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ARTICLES

"IMMINENT DANGER" WITHIN 28 U.S.C. § 1915(g) OF THE PRISON LITIGATION REFORM ACT: ARE CONGRESS AND COURTS BEING REALISTIC?

B. Patrick Costello, Jr. *

I. INTRODUCTION

Faced with "the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners,"[1] Congress passed the Prison Litigation Reform Act ("PLRA") of 1995.[2] The PLRA incorporates 28 U.S.C. § 1915(g), which is "popularly known as the 'three strikes' rule."[3] Except in very limited circumstances, § 1915(g) forecloses access to the federal courts for the targeted class of indigent prisoner litigants. Therefore, "aside from the most extraordinary circumstances, § 1915(g) radically reduces the role of federal courts in protecting the constitutional rights of prisoners by prohibiting *in forma pauperis* ("IFP") status for those prisoners who have had three prior dismissals for frivolousness or for failure to state a claim."[4] Such a prisoner is, of course, free to pursue a claim and pay for the filing fees and other expenses. Yet because most inmates generally lack sufficient wealth and find it difficult to pay the total filing fee within thirty days as normally required, approximately ninety-five percent of prisoner-initiated suits are filed IFP.[5]

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* J.D., Notre Dame Law School, 2002; M.B.A., Old Dominion University, 1999; B.A., University of Notre Dame, 1990. I wish to acknowledge the able and invaluable assistance of Ms. Lucy S. Payne, Research Librarian at the Notre Dame Law School, for her astute and patient guidance in the course of the legislative history research necessary to successfully and thoroughly create this work.

The Prison Litigation Reform Act is a dynamic statute of great import, and consequently new cases involving it are decided nationwide practically every day. Therefore, for purposes of efficiency and the demands inherent in the publication process, this work generally addresses federal cases that have been decided on or before April 30, 2002.

1. 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole).

2. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66, (1996) (codified as amended in scattered sections).

3. Abdul-Akbar v. McKelvie, 239 F.3d 307, 310 (3d Cir. 2001), *cert. denied*, 533 U.S. 953 (2001).

4. Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May be Effective, But is it Constitutional?*, 70 TEMP. L. REV. 471, 497 (1997).

5. Sharone Levy, Note, *Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" Within the Prison Litigation Reform Act of 1995*, 86 IOWA L. REV. 361, 362 (2000) (advocating a standard that allows a prisoner who would otherwise be precluded to file *in forma pauperis* if he

Section 1915(g) states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under *imminent danger of serious physical injury*.[6]

Section 1915(g), the "three strikes" rule, does not provide a definition of "imminent danger." Indeed, exhaustive research has revealed a complete lack of legislative history to help judges, practitioners, and prisoners alike determine the meaning and extent of "imminent danger." Consequently, much confusion has been created in the federal court system as to exactly how and when the phrase "imminent danger of serious physical injury" should be interpreted.

This work will shed light on the issue through an examination of recent federal cases and pertinent commentary on the subject. After Part II presents a brief overview of the PLRA and explores the lack of meaningful legislative history on this Act, Part III will explore whether the "three strikes" rule is both effective and equitable in light of its "imminent danger of serious physical injury" requirement. In particular, Part III shall focus on exactly what is "*imminent* danger" in a prison context and when it should be assessed within the statutory exception to the "three strikes rule." A thorough overview presents the viewpoints of federal judges and law review commentators regarding "imminent danger" in light of the absence of any clear and meaningful Congressional intent. While there are no hard and fast answers to this question, all salient points of view are presented. Particular emphasis is paid to a recent Third Circuit case that methodically reveals the crucial details inherent in this debate. This work concludes with a recom-

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has been under imminent danger at any time related to the cause of action). The rationale and procedure involved with IFP status is as follows:

> Prisoners traditionally have been allowed to proceed *in forma pauperis* to guarantee that "no citizen [is] denied an opportunity to commence, prosecute, or defend an action, civil or criminal, 'in any court of the United States' solely because his . . . poverty makes it impossible for him . . . to pay or secure the costs." Currently, a plaintiff must pay between $105 and $120 in filing fees, but under the *in forma pauperis* statute, indigent plaintiffs are allowed to make installment payments after paying an initial partial filing fee. In the case of a prisoner, this fee is assessed by taking twenty percent of either the deposits to or the average balance of his prisoner trust fund account, whichever amount is greater.

Id. at 371 (citations omitted).

mendation for an appropriate and warranted approach, suggesting that Congress amend § 1915(g) to elucidate what it means by "imminent danger" so that courts may realistically deal with frivolous and vexatious prisoner lawsuits without ignoring the exigencies inmates may face in the course of prison life.

II. BRIEF OVERVIEW OF PLRA

A. Background

Prisoners in America often allege improprieties or irregularities in their individual trials and the entire process that led to their convictions. Further, some inmates have grievances with the prison system, the officials who run it, and fellow prisoners. Threats of physical harm do exist in many, if not all, of our prisons. Many of these grievances and complaints warrant serious consideration by reviewing courts, yet many do not. The sheer number of possible claims, regardless of the facts and circumstances of each case, led the Supreme Court to recognize that certain administrative procedures must be pursued before a prisoner may legally take matters into his or her own hands and attempt an escape or harm a guard or other prisoner.[7] The Court specifically noted that a "prisoner must resort to administrative or judicial channels to remedy coercive prison conditions."[8] Yet starting in the 1960s and extending over the next four decades, prisoners who found that internal prison administrative recourse was unsuccessful were able to turn to the courts for redress. Federal courts acknowledged "that prisoners have many fundamental rights that can be vindicated in federal court in civil rights actions brought pursuant to 42 U.S.C. § 1983."[9] However, as prisons are places that collect people who suddenly have much free time on their hands and many possible claims at their disposal, the number of claims filed by prisoners consequently increased dramatically and led to overly litigious and abusive litigants.

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6. 28 U.S.C. § 1915(g) (2000) (emphasis added).

7. In the seminal case of United States v. Bailey, 444 U.S. 394 (1980), the Court held that:

> one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. Clearly, in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of [the federal statute dealing with escape from prison] was his only reasonable alternative.

Id. at 410-11 (citations omitted).

8. *Id.* at 410 n.8 (citing People v. Richards, 75 Cal. Rptr. 597 (1969)).

B. The Act Itself

"Responding to concerns about overcrowded federal court dockets and a deluge of frivolous prisoner litigation . . . Congress took an unprecedented step to restrict state and federal prisoners' access to the federal courts to seek redress for alleged civil rights violations."[10] The 104th Congress (1995-96) commenced work on the PLRA in February 1995 and passed it as a rider to an omnibus appropriations bill signed into law by President Clinton on April 26, 1996.[11] According to its relatively sparse legislative history,[12] the PLRA "had two ostensible purposes: to end perceived judicial micromanagement of correctional facilities and to curb the purported flood of frivolous prisoners' lawsuits inundating the courts."[13] Consequently, the PLRA has two components. The first, originally labeled the Stop Turning Out Prisoners Act, appears to define the circumstances under which courts may enter injunctions against unconstitutional prison conditions such as overcrowding and inadequate medical care.[14] The second component addresses individual suits by prisoners, and the problem of frivolous prisoner litigation.[15]

C. Lack of Legislative Guidance

The statutory text of the PLRA contains neither a definition of "imminent danger" nor an indication as to how and when such danger should be

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9. Lukens, *supra* note 4, at 474.

10. *Id.* at 471.

11. Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 487 (2001). A brief chronology of the PLRA is as follows:

> Senator Dole initially introduced the Prison Litigation Reform Act on September 27, 1995, in Senate Bill 1279 cosponsored by Senator Hatch, the chairperson of the Senate Judiciary Committee, and Senators Abraham, Kyl, Reid, Specter, Hutchinson, Thurmond, Santorum, Bond, D'Amato, and Gramm. . . . President [Clinton], however, vetoed the conference version of the bill. . . . The PLRA provisions were later inserted into the omnibus appropriations bill enacted into law in April of 1996.

Id. at 487 n.11 (2001) (citations omitted).

12. Indeed, one commentator found the overall history of the PLRA to be quite scant:

> A House Report briefly discusses two House bills that were the precursors to the PLRA—the "Stopping Abusive Prisoner Lawsuits Act" and the "Stop Turning Out Prisoners Act." . . . These two bills were incorporated into a broader crime-control bill, House Resolution 667 . . . . Beyond the House Report, the PLRA's legislative history consists primarily of isolated comments of legislators found in the *Congressional Record* and the testimony of witnesses during hearings in the Senate and House of Representatives that focused, only in part, on the precursory legislation.

Id. at 487-88 n.12 (citations omitted).

13. *Id.* at 489.

14. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 18 U.S.C. § 3626(d) (2000), 28 U.S.C. § 1346(b)(2) (2000), 42 U.S.C. § 1997(e) (2000) and other scattered sections).

15. *See* Pub. L. No. 104-134 § 802, 110 Stat. at 1321-65 (codified as amended at 18 U.S.C. § 3626).

assessed.[16] In such a situation, many believe that the next logical step in the interpretation of a statutory provision is to turn to the pertinent legislative history.[17] Yet, extensive research reveals a dearth of any relevant legislative history on the meaning of "imminent danger" within the context of § 1915(g). In fact, a thorough search of the entire Congressional Record for the 104th Congress and the full text of all Congressional Reports for the 104th Congress revealed that Congress failed in any way to consider the meaning of "imminent danger."[18]

Numerous law review commentators have also examined this issue and have written that there is scant legislative history that is helpful in interpreting this statute. In this light, one author has cynically criticized the process by which the PLRA was enacted:

> [T]he PLRA was attached as a rider to an omnibus appropriations bill. This bill was the byproduct of Congress's failure in 1995 to enact eight of the thirteen annual appropriations bills funding federal agencies. This failure was largely attributable to the inclusion of riders in those bills concerning such controversial issues as abortion, environmental regulation, and prisoner litigation.

Congress's failure to enact these appropriations bills led to a budgetary crisis and two government shutdowns, for a week in November of 1995 and twenty-one days during December and January. Congress then used stopgap measures—"mini" continuing resolutions—to fund the government until the omnibus appropriations bill was finally enacted in April of 1996. Buried in the fine print of that bill was the PLRA.[19]

Yet it was not just members of the academy who decried the manner in which this Act was pushed through Congress. Prominent members of Congress decried Congress's cryptic review of the provisions of the PLRA.[20]

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16. *See generally* 28 U.S.C. § 1915(g) (emphasis added).

17. However, many esteemed lawyers and scholars disagree with this approach. For example, the "most prominent standard bearer" of the textual approach to interpretation, Justice Scalia, argues "that legislative history is an unreliable and illegitimate guide to statutory meaning." He further believes "that non-textual approaches give judges excessive interpretive latitude, while inviting Congress improperly to leave difficult questions to the courts." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 759 (4th ed. 1996) (citation omitted).

18. The principle tool used to conduct this research was LEXIS-NEXIS Congressional Universe, *at* http://web.lexis-nexis.com/congcomp. Using this database, a keyword search using "imminent danger" was conducted of the entire Congressional Record for the 104th Congress. Furthermore, a similar keyword search was also conducted of every committee report for the 104th Congress. Both searches revealed a complete lack of legislative history or guidance as to what Congress intended "imminent danger" to mean.

19. Branham, *supra* note 11, at 537-38 (emphasis added).

20. *Id.* at 538. Examples include Senator Kennedy's statement that

> [a]lthough a version of the PLRA was introduced as a free-standing bill and referred to the Judiciary Committee, it was never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a *single hearing* in the Judiciary Committee, hardly the type of thorough review that a

Overall, the lack of statutory guidance and the abbreviated manner in which Congress passed the PLRA led to a lack of any meaningful legislative debate or resultant legislative history on the entire Act, not to mention the meaning of "imminent danger." Consequently, as will be seen below, federal judges have been forced to use alternative methods in their handling of PLRA cases.

III. "*IMMINENT* DANGER" IN A PRISON CONTEXT AND WHEN IT SHOULD BE ASSESSED WITHIN THE STATUTORY EXCEPTION TO THE "THREE STRIKES RULE"

The PLRA's "three strikes rule" provides for an exception if the IFP "prisoner is under imminent danger of serious physical injury."[21] It is worth noting at the outset that the exception appears to apply only to imminent *physical*, not imminent *psychological* danger.[22] Indeed, the limited anecdotal evidence presented at the only hearing held by the Senate Judiciary Committee[23] and during the debates on the Senate floor regarding enactment of the PLRA certainly suggest that a clear distinction between mental and emotional distress and physical injuries might eliminate a number of frivolous suits.[24] For example, if given the ability to file suits for mental and emotional injuries alone, inmates complain to the courts about bad haircuts by prison barbers, being served chunky rather than creamy peanut butter,[25] or

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measure of this scope deserves.

Id. at 538 n.249 (citations omitted) (emphasis added). Senator Simon proclaimed: "I am very discouraged that this legislation was considered as one of many issues on an appropriations bill. Legislation with such far reaching implications certainly deserves to be thoroughly examined by the committee of jurisdiction and not passed as a rider to an appropriations bill." *Id.* (citations omitted). Finally, Representative Mollohan cynically stated:

> The issues raised by these three legislative proposals are in the jurisdiction of the Committee on the Judiciary. These items include a major legislative rewrite of the Truth in Sentencing initiative grants, prison litigation reform and Legal Services Corporation. All these provisions amend current law and have impacts that are not clearly defined, despite the claims of the Committee on the Judiciary. The reasons they have ended up in this appropriations bill are unclear to me, because as far as I know, we still have a Committee on the Judiciary with an especially competent chairman and ranking member, and I see no reason why an appropriations bill should contain such extensive authorizing language.

Id. (citations omitted).

21. 28 U.S.C. § 1915(g) (emphasis added).

22. This author does not mean to discount the fact that there are often instances and situations where truly severe psychological stressors such as fear and anxiety regarding possible future harm may be manifested in physical harm. However, thorough examination of such a subject is perhaps more suitable for a doctoral thesis in psychology, and any effective treatment of this would involve traveling far afield from the world of meaningful legal research and into the social sciences.

23. *See* statement of Senator Kennedy, *supra* note 20.

24. Stacey Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1194 (1997).

25. *Id.*

being issued Converse sneakers rather than Reeboks.[26] One prisoner even sued due to failure of prison officials to invite that inmate to a pizza party for a departing prison employee.[27]

Frivolous cases such as these have, in part, led courts to usually interpret and apply the three strikes provision broadly.[28] Courts generally construe "imminent danger of serious physical injury" strictly.[29] In fact, the United States Court of Appeals for the Eighth Circuit has gone so far as to hold that "the statute's use of the present tense verb[ ] . . . 'is' demonstrates an otherwise ineligible prisoner is only eligible [for waiver of the three strikes rule] to proceed IFP if he is in imminent danger at the time of filing."[30]

A. How "Imminent Danger" Is Currently Construed: The Abdul-Akbar Majority Opinion

There are several cases that have addressed when imminence of danger should be assessed, and those courts are far from uniform in their approach.[31] However, one case in particular—*Abdul-Akbar v. McKelvie*[32]—stands out as clearly presenting all sides of this issue and therefore warrants extensive discussion.

In *Abdul-Akbar*, the Third Circuit considered en banc the question of whether "imminent danger" is to be "assessed as of the time the complaint is filed, or at some time in the past, even though that danger no longer exists when the complaint is filed."[33] Abandoning its prior holding in *Gibbs v.*

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26. *Id.*

27. 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole).

28. Peter Hobart, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 985 (1999) (citing *In re* Crittendem, 143 F.3d 919, 920 (5th Cir. 1998) ("holding that three strikes applies to writs of mandamus"); Adepegba v. Hammons, 103 F.3d 383, 386 (5th Cir. 1996) ("holding that PLRA's three strikes provision applies to appeal pending prior to effective date of PLRA")).

29. *Id.* (citing Rivera v. Allin, 144 F.3d 719, 724 (11th Cir. 1998) ("denying waiver to prisoner who alleged doctor had touched him improperly during exam"); Wilson v. Yaklich, 148 F.3d 596, 601 (6th Cir. 1996) ("holding that 'reasonable fear' of assault, as opposed to assault itself, is insufficient to constitute compensable claim") (quoting Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996). *But cf.* Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) ("holding that placement of inmate near enemies constituted sufficient danger to overcome three strikes rule")). *Ashley* is discussed in detail *infra* at notes 69-74.

30. *Id.* at 986 (citing *Ashley*, 147 F.3d at 717).

31. Levy, *supra* note 5, at 365. The following cases illustrate this point: Medberry v. Butler, 185 F.3d 1189 (11th Cir. 1999) (held "as a matter of first impression that the prisoner's allegation of past danger is insufficient to fall under the exception"); *Ashley v. Dilworth*, 147 F.3d 715 (8th Cir. 1998) ("holding proper consideration of imminent danger is at the time of filing"); Banos v. O'Guin, 144 F.3d 883 (5th Cir. 1998) ("requiring imminent danger at the time the prisoner seeks to file suit"); Gibbs v. Roman, 116 F.3d 83 (3d Cir. 1997) (until overruled by *Abdul-Akbar*, discussed *infra*, the Third Circuit via *Gibbs* stood apart as "the lone jurisdiction to assess the existence of imminent danger at the time of the alleged incident and not at the time of filing"). *Id.* at 365 n.18.

32. 239 F.3d 307 (3d Cir. 2001), *cert. denied*, 533 U.S. 953 (2001).

33. *Id.* at 312.

Roman[34] that "imminent danger" is assessed at the time of the alleged incident, the court instead adopted "the construction set forth by the Fifth, Eighth and Eleventh Circuit, that a prisoner may invoke the 'imminent danger' exception only to seek relief from a danger which is 'imminent' at the time the complaint is filed."[35] The *Abdul-Akbar* court concluded that this interpretation was consistent with the plain language of § 1915(g), with congressional intent, and with the legislative purpose of the PLRA as a whole.[36]

1. Statutory Interpretation

After acknowledging that this was a case of statutory construction regarding the meaning of § 1915(g),[37] the court applied "settled precepts of statutory construction and [took as a] beginning point a recognition that from the earliest times [the court] adopted what is called the American Plain Meaning Rule . . . ."[38] The Supreme Court restated the rule in 1993, holding, "[o]ur task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."[39] Further,

> If the language of the statute is plain, the sole function of the court is to enforce the statute according to its terms. The plain meaning is conclusive, therefore, "except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[40]

2. Applying the American Plain Meaning Rule to § 1915(g)

The court next applied the American Plain Meaning Rule to the language of § 1915(g). The court interpreted the first clause of § 1915(g), "in no event shall a prisoner bring a civil action or appeal a judgment in a civil

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34. 116 F.3d 83 (3d Cir. 1997).

35. *Abdul-Akbar*, 239 F.3d at 312. *See also* Marjorie A. Shields, Annotation, *Validity and Construction of "Three Strikes" Rule Under 28 U.S.C. § 1915(g) Barring Prisoners From In Pauperis Filing of Civil Suit After Three Dismissals For Frivolity*, 168 A.L.R. FED. 433, § 7 (2001) (providing survey of federal courts of appeals holdings regarding what constitutes "imminent" danger for purposes of exception to rule).

36. *Id.*

37. *Id.*

38. *Id.* at 313. The American Plain Meaning Rule states:

> It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Abdul-Akbar, 239 F.3d at 313 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

39. *Abdul-Akbar*, 239 F.3d at 313 (quoting Negonsott v. Samuels, 507 U.S. 99, 104 (1993)).

action or proceeding under this section,"[41] to "obviously mean[] 'a prisoner may not file a new civil complaint.'"[42] The word 'bring' in that clause "plainly refers to *the time when the civil action is initiated*."[43] Acknowledging that the clause "'unless [the prisoner] is in imminent danger of serious physical injury' is an exception to the preclusive effect of the statute,"[44] the court noted that this "exception is cast in the present tense, not in the past tense, and the word 'is' in the exception refers back to the same point in time as the first clause, i.e., the time of filing."[45]

In other words, Congress meant that the "'imminent danger' [must] exist contemporaneously with the bringing of the action."[46] The court added, "[s]omeone whose danger has passed cannot reasonably be described as someone who 'is' in danger, nor can that past danger reasonably be described as 'imminent.'"[47] This view was supported with reference to similar holdings from the Fifth, Eighth, and Eleventh Circuit.[48] Overall, the majority of the en banc Third Circuit held that "the statute plainly means that a prisoner is not permitted to file his complaint unless he is, at that time, under imminent danger. Viewed from the Plain Meaning Rule, we interpret 'is under imminent danger' to relate to the time when 'a prisoner bring[s] a civil action.'"[49]

40. *Id.* (internal citations omitted).

41. 28 U.S.C. § 1915(g).

42. *Abdul-Akbar*, 239 F.3d at 313.

43. *Id.* (emphasis added) (citing Gibbs v. Ryan, 160 F.3d 160, 162 (3d Cir. 1998)).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See Abdul-Akbar*. 239 F.3d at 313-14 (("[T]he language of § 1915(g), by using the present tense, clearly refers to the time when the action or appeal is filed or the motion for I.F.P. status is made.") (quoting Banos v. O'Guin, 144 F.3d 883, 885 (5th Cir. 1998)); (("As the statute's use of the present tense verbs 'bring' and 'is' demonstrates, an otherwise ineligible prisoner is only eligible to proceed I.F.P. if he is in imminent danger *at the time of filing*. Allegations that the prisoner has faced imminent danger in the past are insufficient to trigger this exception to § 1915(g) and authorize the prisoner to pay the filing fee on the installment plan.") (quoting Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998)) (Yet *Ashley* also lends support to the *Abdul-Akbar* dissenters' argument, as is discussed in further detail *infra* at notes 69-74 and accompanying text.); (("Congress's use of the present tense in § 1915(g) confirms that a prisoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed in forma pauperis . . . .") (emphasis added) (quoting Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir. 1999)).

49. *Abdul-Akbar*, 239 F.3d at 313. The author of this work does not disagree with the *Abdul-Akbar* majority's method of statutory construction. However, as presented below, respectful disagreement does arise with the court's end result of that interpretation regarding when "imminent" should be measured. This author also disagrees with Congress's seemingly careless enactment of a provision that effectively bars many post–"three strikes" indigent inmates from the protection of courts should a valid threat of imminent danger of serious physical injury emerge. These contentions are further developed *infra*, commencing at footnote 55 and accompanying text.

3. Where the Majority Is On Point: The Purpose of the PLRA

In disputing appellant Abdul-Akbar's contention that "requiring proof of imminent danger as of the time of filing is inconsistent with Congress's intent,"[50] the court found "congressional intent clear [after an examination of] the purpose of the entire PLRA."[51] In order to curtail "the filing of frivolous and vexatious prisoner lawsuits . . . Congress curtailed the ability of prisoners to take advantage of the privilege of filing I.F.P."[52] Indeed, Congress intended the "three strikes" rule to supply "a powerful economic incentive not to file frivolous lawsuits or appeals,"[53] and Congress

> has deliberately decided to legislate on this subject by proclaiming, as public policy, a determination to reduce prisoner litigation in the federal courts. As citizens, we may disagree with the congressional wisdom, but as judges, knowing the clearly stated legislative purpose, we may not disembowel the legislative act. Federal courts, unlike state common law King's Bench courts, do not have unlimited power and authority. We are limited to that which has been granted by Congress. What Congress gives it may also take away. The ability to proceed I.F.P. is not a constitutional right. Congress granted the right to proceed I.F.P. in 1892, and it has the power to limit this statutorily created right. Here it has taken away our ability as judges to grant I.F.P. status to a "three strikes" prisoner, no matter how meritorious his or her subsequent claims may be, unless the prisoner "is under imminent danger of serious physical injury" when he or she "bring[s] a civil action." Congress has held trump here, and it has dealt a hand. As judges we must play it.[54]

4. Where the Majority Falls Wide of the Mark: Practical Pitfalls of the PLRA in Light of Prison Life

Dismissing on procedural grounds Abdul-Akbar's claim that such an "interpretation of the statute runs counter to the Eighth Amendment,"[55] the majority stated that appellant Abdul-Akbar had "waived this argument by not raising it in his opening brief."[56] Abdul-Akbar had argued that the "right to be free from serious physical in-

50. *Id.* at 314.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 315-16.
55. *Abdul-Akbar*, 239 F.3d at 316 n.2.
56. *Id.*

jury while in prison is surely as fundamental as the right to divorce,"[57] and that he was "entitled to a waiver of the filing fees as a matter of law."[58] The dissent contended that the court should ignore this waiver because, *inter alia*, "the right to be free from serious physical injury is just as weighty as the right to a divorce at issue in *Boddie*, and . . . that such a right represents a fundamental interest for *Boddie* purposes."[59] The majority summarily brushed aside this argument in a footnote, stating

> the importance of the underlying right is largely immaterial to the question whether that right is a fundamental interest for *Boddie* purposes. . . . an underlying constitutional entitlement rises to the level of a *Boddie* fundamental interest only when the government blocks the sole legal means for safeguarding that entitlement, and not simply because the interest itself is a weighty one.[60]

Yet this is exactly where the *Abdul-Akbar* majority erred in its analysis, for in the cases of many prisoners *the government has indeed blocked the sole legal means for safeguarding the right to be free from serious physical injury while in prison.* The serious physical injury exception to Congress's "three strikes" rule, ostensibly "for those cases in which it appears that judicial action is needed as soon as possible to prevent serious physical injuries from occurring in the meantime,"[61] is ineffective when analyzed in light of the realities of prison life and the exigencies often faced therein. The majority was certainly aware that there are at least some instances in prison life where an inmate is in danger of serious physical injury. They approached this issue by defining "imminent" dangers as "those dangers which are about to occur at any moment or are impending"[62] and by definition "always exist[] in the moments before any such injury is inflicted."[63] Applying these definitions to the former *Gibbs* approach, the majority suggested that

> any time that an otherwise disqualified prisoner alleges that any threat of physical injury occurred at *any time*, that prisoner automatically qualifies for the imminent danger exception. The *Gibbs* interpretation of the imminent danger exception thereby swallows the rule. Like every other court of appeals that has considered this

57. *Id.* (quoting brief for the appellant which cited as authority Boddie v. Connecticut, 401 U.S. 371 (1971)).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Abdul-Akbar*, 239 F.3d at 319.
62. *Id.* at 315 (citing WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 611 (1984)).
63. *Id.* at 315.

> issue, we refuse to conclude that with one hand Congress intended to enact a statutory rule that would reduce the huge volume of prisoner litigation, but, with the other hand, it engrafted an open-ended exception that would eviscerate the rule.[64]

However, the majority does not adequately address the fact that Congress's "economic deterrence rationale"[65] behind the "three strikes" rule fails to protect the needs of indigent prisoners due to the following practical aspects of prison life: "imminent danger" can reasonably be considered a constant, on—going threat in certain prison—life scenarios, and the filing requirements for a civil action or appeal are such that often the danger will have been realized before the matter is brought before a court. As these reasons of practicality are thoroughly laid out in the *Abdul-Akbar* dissent, it therefore warrants discussion in this work.

B. How "Imminent Danger" Should Be Construed: The Abdul-Akbar Dissenting Opinion

A portion of the dissent's initial attack on the majority opinion is the statement that

> [n]o clear intent may be discerned from § 1915(g)'s use of the present tense ("unless the prisoner *is* in imminent danger"), because the same subsection elsewhere employs the present tense in reference to what are expressly recognized as past events ("if the prisoner has brought an action or appeal . . . that *was* dismissed in the grounds that it is frivolous, malicious or fails to state a claim . . . .").[66]

The dissenters believe that "[t]his erroneous combination of tenses renders the statutory provision ambiguous, and . . . such ambiguity must be resolved in favor of preserving the right of access to the courts for prisoners threatened with bodily injury."[67] However, "the majority appears simply to assume that its holding that imminent danger must be assessed at the time of filing is dispositive of this case . . . . In so assuming, the majority *seriously undermines* protection of physically endangered prisoners by paying too little heed to *ongoing* threats."[68]

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64. *Id.* (emphasis added).
65. *Id.* at 319.
66. *Id.* at 320 (Mansmann, J., dissenting) (emphasis added).
67. *Abdul-Akbar*, 239 F.3d at 320 (Mansmann, J., dissenting).
68. *Id.* at 321 (Mansmann, J., dissenting) (emphases added).

This conception of imminent danger has been explicitly recognized by the Eighth Circuit Court of Appeals in the case of *Ashley v. Dilworth*.[69] In that case, prisoner Ashley had listed other inmates on his "enemy alert list" which was given to prisoner authorities for the ostensible purpose of keeping Ashley separated from those inmates for his own protection.[70] Prison officials were aware that these other inmates had assaulted Ashley on prior occasions, yet the guards did not keep him separate from those inmates.[71] Careful review of the pleadings and official prison reports led the court to agree with Ashley that the prison officials had actually threatened "to transfer him so as to place him near an enemy, intending that he be harmed."[72] Indeed, Ashley was subsequently twice attacked by his enemy, once with a sharpened screwdriver and once with a butcher knife.[73] The Eight Circuit panel held that Ashley "properly alleged an ongoing danger" and thereby met "the imminent danger exception of § 1915(g)."[74]

As previously noted, Congress failed to define in the PLRA the fundamental phrase "imminent danger."[75] The *Abdul-Akbar* majority provides a lengthy explication of statutory tense and applies a dictionary definition for the meaning of "imminent."[76] However, this treatment of "imminent" danger glosses over the crucial import of this phrase. The majority acknowledged that the purpose of the "imminent danger of serious physical injury" exception is to "prevent[] future harms."[77] Yet the dissent is very clear in pointing out that such a definition is far too restrictive.[78] To be sure,

> [i]n a *real-world* prison setting, the timing of an attack cannot be so neatly predicted. It may be that an ongoing threat of danger looms over a prisoner for an extended period. At any given moment, the harm might not be "about to" occur; then again, it might. Such is the nature of "danger." *It involves risk, not certainty*.[79]

In the absence of any clear statutory text or Congressional guidance regarding the phrase "imminent danger" in the PLRA, "it may be instructive . . . to consider the definition accorded the same phrase in other contexts."[80]

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69. 147 F.3d 715 (8th Cir. 1998).
70. *Id.* at 716.
71. *Id.* at 717.
72. *Id.*
73. *Abdul-Akbar*, 239 F.3d at 717.
74. *Id.*
75. *See supra* note 16 and accompanying text.
76. *See supra* notes 62-63 and accompanying text.
77. *Abdul-Akbar*, 239 F.3d at 315.
78. *Id.* at 321 (Mansmann, J., dissenting).
79. *Id.* (Mansmann, J., dissenting) (emphases added).
80. *Id.* (Mansmann, J., dissenting).

For example, many courts have considered the meaning of "imminent" in the context of self-defense statutes, which are quite comparable to the PLRA as far as the type of physical threat a person might face and possibly even the span of time in which they face it. This is especially true in the context of domestic abuse cases. In a 1992 self-defense case, Judge Cummings wrote for a panel of the Seventh Circuit that

> [i]nterpretation of the word imminent, as immediate or otherwise, is a matter of state law that must be decided by state courts and legislatures. See *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) ("Whether or not we would choose to interpret a similarly worded federal regulation in that fashion, we are bound by the state court's interpretation, which is relevant to our constitutional analysis only insofar as it fixes the meaning of the regulation.").[81]

Judge Cummings continued by noting that "regardless of the merits of a particular construction of the word imminent in self-defense statutes, ultimately the meaning of that word is an issue upon which state courts can and do differ."[82]

Yet a case from the same circuit, *United States v. Haynes*,[83] illustrates the approach taken by many courts in self-defense cases that a threat is not "imminent" if retreat or similar step avoids injury.[84] This approach ignores the real-life exigencies inmates face in the course of prison life. Inmate-defendant Haynes preemptively attacked another inmate who had been menacingly threatening him over a period of a month. Writing for a panel that also included Judges Coffey and Evans, Judge Easterbrook laid out the chilling factual scenario in *Haynes*:

> Haynes made an offer of proof that Flores-Pedroso was a bully who had a reputation for coercing smaller inmates (such as Haynes) to provide favors of all kinds—food, commissary items, and sex. About a month before the incident in the cafeteria, Flores-Pedroso began pressuring Haynes to use Haynes' position as a food preparer in the kitchen to do favors for him. Haynes refused, and in response Flores-Pedroso threatened to make Haynes his "bitch" (homosexual plaything). For the next month staredowns

81. Whipple v. Duckworth, 957 F.2d 418, 422 (7th Cir. 1992) (*overruled on other grounds by* Eaglin v. Welborn, 57 F.3d 496 (7th Cir. 1995)).

82. *Id.*

83. 143 F.3d 1089 (7th Cir. 1998) (holding *inter alia* that defendant-inmate was properly barred from asserting proposed defense based on self-defense in assault prosecution arising from defendant's conduct in pouring scalding oil on another inmate who allegedly had threatened him with injury on several occasions, given that defendant had time and opportunity to pursue lawful alternative of seeking protection from guards, despite perceived "evils" of such course).

84. *Id.* at 1091.

> and jostling occurred, while Flores-Pedroso kept up a stream of threats. One time Flores-Pedroso cornered Haynes in a bathroom, and Haynes thought that rape was imminent, but another inmate entered and Flores-Pedroso left. A day before Haynes poured the oil, Flores-Pedroso picked up Haynes and slammed him to the ground within sight of a guard, *who did nothing*. On the day of the oil incident, Flores-Pedroso told Haynes that as soon as food service was closed for the afternoon he would "finish what he started." Haynes contends that he believed that *he would be attacked as soon as he left the cafeteria*, and that he struck first in order to protect himself.[85]

In discussing regarding whether Haynes' offer of proof satisfied the normal understanding of self-defense, the court considered whether Haynes had been in "imminent" danger at the time he attacked the other inmate: "Haynes was not faced with an imminent use of force by Flores-Pedroso. There was a threat of action later that afternoon, but Flores-Pedroso had made unfulfilled threats before, and anyway 'later' and 'imminent' are opposites."[86]

While this discussion of "imminence" may be valid in the context of *immediate* self-defense, it bears closer scrutiny in light of § 1915(g)'s exception for imminent danger of serious physical injury. If one applies the *Haynes* court's restrictive understanding of "imminence" or "imminent" to § 1915(g), it appears that there would be few, if any, occasions when an inmate would have the necessary time to complete the paperwork necessary to qualify for the "imminent danger exception" and qualify to file *in forma pauperis*. The exception for situations when the prisoner is under "imminent danger of serious physical injury" will be very difficult to meet because by the time a prisoner prepares and files a complaint, the imminence of the alleged danger likely will have dissipated.[87] Under such an understanding, the harm faced by the inmate could very well be realized immediately after the danger finally becomes "imminent." Indeed, if the reader puts himself in the shoes of an inmate who believes he faces a physical attack "as soon as he [leaves] the cafeteria,"[88] the concept of this danger being "imminent" becomes much more clear. The procedures and time required to file a civil

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85. *Id.* at 1089-90 (emphases added).

86. *Id.* at 1090.

87. Lukens, *supra* note 4, at 497. An illustration of this crucial point serves to elucidate the matter:

> For example, if the prisoner's complaint is about a beating at the hands of a correctional officer, the only way that this complaint could satisfy § 1915(g) is if the prisoner were to allege that this particular correctional officer regularly beats the prisoner, and that the physical injury will be brought upon the prisoner again in the future.

Id. at 511.

action and have it come before a federal court certainly take longer than inmate Haynes felt he had before the impending attack by Flores-Pedroso. In sum, such reasoning effectively eviscerates § 1915(g) and leaves an inmate facing imminent danger without any possible protection of a court.[89]

The *Abdul-Akbar* dissenters point out that courts have interpreted "imminent" much more realistically in Eight Amendment prison cases than that granted by the majority in the factually similar § 1915(g) context. For example,

> under the Eighth Amendment prison authorities must protect prisoners not only from current threats, but also from "sufficiently imminent dangers"; the courts have defined that phrase as encompassing those dangers "likely to cause harm in the 'next week, month, or year.'" *Horton v. Cockrell,* 70 F.3d 397, 401 (5th Cir. 1995) (quoting *Helling v. McKinney,* 509 U.S. 25 (1993); *Payne v. Collins,* 986 F. Supp. 1036, 1052 (E.D. Tex. 1997) . . . .[90]

The Third Circuit Court of Appeals has gone so far as to define "imminent" harm in the relatively benign context of preliminary injunctions to be "where the potential harm was not 'uncertain or speculative,' but might be expected to occur before the threat could otherwise be averted."[91] And in discussions of mere standing, *not* "imminent danger of *serious physical injury*" as in § 1915(g), courts have framed their inquiry into the 'immediate threat' as one encompassing consideration of the likelihood of an ongoing danger, as evidenced by past events."[92]

As noted above, the *Abdul-Akbar* majority approached this issue by defining "imminent" dangers as "those dangers which are about to occur at any moment or are impending."[93] While the dissent does not question this common dictionary definition of "imminent" in the context of danger, it is helpful to parse and scrutinize this meaning to determine if a reasonable and

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88. *Haynes*, 143 F.3d at 1090.

89. Such an action leaves the government open to suits based on the Eighth Amendment. As the United States Supreme Court noted,

> [w]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, *and reasonable safety*—it transgresses the substantive limits on state action set by the Eighth Amendment . . . .

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989) (emphasis added).

90. *Abdul-Akbar*, 239 F.3d at 321 (Mansmann, J., dissenting).

91. *Id.* at 321-22 (Mansmann, J., dissenting).

92. *Id.* at 322 (Mansmann, J., dissenting) (citing O'Shea v. Littleton, 414 U.S. 488, 496 (1974) ("past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury")).

logical alternative is more appropriate. "Impending" means "*to hover threateningly*; to be about to happen."[94] Indeed, there are certainly many realistic and all too common scenarios in the context of prison life where imminent danger of serious physical injury hovers threateningly over a particular inmate—one need only look for an example to the unsettling factual scenario presented by Judge Easterbrook in *Haynes*.[95] Further, such a narrow reading of the exception provided for in § 1915(g) will have a far-reaching effect, as persistent, ongoing imminent danger is a condition all too often encountered in our nation's prisons.[96] The Supreme Court has even noted that in many prisons, "[g]uards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment and despair are commonplace."[97]

Consequently, by

> suggesting that the mere passage of time between the incidents and after the last incident means that the danger was no longer imminent at the time of filing, the [*Abdul-Akbar*] majority disregards the continuing, unremedied nature of the factors that allegedly caused the incidents. Indeed, the occurrence of multiple incidents over a substantial time period *supports* rather than undermines the conclusion that Appellant's danger was ongoing.[98]

In sum, reacting to the *Abdul-Akbar* majority holding that § 1915(g)'s "imminent danger of serious physical injury" is to be measured as of the filing date of the IFP prisoner's claim, the dissenters furnished an extensive and compelling argument that such a view ignores the very real and very dangerous category of "ongoing threats" that continue to exist in our prisons.

IV. CONCLUSION

Responding to concerns about overcrowded federal court dockets and a deluge of frivolous prisoner litigation, Congress took an unprecedented step to restrict state and federal prisoners' access to the federal courts to seek redress for alleged civil rights violations. Yet Congress failed to consider at all the meaning of "imminent danger," and this has forced federal judges to use alternative methods in their handling of PLRA cases.

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93. *Supra* note 62 and accompanying text.
94. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 613 (1984) (emphasis added).
95. *Supra* note 85 and accompanying text.
96. *Abdul-Akbar*, 239 F.3d at 324 n.13 (Mansmann, J., dissenting).
97. *Id.* (Mansmann, J., dissenting) (quoting Wolff v. McDonnell, 418 U.S. 539, 562, (1974)).
98. *Abdul-Akbar*, 239 F.3d at 323 n.11 (Mansmann, J., dissenting).

Cognizant of Congress's overall desire to reduce frivolous prisoner litigation, and aware that most prisoners file complaints IFP, the Third, Fifth, Eighth and Eleventh Circuit Courts of Appeals set forth a rigid and unforgiving construction of § 1915(g)'s "imminent danger of serious physical injury" exception. This construction holds that a prisoner may invoke the "imminent danger" exception only to seek relief from a danger which is "imminent" at the time the complaint is filed. While such an interpretation does reduce frivolous litigation, it ignores the following predicament: prisoners with three strikes seeking IFP status are faced with the insurmountable obstacle of showing that a serious physical injury is about to befall them at any moment, and they may not predicate their showing on an ongoing risk based on past events.

It is a non sequitur to argue in matters of court procedure or civil injunctions that imminent danger means "ongoing" or "likely to occur," while a less realistic, time-sensitive, and practical definition of the term is proffered in the circumstance of life-threatening prison violence. In fact, any scenario in which life is at risk certainly demands *at least* as encompassing a definition of "imminent danger" as, say an environmental injunction case. Indeed, the politics of being "tough on crime" and the desire to reduce trivial litigation should not result in placing prisoners in "imminent danger of serious physical injury" with no true recourse.

Congress should amend § 1915(g) to provide meaningful and clear guidance for what the term "imminent danger" means. This will allow courts to interpret the statute with confidence and accuracy so that they may handle the large number of prisoner lawsuits without overlooking the very real danger that some inmates face on a daily basis while in prison.

And in the interim, courts should reconsider their strict and unforgiving approach toward interpreting what Congress failed to elucidate. Indeed, persistent, ongoing imminent danger is a condition all too often encountered in our nation's prisons. The methodology adopted by the *Abdul-Akbar* dissenters adequately serves to reduce much of the frivolous litigation, while not abandoning the rights of prisoners to have their physical well-being safeguarded. Otherwise, we must ask ourselves the following: "What, then, will suffice? Must a prisoner be running from his attackers as he files?"[99] By limiting the imminent danger exception to the "sword of Damocles" situation, it is unmistakable that the current, narrow interpretation of "imminent danger" all but writes the exception out of the statute.[100] Until clearly instructed by Congress to interpret the statute in this harsh and rigorous man-

99. *Id.* at 324 (Mansmann, J., dissenting).
100. *Id.*

ner, courts should err on the side of protecting the physical safety of inmates who are unable to legally do so themselves. Justice and fairness demand nothing less.