UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARICOPA COUNTY SHERIFF'S OFFICE, JOE ARPAIO, the duly Elected Sheriff of Maricopa County, et al.,	Ninth Circuit Docket No. 98-16995
Appellants,	Lower Court Docket No. DC# CV-77-00479-EHC District of Arizona (Phoenix)
vs.	
DAMIAN HART, et al.,	
Appellees,	

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLEES' RESPONDING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal by the Defendants of an order by the United States District Court of Arizona (the Honorable Earll H. Carroll), signed on September 9, 1998 and filed on September 10, 1998, in which the District Court denied Defendant's Motion to Terminate a Consent Decree pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(b). The District Court had jurisdiction pursuant to 28 U.S.C. § 1343(a) and 1381. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. WHETHER THE CONSENT DECREE TERMINATION PROVISIONS OF THE PRISON LITIGATION REFORM 18 U.S.C. § 3626(b) ARE UNCONSTITUTIONAL.

STATEMENT OF THE CASE

In 1977, the Plaintiffs instituted a class action lawsuit aimed at addressing issues of denial of constitutional rights of pre-trial detainees in Maricopa County, Arizona. The Defendants were the Maricopa County Board of Supervisors and the Maricopa County Sheriff's Office (ROA 1).[1]

The class action litigation resulted in a Consent Decree between the parties in 1981 (ROA 166). Consequently, there was never a trial and there were no Findings of Fact or Conclusions of Law. The Consent Decree was eventually superceded by an Amended Judgment entered by stipulation of the parties on January 10, 1995 (ROA 705 and ER 1).

In April, 1998, two years after passage of the PLRA, Defendants filed a motion with the District Court to terminate the Amended Judgment. The motion was based on the termination provisions of the PLRA (18 U.S.C. 3626(b)) (ROA 755 and ER 2). There was no other basis claimed in the motion for termination of the Amended Judgment other than the PLRA. This motion was made despite the fact that in 1997, the District Court for the

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[1] The record of the District Court has been indexed for appeal by the Clerk of the District Court. Reference to the Clerk's record will be designated Record on Appeal (ROA @ ___). Reference to the excerpts from the Record submitted with Defendant's brief will be referred to as ER_____.

District of Arizona had found the termination of consent decrees provisions of the PLRA unconstitutional and in violation of the Separation of Powers doctrine. *Taylor v. State of Arizona*, 972 F.Supp. 1239 (D. Ariz. 1997) (Hon. Robert Broomfield).

On May 4, 1998, a panel of this Court upheld the District Court's decision in *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), Op. withdrawn, rehearing *en banc* granted, 158 F.3d 1059 (9th Cir. 1998).

Based on *Taylor*, the District Court in this case denied the Motion to Terminate the Consent Decree (Amended Judgment). The Defendants then appealed the denial of their Motion to Terminate to this Court. Oral argument on the *Taylor* rehearing before the *en banc* court occurred on January 21, 1999. A decision has not yet been rendered as for as the Plaintiffs know.

SUMMARY OF ARGUMENT

The termination provisions of the PLRA (18 U.S.C. 3626(b)) is a mandate by Congress requiring courts to terminate relief which the court has already entered if (1) two years has passed since the Decree was entered (18 U.S.C. 3626(b)(1), or; immediately if (2) certain findings were not made in past court

decrees; findings that would necessarily not be made precisely because the decree was by consent (§ 3626(b)(2)).

The supposed "limitation" on the termination provisions of 3626(b) is illusory because at most it gives the Plaintiffs only the opportunity to try to prove their case all over again with the *defacto* result being that their consent decree is of no value to them.

Congress, therefore, has dictated to the courts that the courts reopen final decrees and enter a specific order--termination. Congress has not changed the substantive law underlying the consent decrees, which could in a proper Rule 60(b) proceeding result in modification or termination. The substantive laws underlying the consent decrees are the constitutional rights of jail inmates under the Eighth Amendment to the United States Constitution. Congress has simply dictated a result in a discrete group of cases and instructed the Article III Courts to order specific relief (termination of consent decrees). By doing so, Congress has violated the Separation of Powers doctrine and therefore, the statute is unconstitutional.

STANDARD OF REVIEW

Plaintiffs agree that the standard of review, where the constitutionality of an act of Congress is an issue, is a *de novo* review.

I. INTRODUCTION

The Prison Litigation Reform Act of 1995 ("PLRA") (signed into law April 26, 1996) 18 U.S.C. § 3626 requires immediate termination of judicial relief entered pursuant to consent decrees. The PLRA requires such termination unless the plaintiff can show that the court granting the relief initially made three findings:

1) That the relief approved was narrowly drawn;

2) That the relief extends no further than necessary to control a violation of the federal right;

3) That the relief is the least intrusive means available to correct the violation of the federal right.

See 18 U.S.C. § 3626(b)(2).

When the case was resolved by a consent decree, such findings are impossible precisely because the case was completed by consent decree. Of course, that was exactly the goal Congress

had when it passed this legislation--to effectively terminate consent decrees that had previously resolved prisoners (or pre-trial detainees) constitutional claims.

The actions of Congress, however, in dictating to Article III Courts the requirement that they terminate relief which hd been granted in previously final consent decrees, must run headlong into an irreconcilable separation of powers problem.

In an effort to avoid an interpretation by the courts that the PLRA was dictating a certain result to the courts, the Act contains a "limitation" on the immediate termination mandate. That limitation, or exception, holds that relief under a decree will not terminate if the court:

> Makes written findings based on the record that prospective relief remains necessary to correct an ongoing violation of the federal right, extends no further than necessary to correct the violation of the federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation. 18 U.S.C. § 3626(b)(3) (emphasis added).

This limitation is "illusory." These findings cannot be made because no record was made. This was a consent decree which by obvious implication did not require a trial or extensive record. The decree is not being obeyed[2], but the plaintiff class

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[2] Which Defendants acknowledge it is not in at least one crucial aspect, jail population/overcrowding (See Defendants' Brief at 11).

essentially has to start their lawsuit over because the PLRA requires them prove a federal constitutional violation to save the consent decree. *See, Taylor v. U.S.*, 143 F.3d 1178 (9th Cir. 1998), opinion withdrawn, rehearing *en banc* granted, 158 F.3d 1059 (9th Cir. 1998).[3]

A. THE STATUTE IN QUESTION

It is the "termination of relief" section of the PLRA which is under analysis in this case since it is this section of the PLRA under which Defendants have moved to terminate the consent decree. The only issue here is the constitutionality of this section of the PLRA (18 U.S.C. § 3626(b)). Not in question is whether courts can terminate or modify consent decrees based on

[3] The *Taylor* case involves a post conviction inmate class in Arizona. This case involves a pre-trial detainee class of inmates in Maricopa County, Arizona. Both classes were parties to original consent decrees in the 1970's which were amended in the 1990's. In *Taylor*, the state moved to terminate the consent decree under the PLRA and the U.S. District Court in Arizona ruled the immediate termination provisions of the PLRA unconstitutional. Just before this court handed down its ruling in the *Taylor* case, the Defendants in this case, likewise filed a motion to terminate the consent decree in April, 1998 under the PLRA. About a month after the Defendants' motion was filed in this case, this court's decision in *Taylor* was handed down on May 4, 1998. Based on the *Taylor* decision, the district court denied the Defendants' motion to terminate. This court then granted an *en banc* rehearing on *Taylor*. Oral argument in the *Taylor en banc* hearing was held on January 21, 1999.

changes in the law or fact under traditional methods such as Rule 60(b).

The statute in question in this appeal states as follows:

> (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 intervener--
> (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.
> (B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).
> (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.
> (3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

This statute clearly provides at §(b)(1) that termination of prospective relief occurs two (2) years from the date of the order or two years from the date of the passage of the PLRA for orders in existence prior to the passage of the PLRA (retroactivity). Since this consent decree was in existence prior to the PLRA, the consent decree will terminate under the statute upon Defendants' motion anytime after April 26, 1998. Thus, Congress mandates relief in this discrete set of cases contrary to the specific language of the agreement between the parties, and later adopted by the court as its order.

If, for some reason §(b)(1) is not swift enough for Congress or the Defendants to effectuate a change in a final court decree, §(b)(2) provides for immediate termination at the request of the Defendant unless it can be shown by the Plaintiffs that the court made a finding 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.

Subsection (b)(3) purports to create a limitation to the termination provisions when the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of a federal right, extends no further than necessary to correct the federal right

violation and that the prospective relief is narrowly drawn in the least intrusive means to correct the violation.

In summary, a Defendant party to a consent decree in prison litigation can have the prospective relief of a consent decree terminated merely by asking that it be so, at the latest, two years after the decree is entered (b)(1) even assuming need still exists for the Consent Decree. If the Defendant wants to move faster, the Defendant can ask that the decree be terminated immediately under (b)(2) because in all consent decrees, at least those drafted without prior knowledge of the PLRA, the necessary findings will most likely be absent.[4]

Finally, §(b)(3) pretends to be a limitation on the termination of prospective relief under §(b)(1) and §(b)(2) where the court makes it findings based on the record concerning the case. However, since such records cannot be expected to exist, no court will be able to make such findings based on a record that resulted in a consent decree. This supposed limitation is truly illusory.

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[4] And even if a Plaintiff somehow managed to avoid immediate termination under §(b)(2), there would still be termination for the asking by the Defendant one year after the court denied such termination. *See* 18 U.S.C. 3626 (b)(1)(ii). Obviously, termination is going to occur under §(b)(1) or §(b)(2).

Defendants argue at pgs. 16-18 of their brief that §(b)(3) has substantive value in that it allows Plaintiffs to "supplement the record and have continued prospective relief found necessary under § 3626(b)(3)" citing *Carty v. Farrelly*, 957 F.Supp, 727, 733 (D.V.I. 1997). What Defendants are really saying is that §(b)(3) forces Plaintiffs to try to prove their case again when it has already been resolved by a consent decree. This is the very reason that this limitation has been dubbed "illusory": (b)(3) requires Plaintiffs to start all over and to prove their case anew. The reality, therefore, is that the prospective relief that Plaintiffs earned in their consent decree has been trumped by Congress and the Plaintiffs are forced to start over if they can mount the necessary resources once again. Where the Plaintiffs are prisoners and jail inmates, it is questionable whether they can mount such resources.

II. ARGUMENT

It is clear that the termination portion of the statute requires, one way or another, termination of prospective relief in consent decrees. The question presented is whether this violates the Separation of Powers between Congress and the Courts and is, therefore, unconstitutional.

A. LEGAL BACKGROUND

District Courts from the Third, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have held the termination provisions of the PLRA unconstitutional under the Separation of Powers doctrine. *See, e.g., Denike v. Fauver*, 3 F.Supp.2d 540 (D.N.J. 1998). The Circuit courts, however, have ruled the statute constitutional (except of course, the 9th Circuit in *Taylor*). *See, Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998); *Daugan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997); *Gavin v. Bramstad*, 122 F.3d 1081 (8th Cir. 1997); *Phyler v. Moore*, 100 F.3d 365 (4th Cir. 1996); *cert denied* _____ U.S. _____, 117 S.Ct. 2460, 138 L.ed.2d 217 (1997).

Commentators, on the other hand, have analyzed the PLRA and concluded that it unconstitutional for the same reason as the panel in *Taylor:*

> Ira Bloom, *Prisons, Prisoners and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 Ariz. L. Rev. 389 (1998); Mark Tushnet and Larry Yackle, *Symbolic Statues and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 59-62 (1997); Richard J. Costa, Note, *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?*, 63 Brooklyn L. Rev. 319 (1997); Catherine G. Patsos, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y. L. Sch. L. Rev. 205

(1998); and Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial power or Quelling Judicial Micro-Management?*, *1997 Wis. L. Rev. 1275*

B. THE TERMINATION PROVISION OF THE PLRA VIOLATES THE SEPARATION OF POWERS DOCTRINE.

In *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.ed 435 (1855), the State of Pennsylvania obtained an injunction against a bridge company claiming that the bridge obstructed navigation. Congress then passed a statute establishing the bridge as a post road. This had the effect of nullifying the legal basis for the Pennsylvania injunction. The bridge was soon thereafter washed out in a storm. When the bridge company attempted to rebuild, Pennsylvania tried to impose their injunction, claiming that Congress, because of separation of powers, could not undo the court's injunction by subsequent legislation.

The Supreme Court rejected Pennsylvania's claim. In so doing, they distinguished between money judgments and executory injunctions. As to executory injunctions, the *Wheeling Bridge* court stated:

> Now, whether it is a future, existing or continuing obstruction depends upon the question whether or not it interfered with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain

> the decree of the court cannot be enforced. 59 U.S. at 431-32.

Thus, according to *Wheeling*, when the substantive law underlying an injunction is changed by competent authority, the court may modify or even terminate an injunction, even though it is final, to conform to the change in law.

In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.ed 2d 328 (1995), the Supreme Court reviewed Congressional action which was designed to overturn a previous decision by the Supreme Court. In 1991, the Supreme Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.3d 2d 321 (1991), defined a new rule regarding the statute of limitations in securities cases, leaving some litigants with a dismissal on the merits. Congress then passed a law amending the statute of limitations and reinstating the old statute retroactively to reinstate the dismissed cases. *Plaut* held that Congress could not, under separation of powers, reopen final judgments:

> 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. Our decisions. . . have uniformly provided fair warning that such an act exceeds the power of Congress.

Plaut did, however, distinguish the situation in that case from Congressional Legislation "that altered the prospective

effect of injunctions entered by Article III courts." *Plaut*, 514 U.S. at 232, 115 S.Ct. at 1459 and in so doing, the court cited *Wheeling Bridge*.

The *Plaut/Wheeling Bridge* cases poses the question of whether consent decrees are "final judgments." The Supreme Court has answered the question affirmatively in a prisoner's rights case. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748, 116 L.ed 2d 867 (1992):

> A consent decree is a final judgment that may be reopened only to the extent that equity requires. 502 U.S. at 391.

The issue that must be resolved, therefore, is whether the termination provisions of the PLRA are an unconstitutional infringement on an Article III Court final order (*Plaut/Rufo*) or a change in substantive law governing an "executory injunction" (*Wheeling Bridge*).

Plaintiffs suggest that, like the panel in *Taylor*, that it is the nature of the "change" that defines whether the termination section of the PLRA runs afoul of the Separation of Powers doctrine. Here, the substantive law that underlies this consent decree is the United States Constitution. Obviously, the Constitution has not been changed by Congress. What Congress has attempted to do is to simply tell the courts to terminate all prison litigation consent decrees without any change whatsoever

in the underlying, substantive law. It is difficult to conceive of a more elementary separation of powers conflict.

Where a federal statute created by Congress is the substantive law underlying a particular court decree and where Congress sees fit to change that substantive law, then executory injunctions such as those in *Wheeling Bridge* can be terminated or modified as a result without violating the Separation of Powers doctrine. But where the underlying substantive law is the Constitution, which so far has not been changed by Congress, Congress oversteps its power by a long distance when it requires the courts to terminate consent decrees that are remedial of constitutional violations.

The U.S. Supreme Court has recognized this distinction on a number of occasions. In *Wheeling Bridge*, for example, the underlying substantive law involved Congress' statutory power to designate a bridge as a post road. Once Congress so designated the bridge, the legal grounds for injunction by Pennsylvania could not exist and the injunction could be terminated.

Likewise, in *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996), the district court had issued an injunction against a telescope project in Arizona because the project violated Federal Environmental Statutes. In reaction, Congress passed legislation aimed at the injunction which the court

interpreted as amending the environmental laws so that the project would no longer be in violation. In *Mount Graham,* the substantive law that was changed was the environmental law, not any constitutional provision.

The same result occurred in *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 112 S.Ct. 1407, 188 L.ed 2d 73 (1992) where amendments to the Federal Statutes by Congress passed the separation of powers analysis because these were "changes in the law" and these changes did not have a Constitutional underpinning.

United States v. Yacoubian, 29 F.3d 1 (9th Cir. 1994) illustrates several points relevant to this inquiry. In *Yacoubian,* the Immigration and Naturalization Service (INS) instituted deportation proceedings against Yacoubian for a firearms conviction. The district court held that the deportation violated the court's previous judicial recommendation against deportation (JRAD) and enjoined INS from initiating deportation proceedings. At the time of the injunction, the JRAD was interpreted to include those individuals who had been convicted of firearms offenses pursuant to Federal Statute, 8 U.S.C. 1251(b).

About a year after the JRAD Congress amended these statutes to clearly include firearms convictions as a grounds for

deportation. *Yacoubian* argued that the new law by Congress violated separation of powers.

First, the court noted:

> For separation of powers purposes, the Judgment in Yacoubian's case is "final" because the time for appeal of the JRAD ran without any party's appeal rights being exercised. . . 28 F.3d at 8.

In fact, this court in *Yacoubian* even noted that a consent decree in the prison litigation context is a final judgment:

> A Judgment or decree of this court, if appealable, is, after no appeal is taken, conclusive upon the parties. (Citation omitted). . . . *See also, Hook v. Arizona Department of Corrections*, 972 F.2d 1012, 1027 (9th Cir. 1992). (The consent decree is a final, binding judgment that was never appealed.)

Thus, for purposes of the *Plaut/Wheeling Bridge* analysis, it is clear that the judgment in this case is a "final judgment." The *Yacoubian* court went on to hold, however, that the case did not violate separation of powers because:

> Congress was within its power to amend the statute and to make that change apply retroactively. . . application of 8 U.S.C. § 1251(a)(2)(c) to *Yacoubian* does not offend the Constitution.

Thus, *Yacoubian* falls within the line of cases holding that when Congress changes substantive law that Congress alone controls (i.e., Federal statutes), Congress may apply those changes retroactively, even to final judgments, without violating separation of powers.

On the other hand, when the underlying "substantive law" is constitutional (i.e., the 8th Amendment in this case) the Supreme Court has held that the Separation of Powers doctrine prohibits Congress from dictating results to Article III courts.

In *Northern Pipeline Construction Co. V. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 Led 2d 598 (1982), the Supreme Court spoke to this issue in a case where Congress attempted to create a set of adjunct (bankruptcy) courts to the District Court system with judges who were not Article III Judges, i.e., judges who, unlike Article III Judges, did not have life tenure and were subject to removal by a judicial council. The court held that this attempt by Congress to establish "Legislative Courts" to exercise jurisdiction over all matters arising under the bankruptcy laws violates the separation of powers doctrine. In so holding, the court stated that there was a

> critical difference between rights created by federal statutes and rights recognized by the Constitution. Moreover, such a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Article III. The constitutional system of checks and balances is deigned to guard against "encroachment or aggrandizement" by Congress at the expense of the other branches of government. *Buckley v. Valeo*, 424 U.S. at 122. But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to. . .prescribe remedies. . . . Such provisions do, in a sense, affect the exercise of

> judicial power, but they are also incidental to Congress' power to define the right that it has created. 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 it has created. Rather, such inroads suggest unwarranted encroachments upon the Judicial power of the United States, which our Constitution reserves for Article III Courts. 458 U.S. at 83-84. (Emphasis added)

Likewise, in *City of Boerne v. Flores,* _____ U.S. ____, 117 S.Ct. 2157, 138 L.ed 2d 624 (1997), the Supreme Court dealt with the constitutionality of the Religious Freedom Restoration Act (RFRA) 42 U.S.C. § 2000bb *et seq.* That act prohibited any governmental authority from substantially burdening a person's exercise of religion even if the burden stemmed from a rule of general applicability unless the government could demonstrate that the burden furthered a "compelling state interest" and is the least restrictive means of furthering that interest.

When the Catholic Archbishop of San Antonio was denied a building permit to enlarge the church because of zoning laws, he sued local zoning authorities under the RFRA. The District Court held the Act was unconstitutional on separation of powers grounds. The Fifth Circuit Court of Appeals reversed, finding the RFRA constitutional.

The Supreme Court reversed and held the RFRA unconstitutional because *inter alia*, the Act attempted to define a standard by which First Amendment Freedom of Religion cases would be decided.

> RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here involved are beyond Congressional authority, it is this court's precedent, not RFRA which must control.
>
> . . . [Broad] as the power of Congress is. . .RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The Judgment of the Court of Appeals sustaining the Act's constitutionality is reversed. 117 S.Ct. At 2172.

Both *Northern Pipeline* and *City of Boerne* involved situations, as here, where Congress attempted to pass legislation which had the effect of encroaching on the power of Article III Courts in the area of constitutional law, rather than federal statutory law. In both instances, the Congressional act was ruled unconstitutional on separation of power grounds.

The Defendants nonetheless maintain that constitutional law is not the underlying law in this case. Apparently recognizing the difficulty for their position if constitutional law <u>is</u> the underlying law, Defendants claim that

> The PLRA involves a restriction on the remedial powers of the courts rather than a change in the underlying substantive law. . . Defendants' brief @ 27.

Citing *Inmates of Suffolk County v. Rouse, supra,* Defendants take the position that "the relevant underlying law in this case is not the Eighth Amendment. . . Rather, the relevant underlying law relates to the District Court's authority to issue and maintain prospective relief absent a violation of a federal right. . ." *Id.* Defendants then conclude that:

> If a consent decree fails to meet the PLRA standards, termination of the decree pursuant to the PLRA, merely effectuates Congress' decision to divest district courts of the ability to construct or perpetuate relief when no violation of a federal right exists. *Id.* at 27-28.

To say that the underlying law is not the Eighth Amendment, but that it is merely the court's remedial power is, at best, to miss the forest for the trees. First, this legislation is aimed explicitly at prison litigation, not at the general remedial power of the district court and prison litigation is invariably based on constitutional law. Second, this cause of action and the case at bar is an Eighth Amendment case (ROA 1). Third, there has been a violation of a federal right, i.e., the constitutional protection afforded under the Eighth Amendment and a consent decree remedies that violation.

This argument by the Defendants brings this issue even more within the ambit of the *City of Boerne v. Flores, supra,* case. Like *Boerne,* the PLRA attempts to set standards by which the

district courts decide cases and controversies of a constitutional law dimension. Much more serious in terms of separation of powers is that the PLRA actually requires the district court to terminate relief that the court has approved in cases involving violations of constitutional rights. Could Congress direct the district courts to terminate prospective relief in cases where a consent decree enjoining the violation of First Amendment rights had been entered by the district courts? Plaintiff suggests that Congress could not do so.

In a nutshell, Congress has attempted through the PLRA, to eliminate a class of Article III court decrees that are based on underlying law that Congress does not substantively control, constitutional law. To allow Congress to do so by (supposedly) "restricting the remedial powers" of the district courts would be a semantic victory that renders the doctrine of separation of powers meaningless.

C. THE PLRA VIOLATES *U.S. V. KLEIN*

In *U.S. v. Klein,* 80 U.S. (13 Wall) 128, 20 L.ed 519 (1871), the controversy involved the following: Congress had passed a law allowing noncombatant confederates to reclaim confiscated property by presenting proof of loyalty. In accordance with *U.S. v. Padelford,* 76 U.S. (9 Wall) 531, 19 L.ed 788 (1869), Klein

proved loyalty by presenting a pardon. Congress then passed another law that said, contrary to *Padelford*, that a pardon was proof of disloyalty and directed the courts to dismiss any pending actions based on a pardon.

The *Klein* court relied on the separation of powers doctrine to invalidate Congress' new law. The *Klein* court reasoned, in distinguishing *Wheeling Bridge*, that the underlying law was not changed, but that the Court "was forbidden to give the effect to evidence which, in its own judgment, such evidence should have and was directed to give an effect precisely contrary." 80 U.S. at 147.

Defendants here argue that this case is not controlled by *Klein* because the *Klein* prohibition does not take hold where Congress "amends applicable law," citing *Plaut*, 514 U.S. at 218. There are several answers to this contention. Previously, the Defendants argued that Congress had <u>not</u> attempted to amend applicable law but had simply limited the district court's "remedial" powers (see Defendants' Brief at 27). Second, Congress here, like *Klein*, <u>did not</u> amend applicable law; the constitutional provisions upon which the court decree is based are unchanged. Third, Congress <u>could not</u> change applicable law because applicable law here is the Constitution.

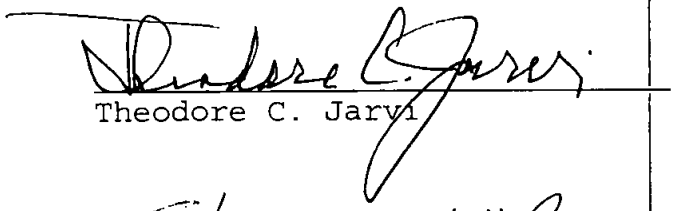
In this case Congress has attempted to do just what Congress attempted to do in *Klein*; direct the outcome of a discrete type of case, (prison litigation), but here the impact on the principles of separation of powers is even more egregious because in this case Congress has directed termination of relief "approved by the court for constitutional violations" *see Taylor, supra*, at 1185.

III. CONCLUSION

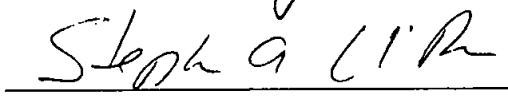
It is clear that the judgment in this case is "final" (*Rufo/Yacoubian/Hook*) and is based on remedying a constitutional claim. By attempting to require courts to adopt new reopening standards that did not exist at the time the decree was entered, Congress has created a classic separation of powers conflict. The *Plaut* court emphasized that the power to reopen final judgments is judicial and not legislative in nature (*Plaut*, 115 S.Ct. at 1455). Courts may reopen final decrees where a change in the facts or law demands an equitable change. Congress may not require Courts to reopen final judgments where those judgments are final. Where Congress changes the underlying law upon which a judgment or decree is based, Courts will often modify or terminate the decree based on that change. Here, however, Congress has not and could not change the underlying

law; Congress has simply attempted to tell Courts to reopen final decrees to terminate them. That kind of a Congressional mandate aimed at Article III Courts violates separation of powers.

The PLRA termination provision violates the separation of powers doctrine for the reasons stated in this brief and is therefore unconstitutional. Accordingly, the order of the district court denying Appellants' Motion to Terminate the Consent Decree should be affirmed.



Theodore C. Jarvi



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STATEMENT OF RELATED CASES

Taylor v. United States (Ninth Circuit Docket Nos. 97-16069 and 97-16071) involve the same legal issue as this case, the constitutionality of the termination provisions of the PLRA under the separation of powers doctrine.

CERTIFICATION PURSUANT TO CIRCUIT RULE 32(E)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Responding Brief of Appellees is monospaced, has 10.5 characters per inch and contains 6,475 words.

DATED this 22 day of February, 1999.

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CERTIFICATE OF SERVICE

STATE OF ARIZONA)
)**ss.**
County of Maricopa)

THEODORE C. JARVI, being first duly sworn upon his oath, deposes and says:

On the 22 day of February, 1999, I caused to be mailed by U.S. Mail, First Class, postage prepaid, an original and fifteen (15) copies of the attached Appellees' Responding Brief, to the United States Court of Appeals, Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939, and caused two (2) copies to be mailed by U.S. Mail to Andrew L. Pringle, Esq., Mariscal, Weeks, McIntyre & Friedlander, P.A., 2901 North Central Avenue, Suite 200, Phoenix, AZ 85012-5000, Attorney for the Appellant.

THEODORE C. JARVI

The foregoing instrument was acknowledged before me this 22nd day of February, 1999, by Theodore C. Jarvi.

Notary Public

My commission expires:

OFFICIAL SEAL
KAREN L. WILSMAN
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires Aug. 12, 1999