COMMENTS

DUE PROCESS RIGHTS AND THE TERMINATION OF CONSENT DECREES UNDER THE PRISON LITIGATION REFORM ACT

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Decades of criticism regarding prisoner litigation culminated in the Prison Litigation Reform Act of 1995 (PLRA). Taking advantage of the increased availability of civil rights claims under 42 U.S.C. § 1983, prisoners were one of the fastest growing plaintiff classes in the federal courts from 1960 to the present. In 1994, the year before members of Congress introduced the PLRA, prisoners filed 60,086 cases in the federal courts, making up more than one-fourth of the total number of civil cases filed nationally. In 1990, over 1,200 local prison systems, including those in major cities such as New York, Philadelphia, and Detroit, were under federal court supervision. For the most part, this supervision stemmed from class action suits spanning many years.

The rise in prisoner litigation and prospective relief calling for extensive court involvement in prisons generated significant negative attention. Prison administrators expressed frustration with judges taking on a “micro-managing” function in the remedy phase of meritorious cases. Although the vast majority of cases were ultimately


6 See, e.g., Benjamin v. Jacobson, 172 F.3d 144, 166 (2d Cir. 1999) (applying the PLRA to seven related prison condition class action suits that began in the 1970s).
deemed without merit, administrators were overwhelmed by having to answer discovery requests and make court appearances.\(^8\) Local officials complained of the enormous financial and political costs of complying with court-ordered relief and any effort to alter those terms.\(^9\) Legislators blamed judicial activism for the state of prison litigation, finding unjustified usurpation of local criminal justice systems.\(^10\) Many judges, burdened with increasing numbers of pro se inmate complaints on crowded dockets and prison condition class actions, called for legislative reform.\(^11\)

In 1995, Congress responded with the Prison Litigation Reform Act, which was signed by President Clinton as part of the 1996 Appropriations Bill.\(^12\) Among other things, the PLRA places limits on prospective relief,\(^13\) attorney's fees,\(^14\) in forma pauperis waivers,\(^15\) and the use of special masters in prison cases.\(^16\) An analysis of the entire Act is beyond the scope of this Comment. Instead, I will focus on the immediate termination and automatic stay clauses.\(^17\)

Under the termination provisions, prison officials may move to terminate decrees to which they consented before the PLRA was in effect. Unless the court makes written findings within thirty days, extendable to ninety days for good cause, that the relief meets new PLRA prerequisites,\(^18\) the motion to terminate automatically stays the relief.\(^19\) This stay remains in effect until the court rules on the motion—a decision that the PLRA also subjects to a time limit.\(^20\)

The Supreme Court upheld these termination and automatic stay provisions in *Miller v. French*,\(^21\) rejecting a challenge that the PLRA vio-

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\(^8\) See generally id.


\(^10\) See 140 CONG. REC 18,695 (1994) (statement of Sen. Dole, future PLRA sponsor, supporting the nomination of Justice Breyer to the Supreme Court based on Breyer's relatively conservative record on prison litigation because Dole believed "the last thing we need is another activist Warren Court").

\(^11\) See, e.g., Gabel v. Lynaugh, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (per curiam) (noting the court's impatience with "frivolous or malicious appeals" and threatening future sanctions).


\(^17\) Id. § 3626(b)(2), (e)(2).

\(^18\) Id. § 3626(e)(3).

\(^19\) Id. § 3626(e)(2).

\(^20\) Id. § 3626(e)(1) (mandating that judges "shall promptly rule on any motion to ... terminate prospective relief .... Mandamus shall lie to remedy any failure to issue a prompt ruling.

lated separation of powers principles. The majority rejected the Department of Justice’s interpretation of the automatic stay provision, although this reading would have avoided the separation of powers question. Five Justices found that Congress could change the substantive law underlying terms of prospective relief, even if this overrode a federal judge’s prior order of equitable relief. This *Miller* holding is consistent with a general trend over the last twenty years of limiting federal equitable powers, particularly in institutional reform litigation, through narrow interpretation of civil rights statutes and deference to congressional action.

Bolstered by *Miller*, parties have successfully terminated many of the major consent decrees governing prison conditions pursuant to the PLRA. Few viable legal challenges to the PLRA remain for plaintiffs faced with imminent termination of consent decrees. This Comment assumes that *Miller*, combined with widespread political support for the PLRA, practically forecloses any arguments based on an assertion that federal equity powers justify remedial intrusion into state and local autonomy. *Miller* explicitly rejected the separation of powers argument.

In fact, separation of powers principles are increasingly invoked by defendants in institutional reform cases, rather than prisoners. Defendants have successfully argued that federal court intervention in local prison system management violates separation of powers as well as federalism principles. See, e.g., Mauro v. Arpaio, 188 F.3d 1054, 1058 (9th Cir. 1999) (denying...
The Miller majority, however, explicitly left one constitutional issue unresolved. Plaintiffs faced with a termination motion may still claim, as a factual matter, that the time limit imposed by the automatic stay clause deprives them of procedural due process by impairing the right to present evidence at a hearing. Rather than relying on theories of equity jurisdiction or the proper role of courts as catalysts for social change, the due process argument rests on a practical presentation of plaintiffs' position—the PLRA violates plaintiffs' rights by denying them a full and fair adjudication of their constitutional and statutory claims before previously ordered relief is automatically stayed and ultimately terminated.

This Comment examines the potential of this due process claim. Part I reviews the PLRA and its impact on pre-existing class action litigation by prisoners, examining Miller v. French and several lower court cases. I emphasize how the termination and automatic stay clauses have affected the final outcome of the litigation. Part II analyzes the challenges made to termination in these cases. For plaintiffs facing termination of relief, I propose an argument that the PLRA mechanism effectively deprives them of due process rights to a fair and full hearing of alleged violations and appropriate remedies. Part III discusses and addresses counter-arguments to the assertion that the PLRA violates due process rights. Part IV draws conclusions about the availability and likely legal success of the due process claim.

A constitutional challenge to these provisions presents a final chance to preserve remedies for unlawful conditions in prison systems. Even if courts recognize that the termination and automatic stay provisions are unconstitutional because of their time limits, it will be a limited victory for prisoners' rights. Some plaintiff classes would be afforded more time to challenge termination of their consent decrees, yet few of these plaintiffs would be able to meet the PLRA's standards for prospective relief. Moreover, a procedural attack does not affect the PLRA's substantive diminution of prisoners' rights. The narrow focus of this Comment is a function of the state of pris-

relief under § 1983 to a prisoner, relying in part on the recognition that prison administration is committed to legislative and executive responsibility and "separation of powers concerns counsel a policy of judicial restraint") (quoting Turner v. Safley, 482 U.S. 78, 84-85 (1987)) (citations omitted); In re Wilkinson, 137 F.3d 911, 914 (6th Cir. 1998) (deferring to defendant's position with respect to security concerns, noting "the administration of state prisons is a matter consigned to the states as part of their sovereign power to enforce the criminal law").

See, e.g., the cases discussed supra note 25.


See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property without due process of law"); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property without due process of law.").

oners' civil rights law. The limited nature of a constitutional critique of two PLRA clauses also suggests that significant change will only come from legislative and political change, not from the courts.

I. THE IMPACT OF THE PLRA TERMINATION CLAUSE

A. Background of the PLRA

In May 1995, Senator Dole introduced the first version of the Prison Litigation Reform Act, modeled after an Arizona law. This version focused on filing fees and requirements for new prospective relief; it did not address the termination of pre-existing relief. The final version, which was the first to include the termination provisions, appeared in the 1996 Appropriations Bill. President Clinton signed the Bill containing the PLRA in April 1996.

During discussions of the Appropriations Bill, Senator Kennedy labeled the PLRA "patently unconstitutional" and "a dangerous legislative incursion into the work of the judicial branch." Kennedy criticized congressional leaders for enacting far-reaching federal court regulation as part of an Appropriations Bill, without a Judiciary Committee mark-up, report, or hearing. In addition to interfering with satisfactory settlements and disrupting judicial oversight, Kennedy warned that the PLRA would be a dangerous precedent for "stripping the Federal courts of the ability to safeguard the civil rights of powerless and disadvantaged groups." Four Senators joined Kennedy in an unsuccessful appeal to then-Attorney General Reno, asking her to negotiate changes to the PLRA before the Administration signed a version of the Appropriations Bill.

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52 This version of the PLRA, written primarily by Senator Abraham (R-MI), remained the same throughout the budget debates. See Title VII §§ 801-810 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-140, § 1(a), 110 Stat. 1327. The Appropriations Bill was signed in April 1996, following a prior presidential veto and a partial government shutdown.

53 As codified, the PLRA amends scattered sections of the U.S. Code, Titles 18, 28, and 42. See supra note 2.


55 See id.

56 Id. at 5194-95.

57 See id. Senator Simon also introduced the testimony of Associate Attorney General Schmidt before the Senate Judiciary Committee, outlining practical problems and potential constitutional challenges to the termination provisions, as discussed in the context of another measure, "Stop Turning Out Prisoners." Overhauling the Nation's Prisons, available at 1995 WL
1. **The Termination Provisions**

The termination and automatic stay clauses of the PLRA affect prospective relief ordered before the passage of the Act. The termination clause provides in relevant part:

In any civil action with respect to prison conditions, a defendant or inter-vener 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.  

Any relief agreed to before the PLRA was adopted must now be narrowly drawn—necessary to correct the violations and the least intrusive means—in order to survive. Under the automatic stay clause, a judge has only thirty days to make written findings to this effect or else the motion to terminate automatically stays the relief. A judge may extend this deadline for sixty additional days for good cause. If the district court fails to rule on the termination motion promptly, the defendants can file a writ of mandamus, allowing the appellate court to order an immediate decision.

**B. Effects on Pre-Existing Class Action Litigation**

After the *Miller* decision, defendants have a clear prerogative to move for termination of prospective relief without a separation of powers challenge. Plaintiffs faced with termination of prospective relief may try to steer prison officials towards settlement before these officials move for termination. Alternatively, upon a showing that the ongoing relief is still necessary and the least intrusive means to...
correct ongoing violations, plaintiffs might be able to persuade judges to make the requisite findings within thirty, or potentially ninety, days, leaving the relief intact. A final option is for plaintiffs to challenge a motion for an automatic stay under the PLRA on other constitutional grounds, such as due process.

In Miller v. French, Harris v. City of Philadelphia, Hadix v. Johnson, and Benjamin v. Jacobson, plaintiffs facing termination of consent decrees raised due process claims to challenge the termination and automatic stay clauses. These due process claims were largely overshadowed, at least at the appellate level, by the separation of powers issue before the Miller decision. To assess the viability of a due process challenge to the termination of relief, plaintiffs must consider how receptive courts have been to other PLRA challenges. The following discussion of four federal cases provides a background for this analysis.

1. Cases Applying the Automatic Stay Clause

a. Miller v. French

The Supreme Court’s treatment of the PLRA in Miller v. French is the best starting point for this analysis. Miller began in 1975, when pro se inmates sought injunctive relief under § 1983 against a state prison administrator in Pendleton, Indiana. The Seventh Circuit ultimately affirmed a remedial order finding Eighth Amendment violations and imposing capacity limits, rules about the use of mechanical restraints, and standards regarding staffing, food, and medical services. With minor modifications, the injunction remained in effect until June 5, 1997 when the State filed a motion to terminate the relief under the PLRA. The plaintiffs moved for a temporary restraining order to enjoin the automatic stay, citing both due process and separation of powers principles. The district court granted the or-

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47 Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997).
48 This focus appears to be one of judicial discretion rather than the scope of litigants’ arguments. See, e.g., French v. Duckworth, 178 F.3d 437, 447 (7th Cir. 1999), cert. granted, 528 U.S. 1045 (1999), rev’d, Miller, 530 U.S. 327 (“This [separation of powers] conclusion makes it unnecessary for us to reach the alternate constitutional grounds on which the prisoners have relied.”).
49 Miller, 530 U.S. at 327.
51 French v. Owens, 777 F.2d 1250, 1258 (7th Cir. 1985).
and the United States intervened to defend the constitutionality of the PLRA automatic stay. The Seventh Circuit affirmed the district court, holding that the automatic stay clause violated separation of powers and, thus, finding it unnecessary to reach the prisoners’ due process claims.

On certiorari to the Supreme Court, the plaintiffs repeated their argument that the automatic stay clause violated separation of powers in prescribing a rule of decision for the courts. A five-member majority disagreed with the Seventh Circuit and upheld the automatic stay, remanding the case for termination proceedings. Writing for the majority, Justice O’Connor emphasized that prospective relief is subject to changes in the substantive law because it lacks the finality of compensatory relief. The controversial automatic stay clause “helps to implement the change in the law” but it does not dictate how courts must rule on each motion. Justice O’Connor acknowledged, however, that the Court had concerns about the “relative brevity” of the time limit for judges to rule on the termination motion before relief is automatically stayed:

[W]ether the time limit is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns.

As dicta, this open question is not central to the holding of Miller, but indicates that influential members of the Supreme Court recognize that the actual time limits might pose concerns beyond separation of powers principles.

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52 See Duckworth, 178 F.3d at 440. After a hearing, the judge entered the order on July 11, 1997 converting the TRO into a preliminary injunction. See id.
53 Although the Justice Department generally supported the PLRA, it advocated a lenient interpretation of the automatic stay clause in the Miller litigation and its Supreme Court brief. Such posturing invited criticism from congressional supporters of the PLRA. See 142 CONG. REC. 23,257 (1996) (statement of Sen. Abraham) (“What we have seen is the Department of Justice intervening in lawsuits in a way that would, in fact, preclude, rather than allow, States to extricate themselves from these various judicial circumstances . . . [and] finding ways to allow the judges to stay in charge.”).
54 Duckworth, 178 F.3d at 447-48 (7th Cir. 1999). The grounds for this decision limited the scope of Supreme Court review to the separation of powers argument.
56 Id. at 349 (“Rather than prescribing a rule of decision, § 3626(e)(2) simply imposes the consequences of the court’s application of the new legal standard.”).
57 Id. at 348-49 (distinguishing United States v. Klein, 80 U.S. 128, 146 (1872), where the Court held a statute unconstitutional because it purported to “prescribe rules of decision”).
58 Id. at 350.
b. Harris v. City of Philadelphia


The PLRA's effect in *Harris* was indirect. In late 1999, the district judge encouraged both sides to settle, preempting a motion to stay the relief. In an August 2000 order approving the settlement terms, the judge indicated that reviewing the record to assess whether the PLRA permitted continuing relief would have been impractical.* See 141 CONG. REC. 35,980 (1995) (statement of Sen. Abraham) (discussing the situation in Philadelphia where "American citizens are put at risk every day by court decrees that curb prison crowding," which "pose an enormous threat to public safety"); *Criminal Oversight*, supra note 5, at A18 (describing the allegedly disastrous effects of releasing 10,000 suspects and arrestees under the charge-based bail policy implemented by *Harris* to meet population caps). While conditions in 1982 justified court intervention, conditions had slowly improved in some areas, leaving the propriety of the consent decree unclear under the new PLRA standards.* See id. at *10.

According to Judge Shapiro in *Harris*, the final settlement was in the best interests of the plaintiff class, even if it did not meet all of the demands sought during the litigation. Judge Shapiro noted:

Eighteen years is generally the age at which a child is declared emancipated. Therefore, subject to the [control of bond funds for plumbing work], the court approves the settlement of the parties... and declares the City emancipated from federal court supervision of the PPS.69

The settlement ordered the dismissal of the case and termination of the two consent decrees in exchange for the City hiring two consultants to monitor conditions in its prisons and making certain physical improvements to the House of Correction.70

Even if the judge could have exhaustively reviewed the record in ninety days, finding ongoing violations might not have satisfied the PLRA's requirement that the prospective relief be necessary and the least intrusive method to remedy such violations. If the court met this burden in examining conditions after the ninety-day limit expired, reinstatement of prospective relief after it had been stayed would be "administrative chaos."71 Settlement appeared the best option to protect plaintiffs' interests while promoting judicial economy and the public interest.

For many plaintiffs facing a PLRA termination motion, settlement may not be an option, particularly since the threat of consent decree termination puts prisoners in a weak bargaining position. As discussed below, some lower courts have devised alternative arguments to avoid the likely consequences of a motion to terminate prospective relief and an automatic stay.

c. Hadix v. Johnson

*Hadix* was a prisoner lawsuit filed in Detroit, Michigan. After twenty years of litigation, the *Hadix* defendants took immediate advantage of the PLRA and moved for termination of the consent decree.72 The district court found the termination clause unconstitutional on separation of powers grounds.73 The Supreme Court's *Miller* decision74 foreclosed this argument on appeal. The plaintiffs had raised equal protection and due process claims, but the district court did not consider them at trial.75 On remand,76 the district court

69 Id. at *11.
70 Id.
71 Id. at *8.
73 See id.
75 See Johnson, 947 F. Supp. at 1102.
terminated some of the remedial orders, but conditioned termination of others on substantial compliance with the terms of the order.  

The Sixth Circuit rejected this approach, chastising the district judge for failing to make the findings that the PLRA requires for sustaining prospective relief.  

On appeal, the Hadix plaintiffs specifically objected to the termination of parts of the prospective relief without an evidentiary hearing.  

The Sixth Circuit agreed, adopting an interpretation of the PLRA that differed from that advanced by the Supreme Court in Miller v. French:

Because the PLRA directs a . . . court to look to current conditions, and because the existing record at the time the motion for termination is filed will often be inadequate for purposes of this determination, the party opposing termination must be given the opportunity to submit additional evidence in an effort to show current and ongoing constitutional violations.

As support, the court cited decisions from other circuits.  

In its remand instructions, the Sixth Circuit ordered that if the parties could not reach a complete settlement within thirty days, the district court should schedule an evidentiary hearing within the next thirty days. The court would then have sixty days after the hearing began to issue an opinion applying the PLRA to the termination mo-

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78 See Hadix v. Johnson, 228 F.3d 662, 671 (6th Cir. 2000).
79 See id.
80 See id.
81 Id. at 671 (emphasis on “termination must be . . .” added).
82 Id. at 672 (citing Loyd v. Ala. Dep’t of Corr., 176 F.3d 1336, 1342 (11th Cir. 1999), cert. denied, 528 U.S. 1061 (1999) (denying plaintiffs a chance to submit evidence “reads all meaning out of” from the termination clause); Bervanger v. Cottey, 178 F.3d 834, 839-40 (7th Cir. 1999) (holding that the district court must hold an evidentiary hearing if there are disputed issues of material fact); Benjamin v. Jacobson, 172 F.3d 144, 166 (2d Cir. 1999) (holding that the “district court must allow the plaintiffs an opportunity to show current and ongoing violations of their federal rights”); Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998) (holding that seekers of prospective relief under the PLRA must be given an opportunity to present their claims). The Court also referred to several district courts that have allowed such a hearing. See, e.g., Jensen v. County of Lake, 958 F. Supp. 397, 406 (N.D. Ind. 1997) (permitting plaintiffs an opportunity to show that constitutional violations exist at the county jail); Cary v. Farrelly, 957 F. Supp. 727, 733 (D.V.I. 1997) (“Based on the testimony taken and the evidence submitted at the hearing, the court finds that conditions . . . do not meet minimal, constitutional standards.”).  
83 See, e.g., Cagle v. Hutto, 177 F.3d 253, 258 (4th Cir. 1999), cert. denied, 530 U.S. 1264 (2000) (denying a right to an evidentiary hearing in all cases, although noting that district court may hold a hearing and must do so if the plaintiff alleges “specific facts which, if true, would amount to a current and ongoing constitutional violation”).
84 Hadix, 228 F.3d at 673.
Although this interpretation of the automatic stay clause could be construed as inconsistent with the intent of Congress in enacting the PLRA time limits, it has been adopted by at least one other district court.\footnote{Id.}{\footnote{See infra notes 88-93 (describing the approach adopted by district court in Benjamin v. Jacobson).}}

d. Benjamin v. Jacobson

In its interpretation of the automatic stay clause before the Supreme Court decided \textit{Miller v. French}, the Second Circuit in \textit{Benjamin v. Jacobson} took a unique approach.\footnote{124 F.3d 162 (2d Cir. 1997).}{\footnote{Id. at 165.}} New York City signed a consent decree in 1978 governing pre-trial detention facilities. It remained in place for eighteen years.\footnote{See Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996).}{\footnote{See \textit{Benjamin}, 124 F.3d 162.}} The court noted that, unlike final court judgments, Congress could change the law underlying consent decrees.\footnote{Id. at 171.}{\footnote{Id.}} It emphasized, however, that the consent decree was not itself vacated—\textit{federal} courts simply could not enforce it.\footnote{Id. at 167.}{\footnote{See \textit{Miller v. French}, 530 U.S. 327, 336-37.}} \textit{State} courts could still enforce it as a contract under state law.\footnote{See Benjamin v. Kerik, No. 75 CIV. 3073 HB, 1999 WL 1225264 at *2 (S.D.N.Y. 1999) (suspending the automatic stay until the court ruled on the motion).}{\footnote{Benjamin v. Kerik, 102 F. Supp. 2d 157 (S.D.N.Y. 2000). The district court issued its decision about two weeks before the Supreme Court decided \textit{Miller}.}} The Second Circuit affirmed, but relied on its unique reading of the PLRA’s termination and stay clauses.\footnote{See Benjamin, 124 F.3d 162.}{\footnote{Id. at 171.}} Noting the departure from the timeframe indicated by the PLRA, the judge wrote:

\begin{quote}
I am only beginning to appreciate the complexities which the defendants’ motion poses for both the litigants and the Court . . . . The hearing itself spanned five days . . . . Post-trial briefing consumed an additional five weeks. This Court has made every effort to decide this motion
\end{quote}
as expeditiously as the circumstances allow, but in the interests of thoroughness and fairness, and in light of the massive record and the complexity of the issues, it is not until today that this decision is rendered.

After reviewing the new record and substantive law, the judge terminated relief concerning law libraries and inmate correspondence. He ordered, however, new narrowly-tailored relief to address the use of mechanical restraints and attorney visitation rights.

The Hadix and Benjamin courts took it upon themselves to provide for evidentiary hearings and to suspend the automatic stay clause. Since many judges will not do so, plaintiffs must take the initiative to demand such an evidentiary hearing. If the issue is raised, courts will have to evaluate the legal basis for bending the PLRA time limit. By adopting the practical logic and experience of Hadix and Benjamin, yet framing the issue in terms of procedural due process, plaintiffs may maximize their chances of being granted additional time to attempt to save remedial orders governing prison conditions.

II. THE PLRA AUTOMATIC STAY CLAUSE AND DUE PROCESS

In Harris, Hadix, and Benjamin, the PLRA would have automatically stayed relief unless the judges had sought alternative ways of enforcing a version of remedial relief. Although the parties reached a settlement in Harris, defendant officials will rarely agree to settlement where they have the option of moving for termination altogether. Settlement could be a viable option where public or federal government scrutiny makes termination appear irresponsible for the local prison system. Settlement is also more likely where the Court may, in fact, find ongoing violations that warrant some variation of prospective relief, as this process will pose additional, burdensome litigation on the defendants. The separation of powers argument, even with the Second Circuit’s assertion that state law could still enforce the consent decree, does not hold much promise in the wake of Miller. If the plaintiffs want a chance to submit additional evidence as to ongoing violations, they must articulate other legal grounds for being entitled to this opportunity.

In some factual circumstances, plaintiffs may successfully argue that a stay and eventual termination of relief, without adequate review of whether relief is still justified under the strict new guidelines.

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97 Id. at 160-61.
98 See id. at 168-78.
99 See supra notes 61-71.
100 See supra notes 72-86.
101 See supra notes 87-98.
of the PLRA, violates due process. The next section analyzes the due process right to a fair and full hearing in the prison litigation context.

A. Latent Support from the Supreme Court

The legal argument for a procedural due process violation fundamentally differs from the separation of powers argument, the argument that has captured more attention in the courts. In Miller, Justice O'Connor wrote:

In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design.¹⁰²

These structural arguments were precisely those the majority of the Court squarely rejected. However, during oral arguments, the Court seemed impatient for one of the parties to make or address the practical due process argument.¹⁰³

Justices asked both sides if they had found any statutes other than the PLRA with such a limited time period and consequences as drastic as erasing a prior judgment.¹⁰⁴ In discussing the automatic stay clause in Miller, Justice Breyer told the attorney for the United States: "I don’t believe it’s conceivable that you could deal with something like [the complicated, twenty-year long prison litigation in Puerto Rico] in 90 days."¹⁰⁵ If that is a typical case, Breyer continued, Congress might be asking district court judges to "do the impossible,"¹⁰⁶ suggesting that their purpose was to end everything within ninety days rather than just speed up the process of prison litigation.¹⁰⁷ The attorney responded that courts could terminate such complicated decrees "piecemeal" and defended congressional intent by submitting that Congress had, in fact, rejected an earlier version that would have simply ended all relief after two years.¹⁰⁸

In questioning the prisoners’ attorney, several Justices focused on the time limit of the automatic stay clause. While the attorney kept returning to his separation of powers argument, the Court forced him to consider whether there would be a constitutional challenge if

¹⁰⁴ Id.
¹⁰⁵ Id. at *32 (referencing Morales Feliciano v. Romero Barcelo, 497 F. Supp. 14 (D.P.R. 1979)).
¹⁰⁶ Id. at *33.
¹⁰⁷ Id.
¹⁰⁸ Id. at *33-34.
the statute gave judges enough time to adjudicate, such as two years. The attorney conceded that it would be "much more problematic" to claim that the PLRA violated separation of powers if the Court simply failed to act within this hypothetical two-year time limit. When the attorney started to return to his structural argument, Justice Souter interjected:

Why do you say more—you're talking about due process then, not separation of powers. If the change in time is the crux for you, all you're talking about is whether Congress has provided enough time for these people to have the court make the proper decision.

The appellee contended that the separation of powers argument meant that the PLRA would still be unconstitutional even if it gave courts ten years to assess whether relief was still justified. This claim was based on the constitutional legal theory that Congress simply cannot terminate a judicial decree unless the substantive law has actually changed.

Two of the dissenters, Justices Breyer and Stevens, adopted the Solicitor General's interpretation of the automatic stay clause, which gives judges discretion to modify or suspend the stay under traditional equity principles. Their dissenting opinion indicates that a truly automatic stay would violate separation of powers and due process. Breyer emphasized the "complexity" of many consent decrees and the volume of evidence that judges would have to review in assessing a motion to terminate. Given these circumstances, "[n]inety days might not provide sufficient time to ascertain the views of several different parties, including monitors, to allow them to present evidence, and to permit each to respond to the arguments and evidence of others." Without time to consider the current conditions, judges may end up having to reinstate the relief while leaving "constitutionally prohibited conditions unremedied, at least temporarily."

The remaining Miller dissenters, Justices Ginsburg and Souter, agreed with the majority that there was clear congressional intent to make the automatic stay non-discretionary. In deciding whether this imposition was constitutional, Justices Souter and Ginsburg

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109 Id. at *39.
110 Id. at *40.
111 Id.
112 Id. at *41-42.
113 Miller, 530 U.S. at 354 (Breyer, J., dissenting).
114 Id.
115 Id. at 355-57.
116 Id. at 357.
117 Id.
118 Id. at 350-51 (Souter, J., dissenting).
would have remanded for a determination of whether the timing was so short as to violate principles of separation of powers.\footnote{Id. at 352-53 ("Whether this constitutional issue arises on the facts of this action... is something we cannot yet tell... If the District Court determined both that it lacked adequate time to make the requisite findings in the period before the automatic stay would become effective, and that applying the stay would violate the separation of powers, the question would then be properly presented.").}

\textbf{B. The Due Process Argument}

This Miller dialogue between the Justices and the litigants demonstrates that plaintiffs forming a due process claim must present a fact-intensive argument. The argument is that, at a minimum, class members have the right to a judge’s meaningful evaluation of the extent of compliance with the consent decree, the nature of outstanding violations, the new requirements imposed by Congress, and the “balance of equities.”\footnote{See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the balance of factors when interpreting what procedural due process is under different circumstances).} The termination clause, combined with the automatic stay provision, does not protect this right. Justice Breyer’s question at oral argument suggests the empirical reality that institutional reform litigation cases are, more often than not, quite complex.\footnote{See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY-MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 34-50 (1998) (giving an overview of prison reform litigation after 1960).} If the clause is enforced as a mandatory time period, class members will be deprived of meaningful access to the courts because judges will be unable to evaluate years of litigation in the ninety days allotted for the determination of whether the terms of relief meet new statutory requirements.

Plaintiffs should draw upon Hadix and Benjamin, in which judges indicate the need to delay the automatic stay for an evidentiary hearing. Plaintiffs must assert first that termination of relief without an adequate opportunity to prove the existence of ongoing violations and the need for relief to the judge violates due process; and second, the automatic stay must be suspended pending such an evidentiary opportunity because of the administrative chaos of reinstating partial relief.\footnote{See Harris v. City of Philadelphia, No. CIV.A.82-1847, 2000 WL 1239948 at *11 (E.D. Pa. Aug. 30, 2000).}

The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.”\footnote{Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (distinguishing the aspects of due process that are relevant to prisoners’ rights).} Although the Rehnquist Court has constrained prisoners’ rights,\footnote{See, e.g., Lewis v. Casey, 518 U.S. 343 (1996) (imposing an actual injury requirement on prisoners’ assertion of a constitutional violation).} it
has not overruled the basic principle articulated by Justice Thurgood Marshall:

It is now established beyond doubt that prisoners have a constitutional right of access to the courts. This Court recognized that right more than 35 years ago... recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful.125

This principle has, however, been limited. Prisoners are not guaranteed counsel for their civil complaints,126 may be required to exhaust administrative remedies before filing in court,127 and are subject to other limitations imposed by Congress and local legislatures, such as the PLRA limits on fees.128 Having the right to submit evidence in an existing court proceeding, however, is fundamental to justice and therefore cannot be "legislated away."129

With "meaningful access" to the courts as the "touchstone," states must at least "assure the indigent defendant an adequate opportunity to present his claims fairly."130 This argument does not challenge the terms of Lewis v. Casey, which held that the Constitution does not guarantee inmates the ability to litigate effectively by providing counsel on appeal or sophisticated law libraries.131 When presenting the due process argument in the PLRA context, plaintiffs are simply asking for meaningful access, not special accommodations. The right to present evidence is one of the factors that courts require when evaluating whether administrative proceedings comport with procedural due process.132

Where prisoner plaintiffs have already succeeded by way of a civil action and are at risk of losing years of work to assure adequate living conditions, it is crucial that they at least have the opportunity to meet the burden of the PLRA. In civil rights litigation, prisoners have fre-

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125 Bounds v. Smith, 430 U.S. 817, 821-22 (1977) (citations omitted and emphasis added) (holding that prisoners' fundamental right of access to the courts requires prison officials to provide law libraries and legal assistance to inmates).

126 See Gideon v. Wainwright, 372 U.S. 335 (1963) (recognizing a right to counsel only in criminal cases).


128 See 28 U.S.C. § 1915 (clarifying statutory restraints that may be placed on the procedures).

129 See Morgan v. United States, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence ... ."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 305, 315 (1950) ("process which is a mere gesture is not due process"). See also Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (holding that, at a minimum, procedural due process is an entitlement to be heard when one's rights may be affected).


131 Lewis, 518 U.S. at 354 (requiring that inmates demonstrate "actual injury" in order to prevail in their claim that the prison law library was inadequate).

sequently been denied such basic procedural due process.^ For background, see Tiffany Werner, Note, Due Process Rights of Prisoners, 28 SETON HALL L. REV. 650 (1997) (discussing due process holdings in Haines v. Kerner, 404 U.S. 519 (1972); Wilwording v. Swanson, 404 U.S. 249 (1971); and Hewitt v. Helms, 459 U.S. 460 (1983)). Prisoners have won hard-fought legal battles for the extension of due process guarantees. These guarantees are vulnerable, however, as support ebbs for prisoners' rights and civil rights litigation under § 1983.\(^6\)

### III. COUNTER-ARGUMENTS TO THE ASSERTION THAT THE TERMINATION AND AUTOMATIC STAY CLAUSES AS IMPLEMENTED BY MOST COURTS VIOLATE DUE PROCESS

#### A. "Automatic" Means Automatic

The most basic argument against the claim that plaintiffs are entitled to an evidentiary hearing before the PLRA automatic stay takes effect is a textual one. The clause reads: "any motion to modify or terminate prospective relief... shall operate as a stay during the period... beginning on the 30th day after such motion is filed."\(^{157}\) The imposition of the thirty-day deadline and the subsequent congressional amendment to extend the period before relief is stayed by sixty days indicate that the PLRA was intended to bind courts to a strict timetable.

In addition, the Supreme Court in Miller has already rejected a reading of the clause that allowed judges to suspend the automatic stay. The two Justices who adopted the interpretation given by the Justice Department\(^{138}\) based this support on the equitable powers of federal judges.

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\(^1\) Cooper v. Pate, 578 U.S. 546 (1964) (allowing prisoner to use § 1983 to overcome Warden's motion to dismiss).

\(^2\) Sut, e.g., Wolff v. McDonnell, 418 U.S. 599 (1974) (finding that where state created right to "good-time credit," prisoner's interest therein was a "liberty" protected by the Fourteenth Amendment, which entitles him to minimum procedures required by the due process clause); Haines v. Kerner, 404 U.S. 519 (1972) (holding pro se prisoner's complaint deserves the same standard of review on the pleadings as other plaintiffs' complaints).


Response

When considering the PLRA, the courts cannot assume that Congress meant for them to do the impossible, that is, make evidentiary findings without the relevant evidence. In cases where an evidentiary hearing is clearly required, this allowance does not countermand the underlying intent of Congress to limit prospective relief to what is necessary and appropriate. While the judges in Hadix and Benjamin do not elaborate on their reading of the clause, they indicate that residual equity powers allow them to alter the timing in order to preserve a balance of equities.139 Allowing plaintiffs the opportunity to present evidence and letting the judge suspend the automatic stay pending an evidentiary hearing can be justified on equitable grounds as well as due process grounds.

Delaying the automatic stay until after an evidentiary hearing would cure the due process violation in this section of the PLRA. Because Congress did not fully consider the due process implications of the statute, courts should read the PLRA in a manner that puts it in least conflict with the Constitution.140

B. The Evidentiary Hearing Will Burden Prison Administrators and Disrupt Prison Administration

In Wolff v. McDonnell, the Court held that “the inmate facing disciplinary proceedings should be allowed to...present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.”141 Such considerations are relevant in the instant issue, where testimony and inspection of prisons may disrupt prison administration.142 In general, the evidentiary hearing will postpone resolution of prison cases and create more work for over-burdened prison administrators.

Response

As the final chapter in extensive litigation, one additional evidentiary hearing will not unduly burden prison administrators. Because

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139 See Hadix v. Johnson, 228 F.3d 662, 672 (6th Cir. 2000); Benjamin v. Jacobson, 102 F. Supp. 2d 159, 161 (S.D.N.Y. 2000) (explaining that the delay in rendering a decision on the termination of relief was “in the interests of thoroughness and fairness”).

140 See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (Brandeis, J., concurring) (expressing support for the canon of constitutional avoidance).


142 For example, see the congressional testimony about frivolous litigation disrupting prison administration and wasting resources, 141 CONG. REC. 14570 (1996).
a monitoring mechanism will already be in place in most instances, gathering evidence will be fairly routine. Although the *Benjamin* court took over a year to review the new evidence and issue findings, this may be due to the fact that the judge, not the plaintiffs, devised the idea of having a pre-stay hearing. Additionally, the case involved jails in New York City, which has one of the largest systems in America.

C. There Is No Due Process Right Involved, Since Consent Decrees Do Not Establish Vested Rights

Due process only covers deprivations of life, liberty, or property, the latter of which does not include a plaintiff’s interest in prospective relief. This position was articulated by former Assistant Attorney General Schmidt, testifying to Congress in defense of the PLRA: “Sections 3626(b)(2) and (b)(3) do not violate the Due Process Clause because injunctive decrees in prison conditions cases are clearly not protected ‘property’ interests . . . . Nor do plaintiffs have any vested rights in the prospective relief afforded under a consent decree.” Given these considerations, plaintiffs may not argue that an automatic stay of relief deprives them of property without due process of law.

Response

The argument proposed for plaintiffs facing immediate termination and automatic stay of relief does not rest on a “vested rights” assertion. That is, plaintiffs do not assert that consent decrees cannot be terminated by legislative changes to the underlying substantive law. Rather, they assert that the way in which relief is terminated through the courts violates one of the fundamental aspects of procedural due process, the right to present evidence, any evidence, when one’s rights may be affected. Without at least a brief evidentiary

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144 See *U.S. Imprisonment Rate Doubles Over 12 Years*, at http://cgi.cnn.com/US/9903/14/us.prison (Mar. 14, 1999) (noting that New York City jails hold 17,700 inmates on an average day, second only to Los Angeles in the size of its municipal jail population).


147 See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (asserting the right to a fair hearing before welfare benefits are terminated). Although prisoners do not have vested rights in the substantive law, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995), they have a procedural right to
hearing, courts will have no way of ascertaining whether prisoners are still being deprived of their constitutional or statutory rights. Without considering any new evidence, judges may stay remedial relief that is actually due prisoners, even under the terms of the PLRA. It is this possibility, made possible through the PLRA's time limit—not the interests vested in prior consent decrees—that violates due process. The Miller majority opinion even noted this apparent defect in the PLRA timing, without mention of the vested rights doctrine.149

While there is no absolute right to admit evidence in one's defense,150 surely due process requires the ability to introduce some evidence when one's interests are being reviewed on an incomplete record.150 Even the most conservative members of the Supreme Court have acknowledged prisoners' rights of meaningful access to the courts.151

D. A Broad Interpretation of the PLRA Serves Public Policy in Terms of Judicial Economy, Protection of State and Local Autonomy, and Taxpayer Savings

In passing the PLRA, Congress responded to its constituents, the rising volume of class action suits, and the questionable role of the federal courts in prison litigation.152 In 1966 there were 218 prisoner a fair hearing when their Eighth Amendment right to be free from cruel or unusual punishment is endangered.

149 Miller v. French, 530 U.S 327, 344 (2000) ("We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns.").


151 See id. (discussing the rights of inmates to admit evidence).

152 For example, see Justice Scalia's opinion in Lewis v. Casey, 518 U.S. 343 (1996).

See Criminal Oversight, supra note 5, at A18 (noting that prisoner filings in federal court increased tenfold from 1975 to 1995). About two-thirds of prisoner suits are brought under § 1983 and about 94% of those plaintiffs receive no relief. In 1990, over 1200 state prisons were operating under some form of judicial supervision. See id. For this position, see 141 CONG. REC. 14571 (1995) (including statements of Senators Dole and Abraham: "the bottom line is that prisons should be prisons, not law firms"); 142 CONG. REC. 23255 (1996) (presenting testimony about frivolous suits under § 1983); Testimony of Paul T. Cappuccio Before the Senate Judiciary Committee, 1995 WL 451870 (July 27, 1995); Testimony of Laura A. Chamberlain, Assistant Corporation Counsel, on behalf of the City of New York, Before the Senate Judiciary Committee, 1996 WL 556532 (Sept. 26, 1996) (summarizing testimony of New York officials about cost of improvements promised by former Mayor Koch). See also Robert Dole, Advocacy on the Bench Has Gone Too Far, WASH. TIMES, Dec. 22, 1995, at A25.

suits in federal court and in 1995 there were 41,600. Prisoner suits make up the largest category of federal civil rights cases.\(^{154}\) Prison administration is the province of state and local governments.

To relieve prison officials and localities from the burden of unnecessary, existing consent decrees, Congress had to impose a time limit before relief would be terminated.\(^{155}\) Under the PLRA, relief will not be terminated if judges find it is still necessary.\(^{156}\) Moreover, for complicated cases, judges may use the full ninety days to review areas in which they believe violations are ongoing, so that they may issue findings to that effect and terminate the remaining, unnecessary parts of the relief.

**Response**

A policy based on efficiency should not override constitutional guarantees. The PLRA asks federal judges to stay and then to terminate prospective relief without regard to one of the fundamental aspects of procedural due process—the right to present evidence.

If policy is used to justify the PLRA and an infringement on prisoners' due process rights, perhaps its advocates should examine what policies have caused prison litigation to reach its modern state. Many consent decrees have been complicated and extended by the recalcitrance of prison administrators and the persistence of constitutional violations within prisons.\(^{157}\) The federal courts are not entirely to blame for the explosion of the prison system that led to capacity-based violations. Criminal justice policies pursuant to the war on drugs, particularly mandatory sentencing, have contributed to the problem.\(^{158}\)

Nonetheless, consent decrees do place burdens on municipal budgets and some criticism of "activist" judges and mismanagement of class action litigation is valid. The question remains: is termination of all consent decrees the correct response? Federal courts are the guarantor of individual rights and the sometimes protector of unpopular causes, as opposed to the more majoritarian legislative

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\(^{154}\) See id. (discussing the dramatic increase in prisoner suits over the last thirty years).


\(^{157}\) See, e.g., *Harris v. City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995) (referring to a class action having to do with overcrowding in prisons).

To curb activism on the bench, Congress may be justified in placing limits on new prospective relief; "automatically" ending previous relief implicates other concerns. Those members of Congress who supported the PLRA because they disapprove of judicial activism in taking over prison systems should not punish prisoner plaintiffs for this ideological disagreement. Plaintiffs deserve full and fair hearings before promised improvements won through years of litigation are abandoned.

Finally, if judicial economy is an important goal, the PLRA should have as its focus individual pro se suits. In the long run, class actions and consent decrees may be among the most efficient ways to handle prisoners' grievances within a large prison system.

CONCLUSION

Senator Orrin Hatch, speaking to the Senate Committee on the Judiciary about implementing the PLRA, noted, "No one, of course, would suggest that prison conditions that actually violate the Constitution should be allowed to persist. The trouble is that the PLRA deprives judges of a fair opportunity to determine whether such conditions do, in fact, exist.

In raising procedural due process, plaintiffs may persuade courts that the PLRA automatic stay is too expedited to ensure meaningful determination of possible constitutional violations and remedies. The timing issue is more likely to succeed than a variation on the separation of powers argument or an appeal to broad federal equitable powers. Assessing the success of the due process argument for delayed stay of prospective relief requires a consideration not only of the trends in congressional regulation of the federal courts, but also the input of the Justice Department. Under the leadership of John Ashcroft, the odds of a government endorsement of the due process argument during the current presidential administration are quite low. Presiding over a 1997 hearing on curbing judicial activism, Ashcroft lauded ideas such as new limitations on the jurisdiction of the federal courts (suggested by former Attorney General Meese), reinstatement of three-judge panels, limits on equitable power, and proposed extension of the procedural scheme of the PLRA to non-prison con-


Ashcroft reminded his colleagues that "the Constitution does not provide for a completely independent judiciary." By keeping federal courts within their proper constitutional role, Ashcroft asserted that Congress "will not only restore the rights of the People, but [it] will also be fulfilling [its] own proper constitutional role to act as a check on judicial excess."

If protest over the PLRA and support for a new reading or reversal does not come from above, it must come from below. Those advocating institutional reform litigation as a solution to prison conditions must learn from the experience of school desegregation, another major twentieth-century litigation-driven movement. The most important lesson is how different these two movements have been. Although causal factors are certainly subject to great debate, it is clear that the Supreme Court in Brown v. Board of Education had a close nexus with changing social consciousness about race and public policy. This accounts for the legitimacy with which many Americans, eventually, regarded school reform litigation. The lack of such popular support for prisoners' rights may help account for the support for strict limits on prison class actions. There are, however, important similarities between school and prison cases. Many major school systems have been under some sort of federal court supervision and have been involved in class action litigation spanning decades. Although the courts have largely succeeded in eliminating overt racial policies in public schools, the limits of equitable remedies are apparent. No court can regulate the patterns of inner city housing, suburban flight, and structural poverty that underlie substandard education in many schools with a majority of minority students.

The analogue has also emerged in prison litigation. Many of the obstacles to a quick resolution of prison suits grew from the explosion of prison populations in the 1980s and 1990s. Until there is social support for rethinking prisons, the criminal justice system, and particularly domestic drug and mental health policies, the courts stand powerless to effectuate meaningful change in America's prisons. This development of a social movement of consciousness of prisoners'

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163 Id.

164 Id. For a similar articulation of this position, see Edwin Meese III, Symposium, Putting the Federal Judiciary Back on the Constitutional Track, 14 GA. ST. U. L. REV. 781 (1998).


rights is unlikely, given the reviled position that convicted criminals have in American sociopolitical culture. It is for these groups, with no majoritarian power in the democratic regime or sympathies for their rights within the majority, that consent decrees may be most precious.

The ultimate effect of the PLRA is under dispute between some scholars who label it a largely symbolic statute unlikely to have systematic effects and others who predict a substantial impact on class actions. Those opposed to the PLRA, particularly the termination of consent decrees, have focused on the structural and theoretical arguments. These approaches have either been foreclosed by Miller or made unlikely given the trends of equity jurisdiction in civil rights litigation. Plaintiffs considering challenging a motion for termination have the best chance if they adopt a practical argument, criticizing the mechanism of the PLRA rather than its aims.

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107 One major facet of political impotence of prisoners is their minority group status within a majoritarian legislative structure. For an academic construction of majoritarian politics concerning the judiciary, see JOHN HARLEY, DEMOCRACY AND DISTRUST (1980).


110 See, e.g., Jack Greenberg, Civil Rights Class Actions: Procedural Means of Obtaining Substance, 39 ARIZ. L. REV. 575, 580 (1997) (“Congress has sent a clear message that it wishes to restrict the broad based remedies ordered by courts in prisoners’ rights suits and possibly in other types of public interest cases as well.”).