134 F.3d 371
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.

Everett HADIX, et al., Plaintiffs-Appellees,
v.
Perry M. JOHNSON, et al., Defendants-Appellants,
and
UNITED STATES OF AMERICA, Intervenor.

No. 96-2548. | Jan. 22, 1998.

On Appeal from the United States District Court for the Western District of Michigan.

Before GUY, NELSON, and DAUGHTREY, Circuit Judges.

Opinion

PER CURIAM.

***1** This is an appeal from an order entered by the district court on November 18, 1996, in response to the defendants' motion for immediate termination of a "prison conditions" consent decree. The district court having reserved final determination of the motion until the constitutionality of the controlling statute could be decided by the court of appeals, we are confronted at the outset with the question whether the order is immediately appealable. Concluding that it is not, we shall dismiss this appeal for want of jurisdiction.

I

In an opinion accompanying its order, the district court acknowledged that "reasonable minds can and have differed" as to the constitutionality of the "immediate termination of prospective relief" provisions of the Prison Litigation Reform Act (PLRA), which provisions are codified at 18 U.S.C. §§ 3626(b)(2) and (3). Although the district court believed that these provisions invade the province of the judiciary in violation of the separation-of-powers doctrine, it recognized that the court of appeals, before which the issue had been raised in a different context, might take the opposite view.[1] Given its uncertainty as to how the separation-of-powers issue would ultimately be decided, the district court elected to defer final determination of the defendants' motion.

Borrowing a characterization offered by the United States, which has filed an appellate brief as intervenor. we observe that the district court did take some "initial steps" along the road to resolving the termination motion.[2] In one such step the court identified some 20 sections of the consent decree that were deemed by the court to be "appropriate for termination." Should the Sixth Circuit decide (as it now has) that the PLRA applies to the consent decree, the district court indicated that these 20 provisions "will be terminated."

With respect to two other provisions of the decree, although the district court said it was not satisfied that the defendants were in compliance therewith, the court found no constitutional violation. These provisions would be terminated too, the court indicated, if the PLRA should be upheld as constitutional.

As to the remaining five provisions considered by the district court, the court found that they addressed current constitutional violations. In only two instances, however, did the court decide that the relief which had been ordered "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 ... is narrowly drawn and the least intrusive means to correct the violation," thus meeting the requirements of 18 U.S.C. § 3626(b)(3) as in effect when the order was issued. (Congress subsequently replaced the phrase "current or ongoing violation" with "current and ongoing violation," Pub.L. 105-119, § 123(a)(2), and the district court will need to apply the latter formulation in rendering a final decision on the motion to terminate.) Insofar as prospective relief might still be necessary in the remaining instances, the district court expressed no opinion as to whether the relief had been tailored as required by § 3626(b)(3).

***2** In the last sentence of its November 18 order, the district court stated that "this Court will reserve final determination of defendants' motion until such time as the Sixth Circuit Court of Appeals has issued its ruling [on the separation-of-powers issue.]" The defendants, promptly appealed. The plaintiffs moved to dismiss the appeal, arguing (1) that there was no final decision appealable under 28 U.S.C. § 1291, (2) that there was no collateral order appealable under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949), and (3) that the order did not fall within any of the categories of interlocutory orders (*e.g,* orders "refusing to dissolve or modifying injunctions") made appealable by 28 U.S.C. § 1292(a)(1). The United States likewise moved to dismiss the appeal for want of jurisdiction.

By order filed on June 13, 1997, a "motions panel" of this court denied the motions for dismissal. Stating that "[t]he November 18 order may be construed as refusing to dissolve an injunction," the motions panel "conclude[d] that the state's appeal should not be dismissed at this time." The panel's order recited, however, that the denial of the motions to dismiss was "without prejudice to the consideration of appellate jurisdiction by the panel assigned to hear the appeal on the merits."

Having further considered the jurisdictional question in the context of our decision on the separation-of-powers question, and having had the benefit of oral argument, the present panel concludes that the district court's November 18 order should not be construed as appealable at this juncture. Briefly stated, our reasoning is as follows.

II

Under 28 U.S.C. § 1291, as noted above, the courts of appeals have jurisdiction of appeals from "final decisions" of the district courts. An order stating, as the November 18 order does state, that the district court will not render a final decision until after the occurrence of a future event, is not itself a final decision. *Cf. Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467 (1978); *Cohen,* 337 U.S. at 546. The lack of finality is heightened, in this instance, by the fact that the district court chose not to make even tentative findings as to whether several elements of the prospective relief in question are tailored in a manner that might salvage them from termination under the Congressional mandate. The November 18 order is clearly not appealable under 28 U.S.C. § 1291.

Neither does the order "appear[ ] to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen,* 337 U.S. at 546. The November 18 order does not come within this "collateral order" exception to the finality rule because, for one thing, the order "does not finally dispose of any claimed right." See *Donovan v. United Steelworkers of America,* 731 F.2d 345, 347 (6th Cir.1984). In this respect the order differs significantly from those at issue in *United States v. Michigan,* 940 F.2d 143 (6th Cir.1991). The latter orders. unlike this one, "[were] indisputably modifications of the consent decree...." *Id.* at 150.

***3** As to the appealability of the November 18 order under 28 U.S.C. § 1292(a)(1)-the statute that confers appellate jurisdiction over (among other things) interlocutory orders "continuing ... or refusing to dissolve ... injunctions"-it is true that the order did not dissolve the injunctive relief previously granted in or pursuant to the consent decree. The practical effect of the November 18 order can thus fairly be said to have been one of "continuing ... or refusing to dissolve ... injunctions." In terms, however, the order did not specifically direct continuation of the injunctive relief granted previously-and the order did not purport finally to refuse dissolution.

For such an order to be immediately appealable under § 1292(a)(1), Supreme Court precedent teaches, a demonstration of the order's "practical effect" is not, by itself, sufficient. *Carson v. American Brands, Inc.,* 450 U.S. 79, 84 (1981).

> "Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule. [the Supreme Court has] construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of 'permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable. consequence.' [Citation omitted.] Unless a litigant can show that an

> interlocutory order of the district court might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." *Id.*

The defendants have not, in our view, made the requisite showing of a "serious, perhaps irreparable, consequence" flowing from the preliminary steps taken by the district court on November 18 and justifying a departure from the general congressional policy against piecemeal review. We recognize-and we are confident that the district court recognizes-the importance of immediate termination of any prospective relief that does not meet the stringent criteria of the PLRA. It is up to the district court to address the application of these criteria in the first instance, however, and we have no reason to doubt that the district court will turn to that task with dispatch now that the separation-of-powers issue has been resolved in the defendants' favor.

The present appeal is DISMISSED for lack of jurisdiction.

Parallel Citations

1998 WL 30820 (C.A.6 (Mich.))

Footnotes

[1] In an opinion filed on January 13, 1998, and recommended for full-text publication, we have now held that the provisions in question do *not* violate the separation-of-powers doctrine. *Hadix v. Johnson,* ---F.3d ---- (6th Cir.1998).

[2] The metaphor comes from *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1948), where the Supreme Court said that 28 U.S.C. § 1291, which vests the courts of appeals with jurisdiction of appeals from final decisions of the district courts, does not permit appeals from decisions-even "fully consummated decisions"-that "are but steps towards final judgment...."