For Opinion See 176 F.3d 1336

United States Court of Appeals,Eleventh Circuit.
Jeffrey LOYD, et al., Appellants,
v.
Joe S. HOPPER, et al., Appellees.
No. 98-06189.
July 8, 1998.

On Appeal from the United States District Court for the Northern District of Alabama

Brief of Appellants

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***xi** *STATEMENT OF JURISDICTION*

This appeal is taken from the United States District Judge's *Order* granting the motion of the Attorney General for the State of Alabama and the Commissioner of the Alabama Department of Corrections to terminate the *Consent Decrees* and the *Permanent Injunction* entered in this case. The plaintiffs filed their *Complaint* under 42 U.S.C. § 1983. The federal district court had jurisdiction over the claims under 28 U.S.C. § 1343(3) and (4).

On January 27, 1998, the District Judge granted the motion to terminate. (R5-127). On February 26, 1998, the plaintiff class filed a timely notice of appeal. (R5-128). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

***1** *STATEMENT OF THE ISSUES*

1. Did the District Judge err in finding that the Attorney General had standing to seek to terminate a consent decree to which neither the State of Alabama nor any state agency was a party, when the Attorney General did not even file a motion to intervene?

2. Did the District Judge err in refusing to allow the presentation of evidence in support of the plaintiffs' contention that the *Consent Decree* was necessary and narrowly drawn to correct a current or ongoing violation of their federal rights?

3. Did the District Judge err in terminating the *Permanent Injunction?*

4. Did the District Judge err in holding the termination provision of the Prison Litigation Reform Act ("PLRA") constitutional, and in applying it so as to vacate the *Consent Decrees* agreed upon by the parties and approved by the District Court for the protection of inmates at the Jackson County Jail?

STATEMENT OF THE CASE

1. *Proceedings and Disposition in the Court Below*

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This case addresses the conditions of confinement at the Jackson County Jail (hereinafter "the jail") in Scottsboro, Alabama. The case was brought by plaintiffs on behalf of all prisoners who are or will be confined at the jail. They sought to remedy the many unconstitutional conditions prevalent in the jail ***2** prior to the lawsuit, including the total lack of inmate exercise, severely unsanitary conditions, inadequate medical care and staffing, lack of access to legal materials, and other serious problems. (R1-1). In their *Complaint,* plaintiffs sued the Alabama Department of Corrections and its Commissioner, Jackson County, members of the Jackson County Commission, the Jackson County Sheriff, the head jailer, and the Administrator of the Jackson County Department of Health. *Id.* On April 15, 1992, Jackson County and the county commissioners filed a crossclaim against the Alabama Department of Corrections and its Commissioner. (R2-22). The District Court certified the plaintiff class on July 6, 1994. (R2-34).

On November 7, 1994, the District Court entered an *Order* approving and adopting a *Consent Decree* settling all issues raised in the lawsuit against Jackson County, the Jackson County Commissioners, the Jackson County Sheriff, and the Chief Jailer of the Jackson County Jail. (R5-93). None of the other defendants was a party to the November 1994 *Consent Decree. Id.* at 2.

On January 12, 1995, the District Court entered a *Permanent Injunction* requiring the Alabama Department of Corrections to remove inmates sentenced to state prison from the jail in a timely manner. (R5-96). On March 17, 1995, the District Court entered an *Order* approving and adopting a second *Consent Decree* settling issues raised by the lawsuit against the Commissioner of the Department of Corrections, the Department of Corrections, the ***3** Alabama Department of Public Health, and the Administrator of the Jackson County Health Department. (R5-99).

The November 1994 *Consent Decree* contained provisions governing conditions and practices in the existing Jackson County Jail, required the building of a new jail, and set forth standards to be used in the management of the new jail. (R5-93-3-46). The March 1995 *Consent Decree,* to which the state agencies were a party, governed the responsibilities of the state agencies to inspect and report on conditions in the jail. (R5-99-3-6).

The *Consent Decrees* and *Permanent Injunction* continued in effect until the Attorney General and the Commissioner of the Alabama Department of Corrections filed their *Motion to Terminate* on July 2, 1997. (R5-117). This motion was based on the termination provision of the recently enacted Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(b)(2), a provision that purports to allow defendants to vacate prospective relief in prison and jail conditions litigation. On July 9, 1997, the District Court *sua sponte* ordered the Attorney General to amend his petition "to clearly state whether he moves for relief on behalf of the parties named in the motion or whether he purports to act on behalf of all the defendants and if he purports to act on behalf of all of the defendants, state his authority for doing so." (R5-118-2). On July 23, the Attorney General responded that a statute authorized him to appear in the federal courts "in any case in which the state may be interested in the result," that he represented the defendants Alabama Department of Corrections

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and ***4** Department of Public Health, and that he was an "intervenor" under PLRA § 3626(b)(2). (R5-119-1-2). The Attorney General, however, never explained the basis for his intervention under the PLRA or moved to intervene under Fed. R. Civ. P. 24.

The prisoners filed their *Opposition* to the motion to terminate on August 1, 1997 (R5-120), and challenged the Attorney General's standing in a *Supplemental Memorandum of Law in Opposition to the Motion to Terminate* filed on January 12, 1998. On January 13, 1998, the Jackson County Sheriff and county defendants filed a *Petition for Order to Show Cause Why the Commissioner of the Alabama Department of Corrections Should Not Be Held in Contempt* for his failure to comply with the *Permanent Injunction* requiring prompt removal of state inmates from the jail. (R5-126).

The District Court held a hearing on the *Motion to Terminate* and on the *Petition for an Order to Show Cause* on January 27, 1998. At that hearing, the court directed plaintiffs' counsel not to discuss issues of constitutionality or standing insofar as they had already been presented in written pleadings. (R17-129-4). The court stated its view that a "fair argument" could be made that the Attorney General had the right to "get in and litigate for" the Jackson County Sheriff and Jackson County officials. (R17-129-7-8). And when plaintiffs' counsel sought to present evidence in support of their claim that the limitation enacted in section 3626(b)(3) applied here to prevent termination, the court cut him off:
***5** I don't think that's necessary. We will enter an order vacating the two consent decrees and the mandatory [sic] injunction. And Mr. Johnson, if I am wrong, I assure you the judges on the Eleventh Circuit are not shy about telling me that I'm wrong -- at least they never have been in the past and I would not anticipate that they would be in the future.

(R17-129-18-19). The District Court's written Order granting the Attorney General's motion was entered that same day, terminating the November 1994 *Consent Decree,* the March 1995 *Consent Decree,* and the *Permanent Injunction.* (R5-127). This appeal follows.

2. *Standard of Review*

This Court examines questions of statutory interpretation and constitutional law *de novo. Hughey v. JMS Development Corp.,* 78 F.3d 1523, 1529 (11th Cir. 1996) (citing *Bechtel Constr. Co. v. Secretary of Labor,* 50 F.3d 926, 931 (11th Cir. 1995)).

*SUMMARY OF THE ARGUMENT*

Neither the Attorney General nor the state agencies whom he represents had standing under Article III to seek the termination of the November 1994 *Consent Decree,* to which they are not a party. The Attorney General failed to invoke either the intervention provision of the PLRA or Rule 24 of the Federal Rules of Civil Procedure; even if he had done so, these provisions would have failed to overcome the absence of injury in fact, causation, and redressability. And despite the speculation of the District Court, the Attorney General does not have the authority to assume the legal positions of Alabama sheriffs and county officials, especially in a case like this one where the Attorney General's interests are directly adverse to that of those of-

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ficials.

Regarding all the injunctive orders in this case, the District Court erred in refusing to allow the plaintiffs to present evidence in support of their contention that the limitation on termination enacted in § 3626(b)(3) applies in this case. Because the District Court refused to consider plaintiffs' evidence, this matter should be remanded for a hearing at which evidence may be presented.

The District Judge further erred in terminating the *Permanent Injunction,* because it was necessary to vindicate the prisoners' rights, was narrowly drawn, and was the least intrusive means available of vindicating their rights. This is so because the *Permanent Injunction* was not the product of an agreement between any of the parties made to avoid further litigation, but was entered by the District Court "upon due consideration, being fully informed in the premises."

The termination provision of the PLRA infringes on the separation of powers, undermines the independence of the judiciary, and imposes precisely the kind of "serious oppression" of a "particular class of citizens" that Article III was designed to prevent.

The Due Process Clauses of the United States Constitution prohibit the legislature from reopening judgments in cases that finally adjudicate the private rights of litigants. In doing so, the PLRA both violates the "vested rights" doctrine and illegally extinguishes plaintiffs' contractual rights under the *Consent Decrees.*

Because it simply piles burdens and restrictions on prison conditions litigation generally, rather than focusing on identifiable abuses, the PLRA also cannot withstand scrutiny under the Equal Protection Clause.

## ARGUMENT

### I. THE ALABAMA ATTORNEY GENERAL DOES NOT HAVE STANDING TO SEEK TERMINATION OF THE NOVEMBER 1994 CONSENT DECREE.

#### A. The Attorney General Does Not Satisfy the Irreducible Standing Requirements of Article III.

Neither the Alabama Attorney General nor any of the agencies he represents have standing to seek the termination of the November 1994 *Consent Decree* in this case. The District Court therefore erred in granted the Attorney General's *Motion to Terminate.*

Standing, the minimum showing that must be made before a case can be properly litigated in federal court, is a fundamental requirement of Article III of the United States Constitution. There are three irreducible elements of the standing requirement. First, a party must show an "injury in fact." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Second, the injury must be "fairly traceable," casually connected to the conduct complained of. *Id.* at 560. Finally, it must be likely that the injury will be redressed by a favorable decision. *Id.* at 561. "The party invoking federal jurisdiction bears the burden of ***8** establishing each of these ele-

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ments." *Id.; see also Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, ___, 118 S. Ct. 1003, 1016-17 (1998); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982).

In *Lujan,* the Secretary of the Interior promulgated a regulation providing for the protection of endangered species. 504 U.S. at 558. When the Secretary later decided to narrow the scope of that regulation, organizations dedicated to wildlife conservation and other environmental groups filed suit. *Id.* at 559. The Supreme Court held that these plaintiffs did not satisfy the constitutional requirement of standing. They could not show that as a result of the Secretary's actions, they faced an actual or imminent injury. *Id.* at 564-67. In addition, they failed to establish that the District Court could adequately redress the injuries that they did allege. *Id.* at 568-71.

In this case, the Attorney General of Alabama has not and cannot demonstrate that he suffers an injury in fact by the continuation of the November 1994 *Consent Decree.* He is not a party to this decree, nor is he the proper representative of any of the entities who are parties. Neither the Attorney General nor the Department of Corrections is placed under any duty as a result of this decree. Its provisions regarding the specifications required of the new jail and the management of the old jail impose burdens on the sheriff and the county defendants alone.

***9** It is insufficient for the Attorney General to maintain that he has an "interest" in this litigation generally, or an abstract concern about the balance of federal-state relations. To satisfy Article III, a party must have suffered or will imminently suffer an injury that is "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983). The injury must be *personal;* a party's "mere interest in a problem, no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972).

Furthermore, whatever injury the Attorney General may assert is not traceable to the conduct complained of: in this case, presumably, the continuation of the *Consent Decree* negotiated by the plaintiffs and county defendants and approved by the District Court. And the Attorney General has not shown that any injury he suffers is redressable by the federal court. The Supreme Court has made clear that Article III standing does not exist where a the applicant can gain only "psychic satisfaction" or "vindication of the rule of law" as a result of his involvement in a case. *Steel Co.,* 118 S. Ct. at 1018-19. There is certainly no standing where the chief objective by the applicant is apparently to foster a "tough-on-crime," anti-federal-courts public image.

For these reasons, it was error for the District Court to allow the Attorney General to pursue termination of the November 1994 *Consent Decree.*

***10** B. No Federal or State Statute Can Overcome the Attorney General's Lack of Article III Standing.

Although the District Court did not address the issue of standing in its *Order* on

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termination, it did so briefly in its remarks at the hearing on January 27, 1998. One of the Court's two points concerned the possibility of intervention under the PLRA:

The statute provides that agencies that are responsible for paying for, or taking care of, providing custody for, all that sort of stuff, have a right to intervene. The statute provides that parties, any party -- says "any" party -- has a right to petition to vacate those orders.

(R17-129-8).

Here the Court appeared to refer to 18 U.S.C. § 3626(a)(3)(F) of the PLRA, which provides:

Any State or local official or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of program facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

No other provision of the PLRA defines the conditions for intervention.

There are several problems with this theory, however -- not the least of which is the fact that neither the Attorney General nor his clients have *applied* to intervene in the first place. In response to the District Court's *sua sponte* inquiry into his representation capacity (R5-118), the Attorney General did ***11** characterize himself as "an intervener under Prison Litigation Reform Act 18 U.S.C. § 3626(b)(2)" (R5-119-2). Section 3626(b)(2), however, merely provides that a "defendant or intervener shall be entitled" to seek termination of certain forms of prospective relief; unlike § 3626(a)(3)(F), it does not state the circumstances under which intervention is proper. The Attorney General has never invoked this latter provision. Even worse, the Attorney General has never filed a motion to intervene or so much as cited Rule 24 of the Federal Rules of Civil Procedure, which requires a "person desiring to intervene" to serve a motion upon the parties:

The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. *The same procedures shall be followed when a statute of the United States gives a right to intervene.*

Fed. R. Civ. P. 24(c) (emphasis added). The Attorney General has not attempted to show that he meets the requirements of this rule. Even assuming that the Attorney General *could* have lawfully intervened in this matter, his actual failure to do so precludes him from seeking termination of the November 1994 *Consent Decree.*

Second, even if the Attorney General had managed to invoke § 3626(a)(3)(F) in this case, by its own terms that statutory provision would not have permitted intervention here. Neither the Attorney General nor his agency clients purport to control appropriation of funds for maintaining the Jackson County Jail or to maintain custody of inmates housed there; these are duties ***12** exercised by Jackson County offi-

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cials and the Jackson County Sheriff. Moreover, the Attorney General has sought to terminate the entire November 1994 *Consent Decree,* a document that addresses such issues as environmental conditions, food service, medical care, religious services, and security at the jail; his efforts are not limited to ending any particular "prisoner release order" -- even though that is the sole basis for intervention under § 3626(a)(3)(F).

Third, and perhaps most importantly, a statute such as the PLRA cannot provide standing where the Constitution itself does not allow it. "Congress may, by legislation expand standing to the full extent permitted by Article III." *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979) (citing *Warth v. Seldin,* 422 U.S. 490, 501 (1975)). However, "in no way may Congress abrogate the Article III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted." *Id.* (citing *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38 (1976)). In *Lujan v. Defenders of Wildlife,* despite their failure to satisfy the requirements for standing under Article III, the plaintiffs argued that they had standing to sue under the "citizen-suit" provision of the Endangered Species Act, which purported to allow any person to challenge the Secretary's actions in federal court. 504 U.S. at 571-72. The Court emphatically rejected this argument:

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury ***13** requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch -- one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

*Id.* at 576. *See also Sierra Club v. Morton,* 405 U.S. 727, 738 (1972) ( "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.").

Thus, to whatever extent the plain language of the statute applies to November 1994 *Consent Decree* in this case, the Attorney General cannot invoke the PLRA as a substitute for his failure to satisfy the injury, causation, and redressability requirements of Article III standing. And certainly he cannot rely on a state statute, such as Ala. Code § 36-15-1(2), as grounds for appearing in federal cases where he does not meet federal constitutional requirements. *Cf.* (R5-119-1). Because the Attorney General had no standing, the District Court had no jurisdiction to entertain his *Motion to Terminate,* and its *Order* granting the motion must be vacated.

C. The Attorney General Does Not Represent the Jackson County Sheriff or Jackson County.

The other point made by the District Court regarding the possibility of intervention concerned the authority of the Alabama Attorney General to represent other parties in this litigation. After plaintiffs orally reiterated their challenge to the ***14** Attorney General's standing, the court made the following comments:

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Well, the Attorney General, if I understand the -- first of all, the Attorney General certainly represents the Department of Health and the Department of Corrections. There's no question about that.
I think a fair argument could be made that Jackson County -- first of all, the sheriff of Jackson County is a state constitutional officer. He is not an officer of Jackson County, he is an officer of the state of Alabama. And I think a fair argument could be made that the Attorney General could get in and litigate for the sheriff if the Attorney General chose to do that.
And I see those assistant AGs over there nodding in agreement with me. But I think that's probably -- you could certainly make a fairly strong argument that the Attorney General could take over litigation on behalf of a sheriff, certainly, where his official duties are concerned.
Jackson County exists only at the sufferance of the state of Alabama. Without the state of Alabama, there could be no Jackson County. There could be no Jackson County Commission. If the Legislature decided to do it, I suppose they could make Jackson County -- could split it in half and send part over to Madison and part over to -- I guess everything east of the Tennessee River -- to DeKalb County, if they wanted to do that.

(R17-129-7-8).

Again, the District Court speculated about what arguments the Attorney General *could* have made, what motions he *could* have filed. In fact, no such tactics were taken. In response to the District Court's *sua sponte Order* (R5-118), the Attorney General stated that he is "in charge of all litigation for the state including state agencies ... [including] the Alabama Department of Corrections and Department of Public Health ...." (R5-119-1) (citations omitted). Plaintiffs do not dispute this. However,***15** the Attorney General never once below purported to represent either the sheriff, the county, or the county commissioners. He never asserted his authority to do so. The assenting nods of his assistants at the January 1998 hearing represent heretofore the most vigorous statement of the Attorney General's position on this matter. "An argument not made is waived ...." *Continental Technical Serv. v. Rockwell Intern Corp.,* 927 F.2d 1198, 1199 (11th Cir. 1991).

Moreover, the District Court was wrong to suggest that the Attorney General "could get in and litigate for the sheriff if the Attorney General chose to do that." The Alabama Constitution provides:
The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.

Ala. Const. art. V, § 112. The framers of the Alabama constitution thus placed sheriffs on par with, not subservient to, the Attorney General. Moreover, the Alabama Legislature has committed the "legal custody and charge of the jail in his county and all prisoners committed thereto" to the sheriff. Ala. Code § 14-6-1; *see also id.* at §§ 11-14-21, 11-16-29, 14-6-4, 14-6-8, 14-6-17, 14-6-19, 14-6-21, 14-6-40, 14-6-94, 14-6-95, 14-6-96, 14-6-97. The legislature has not seen fit to require the

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sheriff, in the exercise of his statutory duties, to defer to the Attorney General. And if he fails to perform these duties, the sheriff, not the Attorney General, is subject to injunctive and ***16** monetary liability under 42 U.S.C. § 1983. Similarly, every county in Alabama "is a body corporate, with power to sue or be sued in any court of record." Ala. Code § 11-1-2. There is no provision or precedent giving the Alabama Attorney General the authority to assert the legal positions of counties in court.

The Attorney General, of course, is himself not a party to this lawsuit. Insofar as he represents the Department of Corrections, however, it is clear that his interests are directly adverse with those of the Jackson County Sheriff and the county defendants. Indeed, at the very time the Attorney General was trying to terminate the *Consent Decrees* and *Permanent Injunction* in this case, the sheriff and county defendants were seeking a contempt order against the DOC Commissioner, for the DOC's failure to comply with that *Permanent Injunction.* (R5-126). Under these circumstances, the Attorney General is ethically prohibited from attempting to represent the state agencies, the sheriff, and the county officials at once. *See* Alabama Rule of Professional Conduct 1.7.

In a case very similar to this one, the Attorney General recently tried to "withdraw" a pleading filed by the Sheriff of Madison County, Alabama, who had stated his opposition to the Attorney General's motion to terminate another jail conditions consent decree to which no state agency was a party. The Attorney General titled his motion the "*Amended Response of Sheriff Joe W. Whisante in His Official Capacity as Sheriff of Madison County.* " After the real Sheriff Whisante objected to this extraordinary***17** motion, the District Court struck it summarily. *See Billy Ray Clark, et al. v. Joe W. Patterson, et al.,* Civil Action No. CV 78-C-5010-NE, *Order Granting Motion to Strike Document Erroneously Entitled "Amended Response of Sheriff Joe W. Whisante in His Official Capacity as Sheriff of Madison County* (N.D. Ala. Nov. 14, 1997). [FN1] The Attorney General's position, as envisioned by the District Court in this case, merits the same sort of summary treatment.

FN1. Appended to this brief as Attachment A.

## II. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS THE OPPORTUNITY TO PRESENT EVIDENCE IN OPPOSITION TO THE ATTORNEY GENERAL'S MOTION TO TERMINATE.

The District Court erred in refusing to hear evidence that the prospective relief in this case remains necessary and narrowly drawn to correct a current or ongoing violation of the plaintiffs' federal rights, and that it is the least intrusive means of correcting the violation. The PLRA plainly provides that a motion to terminate should be denied if such is the case. 18 U.S.C. §3626(b)(3). At the hearing on termination, counsel for the plaintiffs invoked that statute and sought to elicit the testimony of the court-appointed monitor to show the existence here of the conditions specified by the statute for denying a motion to terminate. (R17-129-16-18).

In refusing to hear any evidence, Judge Nelson stated that his "duty is to come to attention, salute, say yes, sir, and go ***18** on to the next problem." (R17-129-18). Other courts, however, have recognized their statutory duty to hear evidence that

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may establish the continuing necessity of an existing injunctive order. In *Benjamin v. Jacobson,* 124 F.3d 162 (2d Cir. 1997), *rhrg. en banc granted,* Dec. 23, 1997, for example, the court noted its agreement

with the position taken by the United States, an intervenor in this action, that the "'record' is not necessarily limited to the record that existed prior to the filing of a motion to terminate under section 3626(b). Rather, where the court determines that additional evidence is necessary for it to decide whether to terminate [federal] relief, the record may include supplemental information that is presented to the court." Given that the pre-existing record will rarely contain information on the "current" state of affairs, this construction of section 3626(b)(3) is the most sensible one. Indeed, a contrary interpretation of the term "record" would render the section a virtual nullity and is, moreover, inconsistent with the approach taken by other courts, which in applying section 3626(b)(3) have allowed the record to be supplemented with information on current conditions.

*Id.* at 179 (citations omitted). As the court in *Benjamin* observed, other courts have recognized the propriety of presenting and hearing evidence relating to current conditions in determining whether to terminate an existing consent decree on the authority of the PLRA. *See, e.g., Tyler v. Murphy,* 135 F.3d 594, 597-98 (8th Cir. 1998) (noting that section 3626(b)(3) "expressly permits the district court to continue appropriately tailored prospective relief that the court finds necessary to remedy a current violation of federal rights"; and holding that, on remand, proponents of prospective relief must be given opportunity to present evidence); *Jensen v. County of Lake,* 958 F.Supp. 397, 406-07 (N.D. Ind. 1997) ***19** (specifying that at hearing on termination, prisoners "will have an opportunity to show whether ongoing constitutional violations exist at the Lake County jail"); *Carty v. Farrelly,* 957 F.Supp. 727, 733-34 (D.V.I. 1997) (declining to terminate consent agreement in light of evidence presented that agreement was narrowly tailored and extends no farther than necessary). *Cf. Hadix v. Johnson,* ___ F.3d ___, Nos. 96-1851, 96-1943, 96-1907, 96-1908, 1998 WL 251069 (6th Cir. May 20, 1998) (reviewing, without deciding, question whether plaintiffs have right to present evidence at hearing on PLRA motion to terminate).

Fundamentally, the District Court's refusal to allow the presentation of evidence establishing the conditions necessary to avoid termination was error because, without evidence, there was no way to make the showing. To show that the *Consent Decree* is necessary to correct a current or ongoing violation of federal right requires evidence describing the current state of affairs in the jail, as well as evidence describing the effectiveness of the court orders in correcting or preventing the violation. Because the plaintiffs in this case were denied the opportunity even to present evidence to establish that the injunctive relief in this case could meet the test established by the PLRA, this Court must remand to the District Court with instructions to hold the evidentiary hearing.

***20** III. THE DISTRICT COURT ERRED IN TERMINATING THE *PERMANENT INJUNCTION*

In terminating the *Permanent Injunction,* the District Court erred not only for the reasons elsewhere stated in this Brief, but also for reasons particular to that in-

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junctive order. The termination provision of the PLRA provides:
(2) Immediate Termination of Prospective Relief. -- In any civil action with respect to prison conditions, a defendant or intervener 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.

18 U.S.C. §3626(b). As subsequent sections of this Brief will discuss, this provision raises serious constitutional questions. It is a cardinal rule of statutory construction that courts should interpret congressional enactments, where possible, in a manner that avoids questions about the enactment's constitutionality. *See Johnson v. Robison,* 415 U.S. 361, 366-67 (1974); *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Because the relief set out in the *Permanent Injunction is* based on findings of constitutional violations and is narrowly tailored to correct those violations, the PLRA did not authorize the lower court to terminate the *Preliminary Injunction.*

The *Permanent Injunction* entered in this case was not the product of any consent agreement between the parties, but was rather produced by the District Court, as it states, "upon due consideration, the court being fully informed in the premises." ***21** (R5-96-1). The relief contained in the *Permanent Injunction* is highly specific and narrowly drawn. It specifies that:
every inmate housed at the Jackson County, Alabama jail, old and new, who has been sentenced to the custody of the Alabama Department of Corrections shall, within (30) thirty days of the date on which the necessary documents associated with such inmate's conviction, sentence, and transfer have been completed and forwarded to the Department of Corrections, be transferred in the usual manner from the physical custody of the Jackson County, Alabama sheriff to the physical custody of the Alabama Department of Corrections.

(R5-96-1). The *Permanent Injunction* further contains detailed provisions governing remedies and recourses in the event of a violation of the above-quoted provision.

It has never been the function of judges to grant broader relief than the law allows, or to do so when the law does not require relief. Thus, when efforts at settlement fail and the resolution of a dispute is committed to the courts, judges grant only necessary relief, and only relief narrowly drawn to vindicate the infringed rights. In making these the conditions for averting termination of relief, the framers of the PLRA simply codified settled practice. *See Smith v. Arkansas Dep't of Correction,* 103 F.3d 637, 647 (8th Cir. 1996) ("[W]e are satisfied, and the parties agree, that the [PLRA] merely codifies existing law and does not change the standards for determining whether to grant an injunction."); *cf. Touissant v. McCarthy,* 801 F.2d 1080, 1086-87 (9th Cir. 1986) ("Injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation."), *cert. denied,* 481 U.S. 1069 (1987); *Newman v. Alabama,* 683 F.2d 1312, 1319 (5th Cir. 1982) ***22** (relief must be no broader than necessary to remedy the constitutional violation), *cert. denied,* 460 U.S. 1083 (1983); *Ruiz v. Estelle,* 679

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F.2d 1115, 1144-46 (5th Cir.) (court must fashion least intrusive remedy that will still be effective), *amended,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983).

At the hearing on January 27, 1998, the plaintiffs advanced the argument that the *Permanent Injunction* could not be terminated because it was issued by the court, and not through any process of negotiated agreement between the parties. (R17-129-4-7). To answer this argument, the District Judge proposed to describe the reasoning that produced the *Permanent Injunction:*

You are mistaken if you think that was a fully litigated matter and that the Court entered that order after full litigation. As I recall, it was not.

There was a problem with the county defendants complying with the limitations on inmate population, and the Court sort of hauled off and did it -- that is, the injunction -- to try to enforce the -- or allow the defendants, the county defendants, to comply with what they'd agreed to do with regard to inmate population at the jail.

(R17-129-5). The lower court's characterization of the *Permanent Injunction* as being just something the District Judge "hauled off and did" cannot govern the resolution of this termination proceeding. It is never appropriate for United States District Judges to "haul off" and grant relief that is not necessary to vindicate a right, nor narrowly tailored to its purpose. If that were the case here, the Attorney General and his Department of Corrections clients would certainly have entered some objection to the *Permanent Injunction* or to the process that produced it. ***23** Yet to date, the Attorney General and the Department of Corrections have never claimed that the *Permanent Injunction* was improperly entered or otherwise void from its inception, and more than two years passed before, by their *Motion to Terminate,* they sought even on other grounds to end it.

Because the *Permanent Injunction* meets the conditions specified in the PLRA for continuing injunctive relief, the District Judge erred in granting a motion to terminate it.

## IV. APPLICATION OF THE PLRA'S PROVISIONS TO THIS CASE WOULD VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS

This Court recently decided several of the issues raised on this appeal. *See Dougan v. Singletary,* 129 F.3d 1424 (11th Cir. 1997). Because the inmates represented in that case did not argue that the statutory provision at issue violated the principle set forth in *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872), the Court declined to address that question. *See Dougan,* 129 F.3d at 1426 n.10. The plaintiffs in this case raised that argument at the District Court, and now raise it again before this Court. *See* Section IV-A-1, *infra.*

With regard to the issues that were addressed in *Dougan,* plaintiffs recognize that the determinations made there are binding at the present level of appeal. In the interest of preserving their arguments for further review, however, plaintiffs briefly present their arguments regarding these issues herein. Moreover, the Ninth Circuit Court of Appeals and the United ***24** States District Court for the District of New Jersey have recently held the termination provision of the PLRA unconstitutional.

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*See Taylor v. United States,* No. 97-16069, 97-16071, 1998 WL 214578 (9th Cir., May 4, 1998); *Denike v. Fauver,* Civ. 83-2737 (DRD), 1998 WL 223647 (D.N.J., May 4, 1998). The occurrence of a split among the circuits on the constitutionality of the PLRA's termination provision attests to the continuing uncertainty about the validity of that provision.

A. THE PLRA'S PROVISION FOR TERMINATION OF FINAL JUDGMENTS ENTERED BY CONSENT VIOLATES ARTICLE III AND THE PRINCIPLE OF SEPARATION OF POWERS.

Article III, § 1 of the Constitution provides: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This explicit allocation of power "serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' ... and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government."' *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848 (1986) (citations omitted).

The termination provision of the PLRA infringes on the separation of powers, undermines the independence of the judiciary, and imposes precisely the kind of "serious oppression" of a "particular class of citizens" that Article III was designed to ***25** prevent. For this reason, the Court should hold that provision unconstitutional.

1. Congress May Not Prescribe Rules of Decision in Pending Cases.

The PLRA abrogates the judicial rules of decision in prison litigation. It provides that prospective relief must be vacated unless the order contains "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. § 3626(b)(2). It thereby displaces both the *Board of Educ. of Oklahoma City v. Dowell,* 498 U.S. 237, 247-50 (1991), requirement of a showing of compliance and unlikelihood of recurrence, and the rule of *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384 (1992), and *Local No. 93 Int'l Ass'n of Fire-fighters v. Cleveland,* 478 U.S. 501, 524-25 (1986), that a consent decree may be approved and enforced even though it provides greater relief than would have been won at trial. Such a legislative mandate violates the principles of separation of powers as enunciated in *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1872).

The Supreme Court held in *Klein* that Congress may not "prescribe rules of decision" to the courts in cases pending before them without violating the constitutional principle of separation of powers. *Id.* at 146. *See Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 430 (1995) (citing *Klein* as holding that "Congress ***26** may not 'prescribe rules of decision to the Judicial Department of the government in cases pending before it."'). Yet this is exactly what the PLRA does.

In *Klein,* Confederates who had been granted Presidential pardons sued for the proceeds of property confiscated by the government during the Civil War. Pursuant to the pardon power granted him under the Constitution, the President issued a proclam-

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ation granting ex-confederates a pardon with restoration of all rights of property. The Court of Claims had decided, in a prior decision that was affirmed by the Supreme Court, that the pardon had the effect of entitling the claimant to payment for the confiscated property. Thereafter, Congress passed a law making such pardons inadmissible in evidence to establish a claimant's entitlement to the confiscated property, but making them conclusive evidence that the bearer had aided in the rebellion -- a finding that constituted grounds for dismissal of the claim. If the Court of Claims had already ruled in the claimant's favor, the statute deprived the Supreme Court of appellate jurisdiction and directed dismissal of the case.

The Court held that this attempt to "prescribe rules of decision" violated separation of powers because it prohibited the Court from giving "the effect to evidence which, in its own judgment, such evidence should have," and directed the Court to "give it [the evidence] an effect precisely the contrary." *Klein,* 80 U.S. at 147. It continued:

The Court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction***27** on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor?

*Id.* at 146-47.

The parallel to *Klein* is remarkable. There, the Court stated: "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?" 80 U.S. at 144. Here, the court is required to ascertain the existence of certain facts -- the absence of particular findings in an order -- and thereupon to declare that the substantive relief it has ordered or approved through previously valid processes is vacated. What is this but to prescribe a rule of decision of a cause in a particular way?

The *Klein* Court distinguished "prescribing rules of decision," which Congress cannot do, from an actual amendment in the governing law, which Congress can do if the law is within its powers. For this distinction *Klein* cited *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1855), in which an injunction against an illegal bridge was deemed unenforceable ***28** after Congress changed the law of navigation -- over which it had plenary power -- to make the bridge legal. As *Klein* itself observed, "No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act." 80 U.S. at 146. *See also Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429, 437 (1992) (finding no *Klein* violation where statute at issue replaced "underlying"

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"legal standards"); *Rufo,* 502 U.S. at 388 (under Fed. R. Civ. P. 60(b), courts can alter final injunctions when "the statutory or decisional law has changed to make legal what the decree was designed to prevent"). By contrast, the PLRA's termination provision purports to reach cases in which the under-lying law is *constitutional* in nature. As the Supreme Court recently held, Congress cannot reach this substantive law: it does not have "the power to determine what constitutes a constitutional violation." *City of Boerne v. Flores,* 117 S.Ct. 2157, 2164 (1997).

Following this reasoning, the Ninth Circuit in *Taylor v. United States,* Nos. 97-16069, 97-16071, 1998 WL 214578, slip op. at 8 (9th Cir., May 4, 1998), held that Congress, in enacting the PLRA, has "prescribed a rule of decision in a discrete group of Article III cases, in violation of *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871)." In making that determination, the court focused on three consequences the PLRA brings on existing consent decrees. First, section 3626(b)(3) findings cannot be made on the existing record because pre-PLRA actions that result ***29** ed in consent decrees typically did not require the making of a full factual record, nor did they produce detailed factual findings. *Id.* at 8. Second, compliance with a consent decree will mean that there are no "ongoing" violations within the meaning of section 3626 (b) (3). *Id.* at 8. Third, if violations are continuing, section 3626 (a)(2) would prohibit meaningful discovery and require the prisoner to prove the case anew to maintain the old decree in effect. *Id.* at 8. *See also Denike v. Fauver,* Civ. 83-2737 (DRD), 1998 WL 223647 (D.N.J., May 4, 1998).

In the two-page written order granting the motion to terminate, the lower court never addresses this or any other of the arguments challenging the constitutionality of the termination provision. Nothing at the hearing itself further discloses the lower court's reasoning in rejecting the constitutional arguments. (R17-129).

In injunctive cases, the nature, extent, and duration of equitable remedies are very much part of the "rules of decision." It is the duty of courts not only to say what the law is, but also to ensure that the law is carried out. Thus, in *Brown v. Board of Education,* after first finding liability, the Court defined the district courts' tasks as "[f]ull implementation of these constitutional principles." *Brown v. Board of Education II,* 349 U.S. 294, 299-300 (1955). District courts have broad equitable powers to remedy constitutional violations, "for breadth and flexibility are inherent in equitable remedies." ***30** *Swann v. Charlotte-Mecklenburg Board of Educ.,* 402 U.S. 1, 15 (1971).

Once a decree is entered, its oversight and duration are also governed by judicial rules. An injunctive decree can be modified on a showing of a "significant change in circumstances" in either fact or law, followed by a showing that the proposed modification is "suitably tailored to the changed circumstance." *Rufo,* 502 U.S. at 383. A decree may be vacated on a showing that the enjoined party has substantially complied with the decree for a reasonable period of time and that it is "unlikely to return to its former ways." *Board of Educ. of Oklahoma City v. Dowell,* 498 U.S. 237, 247-50 (1991).

Consent decrees differ from other injunctive decrees in that they are formulated by

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the parties and not by the court. They may, in fact, provide greater relief than a court could have ordered after a trial. *Rufo,* 502 U.S. at 383, 391; *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. 501, 524-25 (1986). Once entered, however, a consent decree 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.* " *Rufo,* 502 U.S. at 378 (emphasis added).

These judicial rules for the oversight of the court's orders are not subject to a legislative change such as the termination provision here, because Congress may not constitutionally require such a particular result in the case. This body of law is as ***31** central to judicial enforcement of the Constitution as are the courts' interpretation of the Constitution itself. In particular, *Dowell*'s requirement of a reasonable period of compliance and a showing that the unlawful conduct is "unlikely" to recur is essential to ensuring that constitutional violations are meaningfully remedied. Thus, while defendants may be able to end this case through pre-existing principles of equity, they may not do so through § 3626(b)(2).

2. Congress May Not Retroactively Invalidate the Final Judgments of Article III Courts.

In *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211 (1995), the Supreme Court held that Congress cannot reopen the final judgments of Article III courts without violating the principle of separation of powers. Yet the cited subsection of the PLRA, 18 U.S.C. § 3626(b)(2), purports to reopen all prospective relief in civil actions with respect to jail conditions. As applied to the final judgment in this case, this subsection is unconstitutional.

The Supreme Court in *Plaut* held emphatically that statutes such as this are unconstitutional on separation of powers grounds:

... When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." *The Federalist*.... Our decisions ... have uniformly provided fair warning that such an act exceeds the power of Congress....

... The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves....

***32**

... We think legislated invalidation of judicial judgments deserves the same categorical treatment accorded by [*INS v.] Chadha* to congressional invalidation of executive action....

514 U.S. at 225, 230, 240. The Court noted that one of the evils the Framers of the Constitution sought to remedy was "intermingled legislative and judicial powers," which often manifested itself in "judgments being vacated by legislative acts." *Id.* at 219. It concluded as follows:

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We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority do so.

*Id.* at 240. Therefore, to the extent that it sets aside final judgments such as the *Consent Decree* in this case, § 3626(b)(2) of the PLRA cannot stand under *Plaut.*

A final judgment is one that resolves all legal issues, except execution, concerning which the rights of appeal have been exhausted, waived, or have lapsed. *Griffith v. Kentucky,* 479 U.S. 314, 321 n.6 (1987); *Plaut v. Spendthrift Farm, Inc.,* 1 F.3d 1487, 1500 (6th Cir. 1993) (Keith, J., concurring), *aff'd,* 514 U.S. 211 (1995). The Supreme Court explicitly acknowledged in a jail conditions case that "a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 391 (1992); *accord Alberti v. Klevenhagen,* 46 F.3d 1347, 1364-65 (5th Cir. 1995) (jail conditions case); *United States v. Athlone Industries, Inc.,* 746 F.2d 977, 983 n.5 (3d Cir. 1984), and cases ***33** cited therein. In other words, a consent decree 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.* " *Rufo,* 502 U.S. at 378 (emphasis added).

The panel in *Dougan* erred in concluding that consent decrees "are final judgments, but not the 'last word of the judicial department."' 129 F.3d at 1426. The Supreme Court in *Plaut* made clear that a judicial decision becomes the "last word" precisely when it achieves "finality": *i.e.,* the time for appeal expires. *See* 514 U.S. at 227. These terms are synonymous, in both their plain meaning and as used by the Court.

Calling consent decrees "comparatively adaptable" does not alter the separation of powers analysis. *Cf. Dougan,* 129 F.3d at 1426. It is of course true that an equity court retains the power to modify its injunctive orders, a power that is codified in Federal Rule of Civil Procedure 60(b). *See Rufo,* 502 U.S. at 379-81; *Alberti,* 46 F.3d at 1366. But this power extends to *all* other kinds of judgments, too, as the Supreme Court observed in *Plaut.* The Court explicitly rejected the argument that a judgment's vulnerability under Rule 60(b) made it also vulnerable to retroactive legislation: the rule "does not impose any *legislative* mandate-to-reopen upon the courts, but merely reflects and confirms *the courts' own inherent and discretionary power,* 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would ***34** work inequity." 514 U.S. at 233-34. (emphasis added). Rule 60(b) itself explicitly states that "[a] motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

Thus, while it is certainly true that the statute struck down by the Court in *Plaut* and § 3626(b)(2) here are "distinguishable," *Dougan,* 129 F.3d at 1426, it is not at all clear why this distinction should make a difference. In *Plaut,* the Supreme Court emphasized that all legislative attempts to invalidate final judicial judgments deserve "categorical treatment." 514 U.S. at 240. "Good fences make good neighbors."

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*Id.* The fence between the judicial and legislative branches must be rigorously maintained, to protect the integrity of both. It was therefore error for the panel in *Dougan* to uphold the constitutionality of § 3626(b)(2). Plaintiffs ask this Court to reconsider that decision.

For the reasons described above, the Ninth Circuit, in *Taylor v. United States,* Nos. 97-16069, 97-16071, 1998 WL 241578 (slip op. at 3) (9th Cir. May 4, 1998), agreed that, in the PLRA, "Congress, in violation of the Constitution, has reopened the final judgments of the federal courts and unconditionally extinguished past consent decrees affecting prison conditions." *See also Denike v. Fauver,* Civ. 83-2737 (DRD), 1998 WL 223647 (D.N.J. May 4, 1998).

***35** 3. Congress May Not Strip the Courts of Their Power and Duty to Enforce Effective Remedies in Constitutional Cases.

"It is emphatically the province and duty of the judicial department to say what the law is" in the constitutional arena. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). Included within this "province and duty" is the ability to fashion an adequate remedy for every wrong that can be proved in a case over which a court has jurisdiction. *Id.* at 163. Thus, even if Congress has authority to legislate in the area of remedies for constitutional violations, it may not use such authority to obstruct the courts' ability to remedy violations of constitutional rights in an effective manner.

The main substantive remedial limitation of the PLRA provides that the court must find that 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." § 3626(a)(1). In the guise of procedural requirements, the PLRA is designed to make prison and jail conditions litigation so burdensome that it cannot be pursued effectively. It vacates existing orders that lack the precise findings set out in the statute, § 3626(b)(2); prevents the entry of consent judgments, effectively requiring each case to go to trial and depriving inmates and defendants of the most effective remedial mechanism, an order resulting from negotiation and agreement, § 3626(a)(1), 3626(e)(1); and requires ***36** orders to be vacated on motion based only on the passage of time, § 3626(b)(1), 3626(e)(2). Such a design will so completely undermine the courts' authority to effectuate their prior orders as to threaten their inherent power to obtain "submission to their lawful mandates" and "the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991).

As the preceding sections discussed, the Supreme Court has repeatedly addressed the federal courts' remedial power and duties in constitutional cases and has developed a comprehensive set of principles governing the exercise of this Article III function, from the initial formulation of a remedy to its eventual vacatur. This law of remedies is an integral part of judicial authority to enforce the Constitution. The PLRA voids this body of law and substitutes provisions designed to hamper enforcement of the Constitution. This subversion of effective remedies invades the province of the judiciary and violates Article III.

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The PLRA is not a legitimate exercise of Congress's power under Article III, § 1 of the Constitution. While Congress has some power to regulate the jurisdiction and functions of the federal courts, it cannot abrogate their "core" constitutional function: "the impartial, independent, and final adjudication of disputes." *United States v. Rojas,* 53 F.3d 1212, 1214 (11th Cir.) , *cert. denied,* 116 S. Ct. 478 (1995). Indeed, with the PLRA Congress is not regulating practice and procedure in the federal courts; it is regulating the judicial enforcement of the federal Constitution generally. This is clear from the fact that ***37** the statute purports to affect even *state* court actions to enforce the Constitution. *See* § 3626(a), 3626(d). That power is not within the scope of any clause in the Constitution.

In reviewing Congress's recent attempt to reopen federal court judgments, the Supreme Court observed that no such measure had ever been passed by Congress, and added: "That prolonged reticence would be amazing if such interference were not understood to be constitutionally prescribed." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. at 230. Inmates in detention facilities and prisons are the first constituency in more than a century whose unpopularity is so great as to overcome a Congressional majority's scruples about judicial independence. This Court should defend its place in the constitutional order.

B. RETROACTIVE APPLICATION OF THE PLRA'S PROVISION FOR TERMINATION OF RELIEF WOULD DENY DUE PROCESS.

1. Termination of the Relief Pursuant to the PLRA Would Violate Plaintiffs' Vested Rights in the Judgments.

The Due Process Clauses of the United States Constitution prohibit the legislature from reopening judgments in cases that finally adjudicate the private rights of litigants. Because the *Consent Decrees* define the rights of the plaintiff class, it may not be reopened without violating the "vested rights" doctrine.

The Supreme Court held that vested rights are protected from subsequent legislative interference in *McCullough v. Virginia,* ***38** 172 U.S. 102, 123-23 (1898). The holding in *McCullough* was later explained in *Hodges v. Snyder,* 261 U.S. 600 (1923). *Hodges* limited the holding in *McCullough* to those cases which did not concern the enforcement of a public right. 261 U.S. at 603-04. This case concerns the constitutional rights of prisoners, which are not and cannot be "public rights." *See, e.g., Granfinanciera v. Nordberg,* 492 U.S. 33, 51 n.8, 54-55 (1989). The holding in *McCullough* therefore applies to this case. The defendants ask this Court to vacate the *Consent Decrees* pursuant to a law that was passed well after those judgments vested. Plaintiffs' due process interest in the final judgment bars their request.

2. Termination of the Relief Pursuant to the PLRA Would Violate Due Process Limitations on the Power of the Federal Government to Pass Legislation that Has a Retroactive Effect on Contracts.

Application of the PLRA's termination provision would extinguish plaintiffs' contractual rights to relief under the *Consent Decrees* in this case. [FN2] Consent orders are contracts as well as judicial acts. They are supported by consideration:

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"[I]n exchange for the saving of costs and elimination of risk, the ***39** parties each give up something they might have won had they proceeded with the litigation," *United States v. Armour & Co.,* 402 U.S. 673, 681 (1971); *accord Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 381 (1994), and are "to be construed for enforcement purposes basically as a contract ...." *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 238 (1975). It is the parties' agreement that gives the court authority to enter the judgment. *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. at 521-22.

FN2. Although the federal government is not subject to the contract clause of the Constitution, Fifth Amendment due process principles limit the Federal Government's power to enact legislation that has a retroactive effect on governmental or private contracts. J.E. Nowak & R.D. Rotunda, *Constitutional Law* § 11.8 at 405 (4th ed. 1991).

Application of the termination provision of the PLRA would abrogate a governmental contract that benefits plaintiffs. Congress's power to release government contracts is controlled by the "sovereign acts" doctrine. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment,* 477 U.S. 41, 52 (1986); *Horowitz v. United States,* 267 U.S. 458, 461 (1925). Under this doctrine, contractual arrangements can be impaired "indirectly" with "general legislation," but cannot be impaired by "legislation targeting a class of contracts to which [the government] is a party." *Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.,* 25 F.3d 1493, 1501 (10th Cir. 1994). The application of the PLRA's termination provision to allow the defendants to repudiate the obligations they assumed by contract would result in "targeting a class of contracts to which [the government] is a party" in a manner that would release the government from its obligation on the basis of a hostility to the scope of those obligations. *Id.* ***40** For this reason, such application cannot survive constitutional scrutiny.

Even under the rational basis scrutiny applied to congressional abrogation of private contracts, the Supreme Court has declared illegitimate a governmental purpose simply to abrogate a class of existing contractual obligations. *See United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 22 (1977) ("A State could not 'adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."') (quoting *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 439 (1934)). The same illegitimate purpose underlies the PLRA's termination provision. Congressional rhetoric about burdensome consent decrees was simply another way of saying that Congress disliked the obligations in question and wanted to repudiate and destroy them.

Here, by agreeing to the *Consent Decrees,* plaintiffs sacrificed their entitlement to proceed to trial, and the defendants agreed to contracts that included promises of specific remedial action rather than risk a decision by the courts. The result is a contract creating rights that cannot be taken away without violating the Due Process Clause. *See Coombes v. Getz,* 285 U.S. 434 (1932).

***41** C. THE PLRA'S PROVISION FOR TERMINATION OF FINAL JUDGMENTS ENTERED BY CONSENT

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DENIES EQUAL PROTECTION.

In *Romer v. Evans,* 517 U.S. 620 (1996), the Court struck down a Colorado constitutional amendment that prohibited legislative, executive or judicial action designed to protect gays and lesbians from discrimination. Although legislative classifications are generally upheld so long as they bear a rational relation to a legitimate end, the Court held that the amendment

fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, *its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class that it affects; it lacks a rational relationship to legitimate state interests.*

*Id.* at 632 (emphasis added).

The Court continued:

... Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government *and each of its parts* remain open on impartial terms to all who seek its assistance. "'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."' ... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

*Id.* at 633 (emphasis added).

***42** The PLRA -- and § 3626(b)(2) in particular -- is subject to the same constitutional infirmities analyzed by the Court in *Romer.* [FN3]

FN3. Federal enactments are subject to equal protection scrutiny by way of the Fifth Amendment, under which the courts have applied exactly the same analysis as to states under the Equal Protection Clause of the Fourteenth Amendment. *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975).

1. The PLRA Broadly Restricts Prisoners' Right to Judicial Redress.

It is important to recognize the dual nature of the PLRA. Several of the statute's provisions prescribe technical filing and screening requirements for prisoner lawsuits. [FN4] It is clear that these provisions are intended to respond to the problem of ***43** frivolous litigation by *pro se* prisoners -- not a trivial governmental concern. As this Court has held, "[d]eterring frivolous prisoner filings in the federal courts falls within the realm of Congress's legitimate interests, and the specific provisions in question are rationally related to the achievement of that interest." *Mitchell v. Farcass,* 112 F.3d 1483, 1489 (11th Cir. 1997).

FN4. For example, prisoners must exhaust available administrative remedies before filing lawsuits. § 803(d), subsection (g), *amending* 42 U.S.C. § 1997e. They must pay entire filing fees, even if they qualify for *in forma pauperis* status. § 803(d), subsection (a), *amending* 28 U.S.C. § 1915. Their claims may

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> now be dismissed *sua sponte* if they fail to state a claim upon which relief can be granted. § 803(d), subsection (c), *amending* 42 U.S.C. § 1997e. Defendants may waive the right to file an answer, without admitting liability as a result. § 803(d), subsection (g). Prisoners who have three lawsuits dismissed in federal court are deemed "out" of court forever. § 803(d), *amending* 28 U.S.C. § 1915.

By contrast, this case involves provisions of the PLRA that serve only the purpose of gutting judicial enforcement of *meritorious* substantive claims. Section 802 (amending 18 U.S.C. § 3626) restricts the availability of injunctive relief to prisoners in multiple, cumulative ways. This section limits settlements, §§ 3626(a)(1)(A), 3626(c); limits duration of relief, §§ 3626(b); provides automatic stays of relief, § 3626(e)(2); limits preliminary relief, § 3626(a)(2); expands potential intervention by other parties, § 3626(a)(3)(F); and limits the use, compensation, and communications of special masters, §§ 3626(f)(2), 3626(f)(4), 3626(f)(6). Other sections, like § 803(d), which severely limits attorneys' fees that may be won by prevailing prisoner plaintiffs, impose additional serious disabilities on prisoners. Like the Colorado amendment, these provisions impose "a broad and undifferentiated disability on a single named group" in a manner "inexplicable by anything but animus toward the class it affects." *Romer,* 517 U.S. at 632. By setting higher and practically unattainable hurdles for relief, the PLRA does for prisoners in the judicial process what the Colorado amendment did for gays and lesbians in all governmental process. It saddles ***44** prisoners -- unlike any other class of litigants -- with a practical burden of litigation, relitigation, and artificially compressed time frames for the composition of litigation that is unique in our jurisprudence.

2. The PLRA Fails the Rational Basis Test.

The sweeping and cumulative burden of these restrictions on the ability of members of a single, disfavored group to seek enforcement of their legal rights is "a denial of equal protection of the laws in the most literal sense." *Romer,* 517 U.S. at 633. Their "sheer breadth is so discontinuous with [any] reasons [that could be] offered for it that the [statute] seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632.

It is hard to see what *legitimate* government interest could possibly underlie the PLRA's limitations on prisoners' ability to enforce their constitutional rights. *Romer* makes clear that the mere desire to stack the deck against a disfavored group is not legitimate. That principle is as true for prisoners as for gays and lesbians.

The statute is not saved by any "unquestionably legitimate end of minimizing prison operation by judges." *Dougan,* 129 F.3d at 1427. This is a problem that existing law fully addresses, making these new provisions superfluous (and undermining the truth of the rhetoric that accompanied the statute's enactment). If changed factual conditions make compliance with a consent ***45** order substantially more onerous, a modification of the order may be granted on the defendants' motion. *Rufo,* 502 U.S. at 384. That showing is necessary only when an order's term "arguably relates to the

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vindication of a constitutional right"; "minor changes in extraneous details ... unrelated to remedying the underlying constitutional violation" require only a "reasonable basis" for modification. *Id.* at 383-84 & n.7. Further, a decree may be vacated entirely upon a showing of "full and satisfactory compliance" with the court's decrees for a reasonable period of time and that it is "unlikely that the [defendants] will return to their former ways." *Dowell,* 498 U.S. at 247-49. Thus, escape from "micromanagement" -- real or imagined -- is readily available to defendants who meet their responsibilities under the governing court orders.

The statute's approach to consent orders bespeaks a further illegitimate purpose. Consent orders, by definition, are *agreed to* by someone with authority to settle under state and local law. The PLRA represents the legislative overruling of those decisions made by state and local authorities to settle litigation. There is no legitimate federal interest in taking sides in such disputes, and there is certainly no legitimate or rational interest in requiring trials in cases that the litigants are willing to settle.

Finally, the fact that the terms of § 3626 extend to state courts as well as federal courts belies any claim that Congress was concerned with "micromanagement" by federal courts or with ***46** any other aspect of federal court procedure or practice. Congress's purpose in § 3626 was to regulate the decisions of *all* courts in cases asserting prisoners' constitutional claims. This is not a legitimate purpose.

3. Because the PLRA Infringes on a Fundamental Right, It is Subject to, and Fails, Strict Scrutiny.

Prisoners have a fundamental right to seek redress from the courts. That right finds its basis in due process, *see Procunier v. Martinez,* 416 U.S. 396, 419 (1974); *Wolff v. McDonnell,* 418 U.S. 539, 579 (1974); equal protection, *see Pennsylvania v. Finley,* 481 U.S. 551, 557 (1987); and the right to petition the government for the redress of grievances, *see Turner v. Safley,* 482 U.S. 78, 84 (1987).

"Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights."' *McCarthy v. Madigan,* 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886)). By making their litigation more difficult, costly and burdensome than that of other civil rights litigants, the PLRA directly and explicitly targets the fundamental right of prisoners to make civil rights claims challenging conditions of confinement.

When the governmental classification impinges on the exercise of a fundamental right, the courts must apply strict scrutiny by requiring a showing that the classification "has been ***47** precisely tailored to serve a compelling governmental interest." *Plyler v. Doe,* 457 U.S. 202, 216-17 (1982). No such showing is possible here. The desire to disadvantage a particular group of litigants is not a legitimate, much less a compelling, interest. Nor is there a compelling interest based on a perception that prison litigation has resulted in "micromanagement" or other abuses. Even if such concerns were deemed compelling, § 802 of the PLRA is not "precisely tailored"; indeed, it is not tailored at all. It does not narrowly target particular

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kinds of abuses in litigation; rather it indiscriminately vacates all orders that do not meet formal criteria -- the requirements of specific findings -- that were not in effect, and of which the parties and courts had no notice, at the time those orders were entered.

It is instructive to compare the PLRA's requirements to the standards articulated by the Supreme Court addressing largescale, long-term injunctive litigation. An order may be modified on a showing of a significant change of circumstances, in law or in fact, that makes compliance unworkable or substantially more onerous because of unforseen circumstances. *Rufo,* 502 U.S. 367. An order may be vacated entirely upon a showing of "full and satisfactory compliance" with the court's decrees for a reasonable period of time and that it is "unlikely that the [defendants] will return to their former ways." *Dowell,* 498 U.S. at 247-49. In addition, the relevant statute provides for appellate review of all decisions "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify ***48** injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1).

The case-by-case, fact-based inquiry prescribed by *Rufo* and *Dowell,* combined with the ready availability of appellate review, is a narrowly tailored means of serving the interest in keeping the federal courts' injunctive oversight of prisons and jails within appropriate bounds. It contrasts sharply with the shotgun approach of the PLRA, which, as set forth above, simply piles burdens and restrictions on prison conditions litigation generally, rather than focusing on identifiable abuses. The statute therefore cannot withstand scrutiny under the Equal Protection Clause.

CONCLUSION

In terminating the *Consent Decrees* and *Permanent Injunction,* the District Court erred in its interpretation and application of the PLRA. Plaintiffs ask this Court to reverse the decision of the District Judge and remand for the reentry of the *Consent Decrees* and *Permanent Injunction* granting injunctive relief to the plaintiffs.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

| | | |
|---|---|---|
| BILLY RAY CLARK, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| VS. | ) | CIVIL ACTION NO. CV 78-C-5010-NE |
| | ) | |
| JOE W. PATTERSON, et al., | ) | |

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)

Defendants. )

MOTION TO STRIKE DOCUMENT ERRONEOUSLY ENTITLED "AMENDED RESPONSE OF SHERIFF JOE W, WHISANTE IN HIS OFFICIAL CAPACITY AS SHERIFF OF MADISON COUNTY"

COMES NOW Joe W. Whisante, in his official capacity as Sheriff of Madison County, Alabama (hereinafter referred to as "Sheriff Whisante"), and moves this Honorable Court to strike the document heretofore filed in this case, erroneously entitled "AMENDED RESPONSE OF SHERIFF JOE W. WHISANTE IN HIS OFFICIAL CAPACITY AS SHERIFF OF MADISON COUNTY," and for grounds of said motion, says:

1. Sheriff Whisante is the holder of an elected state office created by the Constitution of Alabama and is a member of the Executive Department of the State of Alabama. See Alabama Constitution of 1901, Article V, Section 112, as amended by Amendment No. 284, and *Parker v. Amerson,* 519 So.2d 442 (Ala. 1987). Section 112 of the Alabama Constitution provides as follows:

"Sec. 112. Composition; officers enumerated.

The executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county."

The framers of the Alabama Constitution placed the Sheriff on a par with the Attorney General, not above the Attorney General but not subservient to the Attorney General.

The Alabama Legislature has placed upon the Sheriff, in his official capacity, the legal custody and charge of the jail in his county. See *Code of Alabama,* § 14-6-1, which provides as follows:

"§ 14-6-1. Legal custody and charge of jails and prisoners; appointment of jailer.

The sheriff has the legal custody and charge of the jail in his county and all prisoners committed thereto, except in cases otherwise provided by law, and may appoint a jailer for whose acts he is civilly responsible."

The Alabama Legislature has not seen fit to require the Sheriff, in the exercise of this statutory duty, to defer to the Attorney General.

2. The Attorney General, in his extraordinary "Amended Response of Sheriff Joe W. Whisante In His Official Capacity as Sheriff of Madison County" argues that *Code of Alabama,* § 36-15-21, empowers him to dictate to Sheriff Whisante the position which Sheriff Whisante will take in this litigation. Section 36-15-21 provides as follows: "All litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General. The employment of an assistant attorney general, other than an assistant attorney general em-

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ployed in the office of the Attorney General, for the purpose of representing the state or any department thereof shall be by the Attorney General with the approval of the Governor, but nothing in this section shall prevent the Governor from employing personal counsel, whose compensation shall be payable out of the Governor's Contingent Fund."

Section 36-15-21 does not say that the Attorney General shall direct and control litigation concerning an elected official whose office is created by the Constitution. Applying the rationale set forth in *Parker v. Amerson* at p. 446, if the Legislature can impose upon a Sheriff as a member of the Executive Department of the State and whose office is created by the Constitution, the requirement that the Attorney General can direct and control any litigation in which the Sheriff is involved, over the objection of the Sheriff, such legislation (§ 36-15-21 as interpreted by the Attorney General) violates the separation of powers provisions found in the Alabama Constitution, Article III, Sections 42 and 43, which provide as follows:

"Sec. 42. Legislative, executive and judicial departments established.

The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"Sec. 43. Separation of powers.

In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

3. The Attorney General argues that his position in this litigation is supported by the holding of the Alabama Supreme Court in *Ex parte Weaver,* 570 So.2d 675 (Ala. 1990). The facts of this case are clearly distinguishable from the facts in *Ex parte Weaver.* It is unclear from the opinion in *Weaver* if the party involved was "Mike Weaver, as Commissioner of Insurance of the State of Alabama," (see style of the case) or the "The Alabama Insurance Department" (see p. 676):
"Blue Cross moved to dismiss the complaint, alleging, among other things, that the subscribers had failed to exhaust administrative remedies in the Alabama Insurance Department and had failed to join the Alabama Insurance Department. In response to the motion, the subscribers amended their complaint and added the Insurance Department as a defendant."

The Department of Insurance and the Office of Commissioner of Insurance are creations of the Alabama Legislature (see *Code of Alabama,* § 27-2-1 and § 27-2-2) as opposed to the Office of Sheriff which is created by the Alabama Constitution. By statute, the Attorney General represents the Insurance Department. See *Code of Alabama,* § 27-2-11, which provides:

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"§ 27-2-11. Assignment of assistant attorney general.

The attorney general shall assign to the department an assistant attorney general who shall render to the commissioner such legal services as may be required."

There is no similar statute in regard to the 67 Sheriffs of Alabama. The Commissioner of Insurance is appointed by the Governor as opposed to the 67 Sheriffs who are elected by the people.

Mike Weaver, as Commissioner of Insurance of the State of Alabama, or the Department of Insurance, whichever was the party in *Ex parte Weaver,* was the only state official or state department which was a party in the litigation where the Sheriff *and* the Commissioner of the Department of Corrections are parties to this case.

The only issue in *Ex parte Weaver* was a procedural issue, *i.e.,* should the decision of the Circuit Court of Montgomery County be appealed. The case did not involve conflicting substantive positions. No Alabama case relied upon by the Alabama Supreme Court in *Ex parte Weaver* involved a Sheriff or any other elected official whose office was created by the Alabama Constitution.

In *Ex parte Weaver,* pp. 681-684, the Alabama Supreme Court, by way of dicta, discusses the conflict of interest problem with which the Attorney General is confronted in this case. The Court discusses a Connecticut case, *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission,* 174 Conn. 308, 387 A.2d 533 (1978), and a Mississippi case, *State ex rel Allain v. Mississippi Public Service Commission,* 418 So.2d 779 (Miss. 1982), in this regard. In the Connecticut case, separate Assistant Attorneys General had appeared for the separate state agencies and had taken opposing positions. The trial court ordered the Attorney General to withdraw as counsel for both state agencies. The Connecticut Supreme Court reversed and allowed two agencies to be represented by different Assistant Attorneys General. In the present case, the Attorney General wishes the same Assistant Attorney Generals to represent both parties and dictate that both parties must take the same position.

In *Ex parte Weaver,* the Alabama Supreme Court quoted the following language from the Mississippi case:
"'The attorney general has a large staff which can be assigned in such manner as to afford independent legal counsel and representation to the various agencies. The unique position of the attorney general requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or specially appointed counsel to represent the agency unfettered and uninfluenced by the attorney general's personal opinion. If the public interest is involved, he may intervene to protect it."'

*State ex rel Allain v. Mississippi Public Service Commission, supra.*

In this case, the Attorney General does not wish to assign separate Assistant Attorneys General to represent opposing sides of an issue. The Attorney General wishes to force the Sheriff to take a position consistent with the position of the Attorney

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General and the Department of Corrections. The Attorney General is not supported by the dicta in *Ex parte Weaver.*

Please note that the signature block on the original Motion to Terminate Orders Pursuant to the Prison Litigation Reform Act filed on or about July 3, 1997, and the signature block on the "Amended Response of Sheriff Joe W. Whisante in His Official Capacity as Sheriff of Madison County" are identical with the sole exception that in the "Amended Response," Assistant Attorney General Kim T. Thomas' name is added. In this regard, it is shocking that Assistant Attorneys General Ellen Leonard, Kim T. Thomas and Albert S. Butler, who signed the "Amended Response," although they carry the title Assistant Attorneys General, are apparently assigned to the Legal Division of the Alabama Department of Corrections.

4. This case was orally argued to the Court on August 21, 1997. It was the understanding of the lawyers for Sheriff Whisante that the case was submitted to the Court for a decision at the close of that oral argument. The so-called "Amended Response" was filed by the Attorney General without showing the Court the respect to request or receive permission to reopen the case and submit additional material.

5. This suit was originally filed on January 13, 1978, with the Sheriff of Madison County as a defendant. On April 27, 1978, the plaintiffs' filed a Motion for Leave to Amend the Complaint and to Join Additional Parties which joined the Commissioner of the Department of Corrections as a defendant, which motion was granted by Order entered on April 28, 1978. The case remained active through November 30, 1989. The attorney for Sheriff Whisante now before the Court and his law partners have represented the Sheriff of Madison County at all times. An Assistant Attorney General has represented the Commissioner of the Department of Corrections at all times. At no time during the pendency of this lawsuit has the Attorney General taken the position that he could represent the Sheriff of Madison County over the Sheriff's objections, or that he could dictate the position of the Sheriff. It is interesting to note in the Motion to Terminate Orders filed by the Attorney General and the Commissioner of the Alabama Department of Corrections, in the Certificate of Service, the Assistant Attorney General certifies service upon:
"George W. Royer, Jr., Esq.
Sirote & Permutt
P. O. Box 18248
Huntsville, AL 35804-8248
Attorney for County Defendants"

George W. Royer, Jr. is now, was and at all times since the filing of this lawsuit has been a partner of Julian D. Butler, the attorney appearing for Sheriff Whisante. The position taken by the Attorney General in the "Amended Response" apparently was arrived at only after the Attorney General learned that the position of Sheriff Whisante was inconsistent with the position of the Attorney General.
Julian D. Butler
Bar Number XXX-XX-XXXX
J. Jeffery Rich
Bar Number XXX-XX-XXXX

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1998 WL 34090084 (C.A.11)

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