Benjamin* focused on the Supreme Court's 1856 decision in *Pennsylvania v. Wheeling & Belmont Bridge Co.*²²⁵ The dispute in *Wheeling Bridge* arose out of an injunction against the defendant, entered in 1852, requiring the defendant to remove a bridge that it had constructed over the Ohio River because the bridge was determined to be "an obstruction of the free navigation of the . . . river . . . for which there was no adequate remedy at law."²²⁶ Later in 1852, Congress passed an act declaring the bridge to be a "lawful structure" and further declaring the bridge to be a post-road.²²⁷ The Court in *Wheeling Bridge* upheld the act of Congress and

United States v. Michigan, No. 1:84 CV 63, slip op. at 14 (same).

²²² *Id.* at 1368 (citing *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 590 (1984) (Stevens, J., concurring), *questioned by* *Martin v. Wilks*, 490 U.S. 755 (1989); *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992), *cert. denied*, 506 U.S. 827 (1992)); *United States v. Michigan*, No. 1:84 CV 63, slip op. at 14 (same).

²²³ *Hadix-Western District*, 933 F. Supp. at 1368-69; *United States v. Michigan*, No. 1:84 CV 63, slip op. at 14. Although Judge Feikens, in *Hadix-Eastern District*, did not explicitly discuss finality with respect to consent decrees, the previous discussion is fully attributable to him as well, because he incorporated Judge Enslen's opinion. *See* *Hadix v. Johnson*, 933 F. Supp. 1360, 1361-62 (E.D. Mich. 1996) (concurring with Judge Enslen's opinion in *Hadix-Western District* and incorporating it as an appendix).

²²⁴ *Hadix-Eastern District II*, 947 F. Supp. 1100, 1104 (E.D. Mich. 1996).

²²⁵ *Benjamin v. Jacobsen*, 935 F. Supp. 332, 345 (S.D.N.Y. 1996) (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), *aff'd in part, rev'd in part*, No. 96-7957 (2d Cir. Aug. 26, 1997)).

²²⁶ *Wheeling Bridge*, 59 U.S. at 429.

²²⁷ *Id.* (citing 10 Stat. 112 (1852)). By declaring the bridge to be a post-road, Congress was arguably acting within one of its enumerated powers, *see* U.S. CONST. art. I, § 8, cl. 7.

declared the injunction to be of no further force and effect.²²³ In so holding the Court first noted:

[I]t is urged, that the act of Congress cannot have the effect and operation to annul the judgment of the court already rendered or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, *especially as it respects adjudication upon the private rights of parties*. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.²²⁹

The Court found this general proposition distinguishable from the case before it because the rights involved were *public* in nature.²³⁰ The fact that a private party could maintain an action for public nuisance under state common law did not alter the fact that any damages or removal would arise "out of the unlawful interference with the enjoyment of the public right . . ."²³¹ The Court further reasoned that if the remedy had been an action at law, then Congress would not have been able to alter the decision of the Court.²³²

What is clear from *Wheeling Bridge* is that, where such a judgment involves the private rights of the litigants, Congress has no power to alter a final judgment of an Article III court.²³³ It also is evident that Congress has no power to al-

²²⁸ *Wheeling Bridge*, 59 U.S. at 436.

²²⁹ *Id.* at 431 (emphasis added).

²³⁰ *Id.* (The bridge's "interference with the free navigation of the river constituted an obstruction of a public right secured by acts of Congress" through its power to regulate commerce.); cf. *Hodges v. Snyder*, 261 U.S. 600, 604 (1923). In *Hodges*, the Court applied the rule in *Wheeling Bridge* to the case of a taxpayer lawsuit to enjoin the Board of Education from operating a consolidated school district. *Id.* at 602. During the course of the litigation, the South Dakota legislature passed a law making the consolidated school district legal. *Id.* The Court held that the act of the legislature was valid and the injunction was lifted. *Id.* Although *Hodges* involved the actions of a state legislature affecting the decisions of a state court, it is illustrative of the application of the rule in *Wheeling Bridge*.

²³¹ *Wheeling Bridge*, 59 U.S. at 431.

²³² *Id.* This is not obiter dicta. The Court's award of costs in the prior litigation, based on a remedy at law, were left unaffected by the Court's decisions respecting the injunction. *Id.*

²³³ *Wheeling Bridge* remains good law. As recently as 1995, the Supreme Court has left this decision undisturbed. See *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1459 (1995); see also *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 557 (9th Cir. 1996). In *Thomas*, the Ninth Circuit held constitutional, on separation of powers grounds, an act of Congress, which authorized the construction of a university telescope. *Id.* at 555. The District Court for the District of Arizona had previously granted an injunction enjoining the construction of the telescope because of

ter a final judgment, where the judgment is one at law involving public rights, such as the court costs upheld in *Wheeling Bridge*. What the Court in *Wheeling Bridge* did not address, for the issue was not before it, was whether Congress has the power to modify an equitable judgment based upon private rights. Such is the situation with the consent decrees affected by the PLRA. The rights at stake in these consent decrees are private rights derived from the Constitution often involving claims of cruel and unusual punishment in violation of the Eighth Amendment or claims of unlawful detainment in violation of the Due Process Clause of the Fourteenth Amendment.²³⁴

In holding that Congress had the power to modify the final judgment at issue in the PLRA, the district court in *Benjamin* determined that it was the nature of the remedy, not the nature of the right, which was key in *Wheeling Bridge*.²³⁵ In reaching that conclusion, the court relied on the "historic power of a court of equity to modify its decree in light of changed circumstances."²³⁶ This power of modification, codified in Federal Rule of Civil Procedure 60(b)(5), is inapposite for separation of powers analysis. Rule 60(b)(5) speaks only to the power of the courts, not Congress, to grant relief from a final

the presence in the area of an endangered red squirrel species. *Id.* The Ninth Circuit held that the act of Congress had only prospective effect and thus did not violate the rule in *Plaut*. *Id.* at 556. It further held that because the injunction here was prospective and involved public rights similar to those involved in *Wheeling Bridge*, Congress did have the power to alter the effect of the injunction. *Id.* at 557.

²³⁴ *Hadix v. Johnson*, 933 F. Supp. 1362, 1368 (W.D. Mich. 1996) (holding that the decision in *Wheeling Bridge* is distinguishable from the consent decrees at issue in the PLRA because constitutional rights are private in nature) (citing *Rose v. City of Los Angeles*, 814 F. Supp. 878, 881 (C.D. Cal. 1993)); *United States v. Michigan*, No. 1:84 CV 63, slip op. at 14 (W.D. Mich. July 3, 1996) (same).

²³⁵ *Benjamin v. Jacobson*, 935 F. Supp. 332, 348 (S.D.N.Y. 1996) (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856)), *aff'd in part, rev'd in part*, No. 96-7957 (2d Cir. Aug. 26, 1997).

²³⁶ *Benjamin*, 935 F. Supp. at 346. (citing 11 CHARLES A. WRIGHT, ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2863, at 336 (2d ed. 1995)). See *System Federation No. 91, Railway Employees Department v. Wright*, 364 U.S. 642 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *FED. R. CIV. P.* 60(b)(5).

judgment. One need only to read the remainder of Rule 60 to see that modification is available in situations wholly unrelated to whether the remedy being altered was equitable in nature.²³⁷

The district court in *Benjamin* rejected the argument that private rights guaranteed by the Constitution cannot be legislatively altered.²³⁸ The power of Congress to alter statutorily created rights, public or private, is plenary and beyond question.²³⁹ In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, the Supreme Court, in a bankruptcy decision involving the allocation of power between Article I and Article III courts, made it clear that congressional power to modify constitutionally based rights is limited by the doctrine of separation of powers:

[There is] a critical difference between rights created by federal statute and rights recognized by the Constitution . . . [S]uch a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Art. III. The constitutional system of checks and balances is designed to guard against 'encroachment or aggrandizement' by Congress at the expense of other branches of government. But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies . . . *No comparable justification exists, however, when the right being adjudicated is not of congressional creation.* In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.²⁴⁰

²³⁷ See FED. R. CIV. P. 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect"); 60(b)(2) ("newly discovered evidence"); 60(b)(3) ("fraud . . . , misrepresentation, or other misconduct of an adverse party"); 60(b)(4) ("void judgments"); 60(b)(5) (The remainder of the rule not quoted by the court in *Benjamin* allows modification for a judgment that has been "satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated") By its terms, such a modification is not limited to equitable final judgments; 60(b)(6) (any other reason justifying modification).

²³⁸ *Benjamin*, 935 F. Supp. at 348-49.

²³⁹ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion).

²⁴⁰ *Id.* (plurality opinion) (citation omitted) (emphasis added). See also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (power of the federal courts over constitutional questions is a "permanent and indispensable feature of our constitutional system");

In reaching the conclusion that a consent decree is not a final judgment, the district court in *Benjamin* reasoned that the source of the underlying right was not an essential element of separation of powers analysis because "the doctrine . . . is concerned with the structural allocation of power in the Constitution, rather than the individual claims in a particular action."²⁴¹ Many authorities and commentators would take issue with such a reading of the doctrine of separation of powers.²⁴² It is through the "structural allocation of power" that our underlying liberty is insured.²⁴³ The final judgments rendered in prison condition litigation generally involve rights guaranteed to individuals under the Due Process Clause of the Fourteenth Amendment or the prohibition of cruel and unusual punishment in the Eighth Amendment.²⁴⁴ These private

Marbury v. Madison, 5 U.S. 137, 177 (1803); cf. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding that Congress does not have the power to modify First Amendment rights based upon its Fourteenth Amendment enforcement powers).

²⁴¹ *Benjamin*, 935 F. Supp. at 348.

²⁴² See, e.g., *INS v. Chadha* 462 U.S. 919, 962 (1983) (Powell, J., concurring) (noting that separation of powers reflects the Framers' "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person"); *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (noting that "[t]he doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power," and that "[t]he purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy"); *Separation of Power—Congressional Authority to Reopen Final Judgments*, 109 HARV. L. REV. 229, 235 (1995) ([T]he primary objective of the separation of powers [is] the preservation of individual liberties against government tyranny.); GERALD GUNTHER, CONSTITUTIONAL LAW, at 311 (12th ed. 1991) ("By insisting upon separation of powers, the Framers sought to promote such aims as safeguarding against tyranny and promoting efficiency . . .").

²⁴³ The dangers inherent in consolidated power gave rise to the separation of powers principle. *Separation of Power—Congressional Authority to Reopen Final Judgments*, 109 HARV. L. REV. 229, 235 n.59 (1995) (citing JOHN S. MILL, ON LIBERTY 6 (Stefan Collini ed., 1989) (1859); 1 CHARLES MONTESQUIEU, THE SPIRIT OF THE LAWS 174 (Thomas Nugent trans., 1949) (1748); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1532-33 n.80 (1991) (citing numerous seventeenth century political theorists who, in writing about the separation of legislative, executive, and judicial powers, noted its significance to civil liberty).

²⁴⁴ The PLRA by its own terms applies to persons "accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of the criminal law . . ." 18 U.S.C.A. § 3626(g). Humane conditions of confinement are compelled by the Eighth Amendment, in the case of those convicted of crimes, and by the Due Process Clause, in the case of pre-trial detainees. Appellants' Brief at 21, *Benjamin v. Jacobson*, (No. 96-7957) (citing *Bell v. Wolfish* 441 U.S. 520 (1979)). Pre-trial

constitutional rights are at the heart of separation of powers analysis. As the Court in *Northern Pipeline Constr. Co.* noted, Congress' power to define rights based on the Constitution is limited by the doctrine of separation of powers. Given the Framers' understanding of separation of powers, the nature of the rights involved is essential in determining the scope of this doctrine.

B. *The PLRA Unconstitutionally Alters a Final Judgment*

The Supreme Court recently explored the doctrine of separation of powers in *Plaut v. Spendthrift Farm, Inc.*²⁴⁵ The Court was faced with the question of whether section 27A(b) of the Securities Exchange Act of 1934 violated the doctrine.²⁴⁶ Section 27A(b) retroactively reinstated securities fraud claims filed pursuant to Section 10(b) of the Securities Exchange Act of 1934²⁴⁷ and Rule 10b-5 of the Securities and Exchange Commission,²⁴⁸ which were dismissed as a result of the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.²⁴⁹ The decision in *Lampf* set forth a uniform statute of limitations in cases filed under section 10(b) and Rule 10b-5.²⁵⁰ The Court's decisions in *Lampf* and *James B. Beam Distilling Co. v. Georgia*²⁵¹ operated to make the new statute of limitations applicable to all cases pending on direct review.²⁵² Section 27A(b) required the use of pre-*Lampf* law to determine the limitations period in all cases pending before *Lampf* was decided.²⁵³ As a result of the *Lampf* rule, the

detainees have not been convicted of a crime, and thus cannot be punished. *Bell*, 441 U.S. at 535. The consent decrees at issue in *Benjamin* govern conditions at New York City jails, such as Rikers Island, and involve the rights of pre-trial detainees. *Benjamin*, 935 F. Supp. at 347.

²⁴⁵ 115 S. Ct. 1447 (1995).

²⁴⁶ *Id.* at 1450. Section 27A(b) was codified at 15 U.S.C. § 78aa-1(b) (Supp. V 1993).

²⁴⁷ 15 U.S.C. § 78j(b) (1994).

²⁴⁸ 17 C.F.R. § 240.10b-5 (1995).

²⁴⁹ *Plaut*, 115 S. Ct. at 1450-51 (citing *Lampf*, *Pleva*, *Lipkind*, *Prupis* & *Petigrow v. Gilbertson*, 501 U.S. 350 (1991)).

²⁵⁰ *Lampf*, 501 U.S. at 364.

²⁵¹ 501 U.S. 529 (1991). *Lampf* and *James B. Beam Distilling* were issued on the same day.

²⁵² *Plaut*, 115 S. Ct. at 1450.

²⁵³ *Id.* at 1466 (Stevens, J., dissenting).

petitioners' claim in *Plaut* was dismissed by the district court.²⁵⁴ After passage of section 27A(b), the petitioners returned to court. Their motion, however, was denied when the district court held that section 27A(b) was unconstitutional.²⁵⁵ That decision was affirmed by the Sixth Circuit²⁵⁶ and the Supreme Court.²⁵⁷

The Court in *Plaut* concluded that "Congress ha[d] exceeded its authority by requiring the federal courts to exercise 'the judicial Power of the United States,' in a manner repugnant to the text, structure and traditions of Article III."²⁵⁸ The Court noted that history shows the Framers gave the Federal Judiciary the power "not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy"²⁵⁹ After examining the writings of the Framers and other commentators at the time of the writing of our Constitution, the Court concluded that separation of powers has long been understood as a vital part of our Constitution.²⁶⁰ The Court held that Section 27A(b) was unconstitutional because it required federal courts to reopen final judgments entered before its enactment.²⁶¹

The Court in *Plaut* distinguished the situation where Congress passes retroactive legislation that must be applied to cases that are still on appeal or have not become final because

²⁵⁴ *Id.* at 1451.

²⁵⁵ *Id.* (citing Memorandum Opinion and Order, No. 87-438 (E.D. Ky. Apr. 13, 1992)).

²⁵⁶ *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (1993).

²⁵⁷ 115 S. Ct. 1447 (1995).

²⁵⁸ *Id.* at 1452 (citing U.S. CONST. art. III, § 1).

²⁵⁹ *Id.* at 1453 (citing Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)) (noting that the "judicial Power" referred to in Article III is the power to "render dispositive judgments").

²⁶⁰ *Id.* at 1453-55. President Lincoln respected the notion of separation of powers, even in the wake of the much derided decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), superseded by U.S. CONST. amends. XIII and XIV: [Although] it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice.

IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1953) (First Inaugural Address 1861), quoted in *Plaut*, 115 S. Ct. at 1456.

²⁶¹ *Plaut*, 115 S. Ct. at 1463.

the time to appeal has not expired.²⁶² Congress' power in such a situation is plenary.²⁶³ That situation does not raise separation of powers concerns because such a decision does not represent the final word of the judiciary on a particular case or controversy.²⁶⁴ Justice Scalia's holding is clear from the following:

Not favoritism, nor even corruption, but power is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.²⁶⁵

The automatic termination and stay provisions of the PLRA are no different from the type of intrusion into final judgments condemned by the Supreme Court in *Plaut*. The stay provision plainly invites a motion to modify or terminate prospective relief and guarantees that previously enacted relief will be stayed until final resolution of the motion.²⁶⁶ The statute in *Plaut* provided that any case dismissed as a result of the Court's decision in *Lampf* shall be reinstated upon motion of the plaintiff.²⁶⁷ The PLRA provides that "[a]ny prospective relief subject to a pending motion shall be automatically stayed"²⁶⁸ The effect of both of these statutes is identical: the final judgment of an Article III court is legislatively altered without consideration by the federal judiciary of whether such a modification is warranted.²⁶⁹

The PLRA virtually guarantees automatic termination and has the same effect as the stay provision. Section 3626(b)(2) mandates immediate termination of prospective relief when

²⁶² *Id.* at 1457.

²⁶³ *Id.* (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1500-08 (1994)).

²⁶⁴ *Plaut*, 115 S. Ct. at 1457.

²⁶⁵ *Id.*

²⁶⁶ 18 U.S.C.A. § 3626(e) (providing for a stay, commencing 30 days after filing of the motion, for motions made pursuant to the PLRA and ending on a final order ruling on the motion).

²⁶⁷ 15 U.S.C. § 78aa-1(b) (Supp. V 1993).

²⁶⁸ 18 U.S.C.A. § 3626(e)(2).

²⁶⁹ *Hadix v. Johnson*, 933 F. Supp. 1362, 1368 (W.D. Mich. 1996); *United States v. Michigan*, No. 1:84 CV 63, slip op. at 15 (W.D. Mich. July 3, 1996).

such relief was not granted with the findings required by the Act.²⁷⁰ For instance, the Act requires that prospective relief, "extends no further than necessary to correct the violation of the Federal right"²⁷¹ By its very definition, a consent decree does not involve a decision on the merits, and thus, a finding by the courts of a particular constitutional violation is unlikely to be found.²⁷² Nor is it likely that a state or its prison officials will admit in a consent decree that they have violated the Constitution for fear of subjecting themselves to liability on future claims.²⁷³ Such was the case in *Benjamin*: "Plaintiffs . . . conceded that the newly required findings were not made when the Consent Decrees were entered in 1978-1979."²⁷⁴ The district court rejected a request by the plaintiffs and the United States, as intervenor arguing in support of upholding the Act, that it delay the decision until a report on prison conditions in New York City jails was made.²⁷⁵ The court reasoned that since the requisite findings were not made, the defendants were entitled to "vacatur of the Consent Decrees."²⁷⁶ Plainly, then, the automatic termination provision

²⁷⁰ 18 U.S.C.A. § 3626(b)(2) (requiring termination in the "absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.").

²⁷¹ 18 U.S.C.A. § 3626(b)(2).

²⁷² CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, § 4443, at 383 (1981) (noting the "central characteristic [of a consent decree] is that the court has not actually resolved the substance of the issues presented"). See also Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 n.2 (1986) ("A consent decree is a compromise reached by two parties that is approved by a judge The parties themselves fix the terms of a consent decree . . . and a judge adds his signature to the pact.").

²⁷³ Joseph Wharton, *Courts Now Out of Job as Jailers*, 82-Aug. A.B.A. J. 40 (1996); Tom Terrizi, *Should Prison Consent Decrees be Vacated? No*, N.Y.L.J., Aug. 22, 1996, at 2 ("Of course, with the *Benjamin* consent decree, as with most consent decrees, there is no such current finding [of the violation of a Federal right] because the defendants chose not to oppose the relief sought by the plaintiffs and thereby avoided extensive legal proceedings which would have established the record of the violations."); *Overhauling the Nation's Prisons*, supra note 2 (statement of Steve J. Martin, former official with the Texas Department of Corrections) (noting that "Departments of Corrections elect to settle those cases that they have determined they are likely to lose at trial," in order to foreclose the possibility of being found to have violated the Constitution, and to thereby avoid liability to other prisoners).

²⁷⁴ *Benjamin*, 935 F. Supp. at 357.

²⁷⁵ *Id.*

²⁷⁶ *Id.* The Second Circuit reversed the district court on the issue of vacating

virtually guarantees that a final judgment of an Article III court will be altered in violation of the doctrine of separation of powers as recently interpreted by the Supreme Court in *Plaut*.

C. *The PLRA Unconstitutionally Prescribes a Rule of Decision*

In addition to violating separation of powers principles by unconstitutionally altering a final judgment of an Article III court, the PLRA also violates that doctrine by prescribing a rule of decision.²⁷⁷ The famous case that led to the prohibition on prescribing a rule of decision, *United States v. Klein*, involved a suit by the administrator of a deceased Confederate sympathizer to recover the proceeds of property confiscated by the United States during the Civil War.²⁷⁸ Under the Captured Property Act of March 12, 1863,²⁷⁹ property captured during the war, which was not used in actual hostilities, could be recovered upon proof of loyalty.²⁸⁰ In December of that same year, President Lincoln issued a proclamation offering full pardon with restoration of all property rights to certain Confederate sympathizers if they agreed to swear loyalty to the "Constitution . . . and the union of the States thereunder . . ."²⁸¹ Several additional presidential proclamations ensued, similar in substance to the initial one.²⁸² Such action led Congress to pass an act directing the Court of Claims to disregard, as evidence of loyalty, any pardon or amnesty granted by the President.²⁸³ The substance of the act directed the Court of Claims, and the Supreme Court on appeal, to consider such a

the consent decree. See No. 96-7957 (2d Cir. Aug. 26, 1997). That decision is briefly discussed *supra* note 139.

²⁷⁷ See *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871). Although the courts in the Michigan Decisions did not fully address this issue, the court in *Benjamin* did and rejected it. *Benjamin*, 935 F. Supp. at 349-50.

²⁷⁸ *Klein*, 80 U.S. at 135-37.

²⁷⁹ 12 Stat. 820 (1863).

²⁸⁰ *Klein*, 80 U.S. at 139.

²⁸¹ *Id.* at 140.

²⁸² *Id.* at 141. The Court also noted that prior to the first proclamation, Congress had passed an act, on July 17, 1862, authorizing the President to grant pardons to Confederate sympathizers and that Congress had repealed the same on January 21, 1867, prior to the final proclamation by the President. *Id.* at 141-42. The Court held that these acts of Congress had no effect upon the President's plenary power to pardon. *Id.*

²⁸³ 16 Stat. 235 (1870).

pardon or amnesty as conclusive evidence of disloyalty.²⁸⁴ Thus, a claimant, who swore an oath of loyalty and was granted a pardon, relinquished any claim to the confiscated property.²⁸⁵

The Court struck down the act as a violation of separation of powers. In reaching that conclusion the Court first held that the Court of Claims was an Article III court.²⁸⁶ It then went on to hold:

It is evident . . . that the denial of jurisdiction to [the Supreme Court], as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. [The act provides that t]he court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.²⁸⁷

The Court noted that, unlike *Wheeling Bridge*, Congress here was not acting within its own constitutional power to modify the underlying substantive law, but rather it was prescribing an arbitrary rule of decision in violation of that "which separates the legislative from the judicial power."²⁸⁸

The plaintiffs in *Benjamin* drew an analogy between the statute in *Klein* and the PLRA: "In [*Klein*], the court was required to dismiss the case upon determining the existence of certain facts—a pardon. Here, the court must terminate relief upon determining the existence of certain facts—the absence of particular findings."²⁸⁹ The statute in *Klein* dictated that the

²⁸⁴ *Id.*

²⁸⁵ *Klein*, 80 U.S. at 143.

²⁸⁶ *Id.* at 144. The Court of Claims was established in 1855 to prepare private bills for Congress for persons making claims against the United States. 10 Stat. 612 (1855). In 1863, the role of that court was expanded and given authority to render final judgments, subject to appeal to the Supreme Court. *Klein*, 80 U.S. at 144.

²⁸⁷ *Klein*, 80 U.S. at 146.

²⁸⁸ *Id.* at 146-47 (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856)). The Court also held that by interfering with the effect of a Presidential pardon, Congress infringed upon "the constitutional power of the Executive." *Id.* at 147.

²⁸⁹ Brief of Appellants at 40, *Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996) (No. 96-7957).

courts ignore the power of the President under the Constitution. Similarly, the PLRA dictates that the courts ignore the rights of litigants guaranteed by the Constitution.²³⁰ Congress can no more dictate to the Court of Claims, and the Supreme Court on appeal, to ignore a pardon by the President, than can it tell the district courts to terminate prospective relief in a prison conditions case based not on a change in conditions or substantive law, but rather based on a change in court procedure.²³¹ The court in *Benjamin* reasoned that Congress had modified the underlying substantive law and not prescribed a rule of decision.²³² Congress, however, does not have the power to modify the underlying constitutional rights.²³³ "[I]t is illusory to distinguish . . . between Congress' inability to restrict constitutional rights and its supposed power to limit remedies for constitutional claims. 'Warring' against a constitutional remedy is the equivalent of 'warring' against the Constitution itself."²³⁴

CONCLUSION

Congress, in an attempt to curtail frivolous inmate lawsuits and end the alleged micro-management of state prisons by federal courts, enacted the PLRA in April 1996. In its zeal to end these alleged abuses, Congress stripped away the ability of prisoners to enforce their rights, making it nearly impossible for prisoners and officials to enter into consent decrees. The

²³⁰ *Id.*

²³¹ Although *Klein* was decided more than one hundred years ago, it remains good law. See, e.g., *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2234 (1995) (avoiding an interpretation of the Westfall Act, 28 U.S.C. § 2679(d)(1)-(3), which would have violated the rule in *Klein*); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1452 (1995) (*Klein* rule inapplicable because Section 27A(b) of the Securities Exchange Act of 1934 modified existing substantive law over which Congress has the power to change); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438-39 (1992) (holding *Klein* inapplicable because Congress had the power to alter the underlying substantive law contained in the Migratory Bird Treaty Act).

²³² *Benjamin v. Jacobson*, 935 F. Supp. 332, 349 (S.D.N.Y. 1996) (citing *United States v. Klein*, 80 U.S. (13 Wall) 128, 147 (1871) (citing *Wheeling Bridge*, 59 U.S. at 421), *aff'd in part, rev'd in part*, No. 96-7957 (2d Cir. Aug. 26, 1997).

²³³ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982); Brief of Appellants at 42, *Benjamin* (No. 96-7957).

²³⁴ Brief of Appellants at 42, *Benjamin* (No. 96-7957) (citing *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)) (footnotes omitted).

PLRA ignores decisions made by state officials, who entered into consent decrees for fiscal and policy reasons to avoid an adjudication that they were operating their prisons unconstitutionally. Although Congress arguably does have the power to limit frivolous inmate litigation and to define requirements for the granting of prospective relief in future litigation, it does not have the power to legislatively alter final judgments of Article III courts involving private rights of parties. Nor does it have the power to prescribe a rule of decision in such a case. Such legislation violates the doctrine of separation of powers.

Richard J. Costa