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United States House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

FEDERAL BUREAU OF PRISONS OVERSIGHT HEARING: THE BUREAU OF PRISONS' SHOULD FULLY IMPLEMENT AMELIORATIVE STATUTES TO PREVENT WASTER RESOURCES, DANGEROUS OVERCROWDING, AND NEEDLESS OVER-INCARCERATION

Prepared Statement of

Stephen R. Sady
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The Bureau of Prisons' Should Fully Implement Ameliorative Statutes To Prevent Wasted Resources, Dangerous Overcrowding, And Needless Over-Incarceration

Good morning Chairman Conyers, Chairman Scott, and Members of the Subcommittee:

Thank you for the opportunity to address at least some of the issues that directly affect the freedom and safety of prisoners that I, as a federal public defender, have represented over the years. The issues do not involve the fact of their convictions or length of their sentences, but rather the Bureau of Prisons' (BOP) rules that deny to them the opportunities Congress has deemed important in helping prisoners ovoid unnecessary incarceration and achieve successful transitions into the community.

Over-incarceration of federal prisoners takes a huge societal toll: the hundreds of millions of taxpayer dollars wasted; the human costs of individual freedom lost and families broken; and the redefinition of our society as one willing to incarcerate more than is necessary to accomplish legitimate goals of sentencing. The overarching philosophy of the Sentencing Reform Act – "a sentence sufficient but not greater than necessary" to accomplish the goals of sentencing – should apply to the imposition *and execution* of the sentence. The sooner a prisoner begins community corrections, then supervised release, the sooner community-based rehabilitative programs, with their lesser costs, employment, and family reunification, go into effect. Congress has given the BOP authority to ensure that prisoners are not serving more time of actual incarceration than is necessary. But, the BOP has failed to fully implement available statutory mechanisms to ameliorate sentences.

There are six areas where the BOP has failed to follow the law or use available programs: the Second Chance Act (SCA), the second look statute, good time credit, the residential drug treatment program (RDAP), the boot camp program, and the sentence calculation statutes. The problem lies not with the BOP's statutory authority, but rather with its failure to administer the law as intended. These Congressionally approved mechanisms do not present generalized community safety concerns because the BOP has the discretion – indeed the obligation – to ensure the public's

safety on a case-by-case basis. However, categorical failures to fully implement ameliorative programs deprive thousands of prisoners the benefits that would spare the public millions of dollars and alleviate overcrowding that is dangerous to inmates and correctional officers alike.

The Second Chance Act

In Section 251 of the SCA, Congress doubled the BOP's required consideration of prerelease custody in the community from a maximum of six months to twelve months.[1] Congress also instructed the BOP to promulgate regulations within 90 days to ensure 1) consideration of the five factors listed in 18 U.S.C. § 3621(b), 2) individualized rather than categorical assessment, and 3) placement in the community for a "sufficient duration to provide the greatest likelihood of successful reintegration into the community."[2] Implementation of the SCA's plain language should normally lead to transfer to a halfway house starting at twelve months from the projected release date, with up to the final six months in home detention, unless less time in the community was justified by individual factors that overrode the greater opportunities for work in the community, for family reunification, and for other community-based programming to ease reentry from prison to home.

In response to the SCA, the BOP repeatedly violated the statute's plain intent by clinging to the former rules that effectively limited community corrections to six months, absent undefined extraordinary and compelling circumstances.[3] The Director of the BOP claimed that research supported the six-month limitation.[4] Despite this claim and the SCA's emphasis on evidence-based approaches, discovery obtained in litigation established that no such research exists. Thus, a key aspect of the SCA has become a dead letter. With no empirical support, the BOP failed to adopt the common sense position of Congress that, in general, more time in community transition programs increases the fiscal and individual benefits of employment, family reunification, and less stringent custody.

The BOP's six-month presumption violates the relevant statutes. Their plain text as well as their context belies the BOP's rule that – in effect – retains the pre-SCA six-month standard. Despite

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[1] Second Chance Act, Pub.L. 110-199, § 251, 122 Stat. 657 (Apr. 9, 2008); 18 U.S.C. §3624(c)(2008).

[2] 18 U.S.C. §3624(c)(6)(2008).

[3] *Pre-Release Residential Re-Entry Center Placements Following The Second Chance Act of 2007,* Memorandum From Joyce Conley and Kathleen Kennedy to Chief Executive Officers (Apr. 14, 2008).

[4] United States Sentencing Commission, *Symposium on Alternatives to Incarceration* at 267 (July 14-15, 2008) (statement of Harley Lappin, Director, Federal Bureau of Prisons).

the SCA's express call for "enhance[d]" and "improve[d]" use of community corrections,[5] the SCA rules result in transfer decisions that are virtually identical in length to those prior to the SCA. The BOP's policy of re-instituting the pre-SCA presumption of no more than six months of community corrections violates the plain meaning of the SCA and undermines Congressional intent. As a District Court in New Jersey held, "[o]bviously, an underlying premise of these amendments is that the more time an inmate spends in a CCC before he or she is released from BOP custody, the more likely that his or her community reintegration will be successful."[6] The BOP has flagrantly ignored Congress' clear directive by adopting an incorrect standard requiring "extraordinary" or "compelling" circumstances for community corrections beyond six months.[7] The practice has been to routinely deny requests for exceptions under standards that are either incomprehensible – such as, the prisoner is either too ready to live in the community or not ready enough – or illegal – such as, the prisoner has a halfway house condition of supervised release. Moreover, the BOP has failed to define what constitutes extraordinary or compelling circumstances.

Despite a clear directive from Congress and the opportunity to substantially increase the utilization of community corrections under the SCA, the BOP has hunkered down into its old pattern of providing the same minimal access to community programming as in its pre-SCA policies and practices. The BOP's failure to respond to the opportunities provided is paralleled by the failure to follow clear directives of Congress: despite the instruction to promulgate rules in 90 days, the BOP waited 195 days to issue rules with no notice-and-comment that failed to address the change in access to community corrections. Congress directed a statistical accounting of SCA implementation in one year; the BOP still has not complied. Most importantly, despite the doubling of available time for mandatory consideration of community corrections, the BOP has by rule stuck to its pre-SCA standard of limiting community corrections to six months. And the BOP has not used home detention to accelerate participation in community corrections by beginning the transfer to the halfway house earlier followed by up to six months of home detention. So far, on the amendment to § 3624(c), Congress has spoken, but the agency has not listened – leaving federal prisoners in the same position as if the SCA had never been enacted.

Extraordinary And Compelling Circumstances Warranting Second-Look Resentencing

In 18 U.S.C. § 3582(c), Congress provided for second look resentencing by giving discretion to the sentencing judge to reduce a sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction." Congress realized that a wide variety of circumstances could fit into the description of "extraordinary and compelling" circumstances, and delegated to the

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[5] SCA at §231(c).

[6] *Strong v. Schultz*, 599 F.Supp.2d 556, 562 (D.N.J. 2009).

[7] *Pre-Release Residential Re-Entry Center Placements Floowing The Second Chance Act of 2007,* Memorandum From Joyce Conley and Kathleen Kennedy to Chief Executive Officers (Apr. 14, 2008); Bureau of Prisons Program Statement 7310.04 at 8 (Dec. 16, 1998).

Sentencing Commission the task of setting criteria and providing examples.[8] The statute contemplates that the BOP would perform a gatekeeper function: sentencing discretion is to be exercised by the sentencing judge, but the sentencing judge does not receive notice of the case until the BOP files a motion. This is where practice has broken down.

Despite the explicit direction to the Sentencing Commission, this delegation resulted in no action for the first 20 years of the Guidelines. In this power vacuum, the BOP adopted a rule that, despite the absence of a statutory basis for such a restriction, only permits the filing of a motion based on imminent proximity to death – known as the "death rattle rule." The result of the policy is brutal: with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled on, so a federal judge never had the opportunity to even make a decision.[9]

Last year, the Sentencing Commission adopted a rule that, consistent with the statutory language, contains no limit on what can constitute "extraordinary and compelling" circumstances, and sets out examples beyond imminent death.[10] Although this Guideline became effective on November 1, 2007, we do not believe a single motion has been filed pursuant to the new U.S.S.G. § 1B1.13. The old BOP rule remains on the books, and the BOP, in an interim rule, has not changed a syllable of the basic standard. The BOP explicitly stated in the interim rule that the Sentencing Commission's proposed factors, which had been circulated since May 2006, would not be considered: "It is important to note we do not intend this regulation to change the number of . . . cases recommended by the Bureau to sentencing courts. It is merely a clarification that we will only consider inmates with extraordinary and compelling medical conditions for [reduction in sentence], and not inmates in other, non-medical situations which may be characterized as "hardships," such as a family member's medical problems, economic difficulties, or the inmate's claim of an unjust sentence."[11] The BOP to this day is instructing Wardens by rule to deprive sentencing judges of the opportunity to exercise their discretion and is, in effect, assuring that the range of discretion contemplated by the statute and the Sentencing Commission is never exercised.

Under basic separation of powers principles, the BOP should be operating as no more than the conduit for potential claims to come before the sentencing judge. Otherwise, the BOP effectively becomes the sole adjudicator of second looks – a function already provided to the Executive Branch in the powers of pardon and commutation.

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[8] 28 U.S.C. § 994(t) (2000).

[9] Judi Garret, Dep'ty. Dir., Office of Information, Policy, & Public Affairs, Federal Bureau of Prisons (May 2008), http://or.fd.org/ReferenceFiles/3582cStats.pdf.

[10] U.S.S.G. § 1B1.13, comment. (n.1).

[11] 71 Fed. Reg. 76619-01 (Dec. 21, 2006).

The result of the BOP's obstruction of § 3582(c)'s full implementation is expensive. The deserving prisoners described by the Commission in U.S.S.G. § 1B1.13 are real and numerous. Many of the potential beneficiaries are medically needy and, therefore, expensive to house. Given the number of federal districts, even one motion a year per district would double the number of § 3582(c)(1)(A)(i) motions filed per year, greatly reducing unnecessary prison expenditures. Most importantly, judges, defense counsel, and prosecutors would have a mechanism available to deal with the "extraordinary and compelling" prison tragedies that need judges to do justice.

Good Time Credits

For at least a century, federal sentencing law has calculated good time credits based on the sentence imposed to provide an incentive for good conduct in prison. Prior to 1987, when the Sentencing Reform Act (SRA) went into effect, the good time credit statute provided for graduated available credits per month depending on the length of the sentence. In the SRA, Congress purported to simplify the process by enacting 18 U.S.C. § 3624(b), which provided that prisoners serving a term of imprisonment greater than one year "may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment . . ." Because 54 is almost exactly 15% of the 365 days in a year, the congressional rule appeared to be that, for any term of imprisonment of one year and a day or greater, a prisoner could earn up to 15% of the sentence imposed in good time credits, so the minimum term that must be served on any sentence is 85%.[12]

Along with the good time statute, the SRA delegated to the Sentencing Commission the creation of the Sentencing Table, requiring "that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving

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[12] Former Senator Joseph Biden later described the methodology as follows:

> I was the coauthor of that bill. In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85 percent of that time - 8.5 years, which is what the law mandates. You can get up to 1.5 years in good time credits, but that is all. And we abolished parole. So you know you'll be in prison for at least 8.5 years.

141 CONG. REC. S2348-01, at 2349 (daily ed. Feb. 9, 1995) (statement of Sen. Biden); *see also* 131 CONG. REC. E37-02 (daily ed. Jan. 3, 1985) (statement of Rep. Hamilton) ("Now sentences will be reduced only 15% for good behavior."); 131 CONG. REC. E201-04 (daily ed. Jan. 24, 1985) (statement of Rep. Mazzoli) ("[A] sentence could be shortened 15 percent for good behavior."); 131 CONG. REC. S4083-03 (daily ed Apr. 3, 1985) (statement of Sen. Kennedy) (the "sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for 'good time.'").

sentences to terms of imprisonment, the length of such terms actually served."[13] In calibrating the Sentencing Table, the Sentencing Commission's staff collected large samples of sentences for various crimes and determined the actual time served as a baseline. The Sentencing Commission then "adjusted for good time" by figuring out the longer sentence for which actual time served would be 85%:

> Prison time was increased by dividing by 0.85 good time when the term exceeded 12 months. This adjustment corrected for the good time (resulting in early release) that would be earned under the guidelines. This adjustment made sentences in the Levels Table comparable with those in the guidelines (which refer to sentences prior to the awarding of good time).[14]

The Sentencing Commission incorporated its interpretation of the good time statute in a 1990 amendment to the introduction to the Guidelines manual, stating "[h]onesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior."[15]

For about a decade after the SRA became effective on November 1, 1987, prosecutors, defense attorneys, and judges generally predicted actual minimum time served by multiplying by .85 the potential term of imprisonment in months to calculate the time a defendant, receiving maximum good time, would actually serve before commencing the term of supervised release. However, the 85% calculation was not accurate: internal documents from the BOP indicate that in 1988, the BOP took the position that "good time is earned on sentences of one year and one day or more at a rate of 54 days *for each year of time served*."[16] By counting good time credits against time served, rather than the sentence imposed, the BOP disallowed seven days of potential good time credit. Following an "arithmetically complicated" formula, the BOP's methodology provides only a maximum of 47 days against the sentence imposed as maximum good time credits, or allowing no more than 12.8% of the sentence imposed as good time credit.[17] Therefore, the minimum amount of time that a well-behaved prisoner would serve, with full good time credits, equals 87.2% of the sentence imposed, not 85%.

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[13] 28 U.S.C. § 994(m) (2000).

[14] United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987).

[15] U.S.S.G. ch. 1, pt. A, § 3 (1990 Amendment) (2007 Guidelines Manual at 9).

[16] Bureau of Prisons Program Statement 5880.28 at 1-44 (Feb. 14, 1997) (emphasis added).

[17] *Id*. at 1- 46-47.

The BOP never made a reasoned decision to construe the statute more harshly – the BOP simply assumed the statute unambiguously required the lesser amount of good time credits. Further, there is no indication that the BOP ever took into consideration that the Sentencing Commission had previously interpreted the statute to provide the full 54 days against each year of the time imposed, or that the Sentencing Table, upon which all sentences are initially graphed, was calibrated to be 2.2% higher on the assumption that 15% good time credits on the sentence imposed would be available, not the 12.8% allowed by the BOP.

Prisoners' challenges to the BOP's formulation have as yet been unsuccessful. Although three district courts found that the statute unambiguously provided for 54 days credit based on the length of the sentence,[18] circuit courts found the statue ambiguous, thereby disagreeing with – yet deferring to – the BOP's belief that only 12.8% credit was available.[19] Justice John Paul Stevens explained, in connection with the Supreme Court's denial of certiorari in one case that the prisoners' statutory interpretation appeared to be correct and that, in the absence of a Circuit split, courts and "other Government officials" should re-examine the BOP's method of computing good time credits:

> I think it appropriate to emphasize that the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning the wisdom of the Government's position. As demonstrated by the thoughtful [District Court] opinion, both the test and the history of the statute strongly suggest that it was not intended to alter the pre-existing approach of calculating good-time credit based on the sentence imposed. Despite its technical character, the question has sufficient importance to merit further study, not only by judges but by other Government officials as well.[20]

No government officials appear to have reconsidered the BOP's formulation. However, prisoners have again challenged the rules as contrary to the plain language of the statute, as well as being arbitrary, capricious, an abuse of discretion, and contrary to law under §706 of the Administrative Procedure Act (APA), primarily because the BOP failed to consider the Sentencing Commission's interpretation of the statute as providing for a 15% reduction. The BOP has conceded

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[18] *Moreland v. Fed. Bureau of Prisons*, 363 F.Supp.2d 882, 894 (S.D. Tex. 2005), *rev'd*, 431 F.3d 180 (5th Cir. 2005); *Williams v. Dewalt*, 351 F.Supp.2d 412, 420 (D. Md. 2004), *vacated*, 2005 WL 4705074 (D. Md. 2005); *White v. Scibana*, 314 F.Supp.2d 834, 841 (W.D. Wis. 2004), *rev'd*, 390 F.3d 997 (7th Cir. 2004).

[19] *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005); *Mujahid v. Daniels*, 413 F.3d 991, 999 (9th Cir. 2005); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 532-33 (4th Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 173-74 (3d Cir. 2005); *Perez-Olivo v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005); *White v. Scibana*, 390 F.3d 997, 1002-03 (7th Cir. 2004).

[20] *Moreland v. Federal Bureau of Prisons*, 126 S.Ct. 1906, 1907 (2006) (Stevens, J., statement respecting the denial of certiorari).

that the rules violated the APA, but the court deferred to the BOP nonetheless. [21] Petitions for writs of certiorari are pending in the Supreme Court.

The seven days per year seems small until measured against the number of persons affected and the length of sentences imposed. For all federal prisoners eligible for good time, the total time involved is over 36,000 years (195,435 prisoners[22] x 7 days a year x 9.8 average sentence[23] that is more than a year and less than life, divided by 365 days in a year equals 36,731 years). At $25,894 per year for non-capital incarceration expenditures,[24] this amounts to over $951 million in taxpayer money that Congress did not intend or authorize to expend on incarceration for current prisoners. If prisoners were awarded 54 instead of 47 days per year, the additional beds available would, with no new prison construction, mitigate dangerous overcrowding in prisons that are at 137 percent of capacity.[25] Put another way, 95% of the approximately 200,000 inmates are eligible for good time credit, so every year the over-incarceration by 7 days, at $68 per day, costs taxpayers approximately $93 million.[26] If prisoners were awarded 54 instead of 47 days per year, the additional beds available would, with no new construction, mitigate dangerous overcrowding in a system that is 37% over capacity.[27] The human costs of this over-incarceration defy quantification.

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[21] *Tablada v. Thomas*, 533 F.3d 800 (9th Cir. 2009).

[22] Federal Bureau of Prisons, *Quick Facts About the Bureau of Prisons*, http://www.bop.gov/news/quick.jsp (last visited June 16, 2009) (205, 289 total population adjusted by 4.8 percent—the percentage of prisoners serving less than one year or a life sentence).

[23] Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the House Comm. on Appropriations, 110th Cong. (2008): Testimony on Budget Request for the Fed. Bureau of Prisons in President's Fiscal Year 2009, *available at* 2008 WL 715683.

[24] Memorandum from Matthew Rowland, Deputy Assistant Director, Admin. Office of the U.S. Courts, to Chief Prob. Officers and Chief Pretrial Services Officers (May 6, 2009).

[25] Lappin Statement, *supra* note 23, at 2.

[26] *Id*.

[27] At year end 2006, BOP capacity was 119,243, while the actual population was 190,844 prisoners, so the BOP operated 37% over capacity. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2006, at 4, 5, 20, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf. The BOP population is 201,489 as of June 19, 2008. *See* BOP Weekly Population Report, *available at* http://www.bop.gov/locations/weekly_report.jsp.

Residential Drug Abuse Treatment Programs

In 1990, Congress created the outlines for residential substance abuse treatment to address two leading causes of recidivism – alcoholism and drug addiction.[28] When very few prisoners volunteered for the program, Congress in 1994 enacted an incentive of a sentence reduction of up to one year for successful completion of the program.[29] Participation increased greatly. As we can attest from having spoken to hundreds of participants in what is known as RDAP or the Residential Drug and Alcohol Program, the program is excellent at giving prisoners the tools to return to their communities and to live law-abiding lives.

In its execution of the incentive, however, the BOP has failed to implement the program to cover the full range of prisoners authorized by statute to receive the sentence reduction. The statute limits eligibility for the sentence reduction to prisoners convicted of a nonviolent offense. In implementing the sentence reduction incentive, the BOP administers the program in a manner that does not permit fully the available sentence reduction. The BOP has eliminated broad categories of statutorily eligible prisoners: alien prisoners; prisoners whose offense involved mere possession of a firearm, such as felons in possession of a firearm and drug traffickers who receive a two level gun increase; and prisoners convicted of a nonviolent offense but who have prior violent convictions, regardless of how stale. The BOP should allow all statutorily eligible prisoners to participate in the incentive program, with any current and serious dangerousness addressed on an individual, rather than categorical, basis.

1. Full Availability Of RDAP Incentives

The BOP should take measures to assure that RDAP classes are open and available at a time that permits the maximum amount of sentence reduction to be available. Currently, the BOP only provides an average sentence reduction of 7.6 months for eligible prisoners, rather than the one year available under the statute.[30] For prisoners who annually receive the sentence reduction, the additional 4.4-month reduction would save 1,700 years of prison time at a cost of over $44 million dollars per year (4.4 months x 4,800 prisoners ÷ 12 = 1700 years x $25,894 = $44,019,800).

Several BOP policies result in this expensive underutilization of the RDAP program. The BOP does not make eligibility determinations early enough to be able to plan to send prisoners to

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[28] 18 U.S.C. § 3621(b) (2000).

[29] 18 U.S.C. § 3621(e) (2000). This program appears to at least partially respond to a study indicating that non-violent drug offenders were receiving greater punishment than necessary. U.S. DEPARTMENT OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES (1994).

[30] 2009 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs at 11 (Jan. 2009).

available programs, a practice that will be exacerbated by the BOP's new regulations requiring that RDAP determinations be made late in a prisoner's term of imprisonment . In creating waiting lists, the BOP does not follow the statutory requirement that "proximity to release" provide the priority: while using the potential for good time credits for a projected release date, the BOP does not use the potential for the RDAP sentence reduction, thereby leaving prisoners to obtain a much reduced period of the sentence reduction.[31] In other words, prisoners who are eligible for the reduction see non-eligible prisoners take their places in programs based on release dates that do not include the one-year reduction. Many eligible prisoners could get into classes earlier and receive the full 12-month reduction if the BOP used the potential full sentence reduction for successful completion of the program when calculating proximity for release.[32] Further, the BOP has promulgated inappropriate practices regarding who is an eligible prisoner, disqualifying persons who have not used substances within a year of custody when the addicted person had been complying with pretrial release conditions.[33] And lastly, the allocation of sufficient staff to address the backlog of prisoners on the RDAP waiting list would prevent the delays that inevitably reduce the amount of the sentence reduction.

This constellation of administrative impediments often leaves prisoners with a shorter sentence reduction, not because they do not deserve it, but because of the manner of administration. The most important policy approach should be to assure that the treatment programs receive sufficient funding that classes can accept all prisoners who volunteer for such treatment and that the program is administered so all eligible prisoners receive the full one year sentence reduction.

2. Alien Prisoners

Nothing in the statute ties successful completion of RDAP to participation in community corrections. In fact, as initially promulgated in 1995, the BOP's rules specifically provided for eligibility for all persons who successfully completed the residential program and then succeeded in *either* community corrections *or* transitional programming within the institution.[34] This meant that prisoners with immigration and other detainers could receive the year off, which makes good sense given that alien detainees often became substance abusers in the United States. Their successful treatment would help them live law-abiding lives in their own countries, while not saddling neighboring countries with untreated substance abusers. This sensible program tragically changed due to a classic case of unintended consequences.

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[31] 18 U.S.C. § 3621(e)(1)(C) ("with priority for such treatment accorded based on an eligible prisoner's proximity to release date").

[32] *Thurman v. Thomas,* 2009 WL 936663 (Mar. 30, 2009)(proximity to release under 18 U.S.C. §3621(e)(1)(C) includes potential sentence reduction).

[33] *See Salvador-Orta v. Daniels*, 531 F.Supp.2d 1249, 1252 (D. Or. 2008).

[34] Bureau of Prisons Program Statement 5330.10, ch. 5 at p. 2 (May 25, 1995).

In the original 1995 rules, the follow-up after the residential treatment called for only one session every month.[35] The American Psychological Association wrote the BOP a letter suggesting that more frequent treatment sessions should be included.[36] In response, the BOP promulgated a new rule in 1996 that included a requirement that, to successfully complete the program, the prisoner had to complete community corrections.[37] With no indication that any thought was given to prisoners with detainers who are ineligible for community placement, the BOP in effect eliminated all aliens, as well as United States citizen prisoners with state detainers, from the sentence reduction incentive. There is no reason why the BOP could not reinstate the requirement of successful completion of transitional programming, in lieu of community corrections, for those prisoners who, due to the existence of a detainer, are not in a position to participate in community corrections.

Prisoners initially argued that, as a matter of statutory construction, the BOP lacked authority to create a categorical disqualification based on detainers. This approach was not successful.[38] However, in June 2000, the American Psychological Association reacted with alarm when it realized for the first time that its comment had been used to justify elimination of 26.6% of the federal prison population – those with immigration detainers – from the sentence reduction incentive. The American Psychological Association provided a new comment to the BOP objecting to the misuse of the prior comment and providing strong reasons why such eligibility should continue.[39] Nonetheless, the BOP refused to modify its position.[40] In fact, the BOP has recently determined that prisoners with detainers are ineligible for both the RDAP program and the sentence reduction.[41]

By excluding all prisoners with immigration detainers from an immensely beneficial and cost-saving program based on the misinterpretation of the position of the American Psychological Association deprives the United States and the returning prisoners' home countries the benefits of lowered recidivism and drug-free lifestyles. The cost-savings of allowing over a quarter of the prison

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[35] 28 C.F.R. § 550.59(a) (1995).

[36] Drug Abuse Treatment Programs: Early Release Considerations, 61 Fed. Reg. 25, 121 (May 17, 1996).

[37] *Id*.

[38] *McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999).

[39] Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80745, 80746-47 (Dec. 22, 2000).

[40] *Id*. at 80745.

[41] 28 C.F.R. § 550.53 (2.5.1)((b)(3) (Mar. 16, 2009).

population a year sentence reduction is obvious. The RDAP program should be open to all prisoners who need substance abuse treatment.[42]

3. Gun Possessors

Although the BOP concedes that prisoners whose offenses involve gun possession are statutorily eligible nonviolent offenders, the BOP disqualifies them as a matter of discretion. Originally, the BOP's rule disqualifying gun possessors from the early release incentive appears to have arisen from an initial misinterpretation of the statute. Under its 1995 rules, the BOP adopted a regulation defining nonviolent offense by reference to "crimes of violence" in 18 U.S.C. § 924(c).[43] The BOP then, in program statements, misadvised its personnel that such offenses included simple possession of a firearm by a felon and drug trafficking offenses with a two-level gun specific offense characteristic under U.S.S.G. § 2D1.1(b).[44] After prisoners who believed themselves to be nonviolent offenders filed habeas petitions, the courts generally held that the statute did not categorically disqualify the class of prisoners who merely possessed a firearm. In response, with no empirical evidence in support, and with no APA compliant notice, the BOP issued an interim rule in October 1997 and a final rule in December 2000 that purported to disqualify the same individuals as an exercise of the BOP's categorical discretion.[45] The BOP has reissued rules disqualifying gun possessors from early release consideration, again failing to provide any empirical support for the categorical exclusion.

4. Prior Convictions

Another group of statutorily eligible prisoners are those with prior convictions for listed violent offenses. A prisoner who is serving his sentence for an undoubtedly nonviolent offense is not eligible for the incentive program based on certain prior convictions, regardless of how old the priors are. The subclass of prisoners who should be most clearly eligible includes those whose prior convictions are so stale they do not count as criminal history.

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[42] For a more detailed discussion, *see* Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally,* Federal Sentencing Reporter, Vol. 21, No. 3 at 174 (Feb. 2009).

[43] Drug Abuse Treatment Programs: Early Release Consideration, 60 Fed. Reg. 27692-01 (May 25, 1995).

[44] Bureau of Prisons Program Statement 5161.02 (July 24, 1995).

[45] Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 62 Fed. Reg. 53690 (Oct. 15, 1997); Bureau of Prisons Program Statement 5330.10 (Oct. 7, 1997); Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80745 (Dec. 22, 2000).

In the SRA, Congress specifically delegated to the Sentencing Commission the task of deciding what prior convictions categorically have sufficient relevance to affect the length of time actually served; that is, prior convictions that provide the criminal history points that are considered in reaching a Criminal History Category between I and VI.[46] The Sentencing Commission expressly relied on Parole Commission empirical data in determining that certain sentences over ten or fifteen years old should not count for criminal history points.[47] Given the delegation to the Sentencing Commission of the task of deciding whether the conviction should count toward the length of the current sentence, the BOP's use of stale convictions to eliminate eligibility for the sentencing reduction disregards the empirical conclusion of the body properly delegated to make such decisions. The disqualification of prisoners based on stale convictions would be easily remedied by rule.

The entire question of using prior convictions to disqualify prisoners convicted of a nonviolent offense should also be reexamined. If the sentence has already been enhanced based on a prior conviction, and a sentencing judge already considered the record in imposing sentence, the reduction of up to twelve months still results in a longer sentence for persons based on prior convictions. And these offenders are people who should be given every incentive to participate in a program that can create major changes in their lives and to remove themselves from criminal subcultures, particularly in light of the success of RDAP in lowering recidivism rates.[48] Rather than categorically excluding prisoners, the BOP should exercise discretion individually in determining whether there is some reason a person convicted of a nonviolent offense should not receive the statutory incentive.

Federal Boot Camp Program

In 1990, Congress passed a statute authorizing the creation of a boot camp program with incentives available for successful completion.[49] The BOP, following the statutory direction that the program be available to nonviolent offenders with minor criminal histories, put into place two boot camps for men and one for women.[50] In 1996, through formal rulemaking procedures, the BOP

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[46] 28 U.S.C. § 994(d)(10) (2000) (criminal history one of the factors considered "only to the extent they do have relevance."); *Mistretta v. United States*, 488 U.S., 361, 375-76 (1989).

[47] U.S.S.G. § 4A1.1 (2007); *see* U.S. SENTENCING COMMISSION, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE, at 3 (Jan. 4, 2005).

[48] 2009 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs at 7-8 (Jan. 2009) (male participants are 16 percent less likely to recidivate and 15 percent less likely to relapse than similarly-situated inmates).

[49] 18 U.S.C. § 4046 (2000).

[50] Bureau of Prisons Operations Memorandum 174-90 (Nov. 20, 1990).

institutionalized incentives that included, for nonviolent prisoners sentenced to no more than 30 months incarceration, a sentence reduction of up to six months and an extension of community corrections by over a year.[51] For prisoners with sentences between 30 and 60 months, boot camp eligibility provided extended community corrections, but not the sentence reduction.[52]

The federal boot camp program was well received by almost all participants in the federal system. The Sentencing Commission promulgated a guideline addressing it under the Sentencing Options chapter.[53] In addition to providing programming that, anecdotally, assisted many defendants in developing the discipline and skills needed to maintain employment and a crime-free life, minor offenders who did not need 30 months of incarceration had available a sentencing option that would reduce the actual separation from family, employment, and community by six months, coupled with heightened supervision under the community corrections program. In 1996, a study of the Lewisburg federal boot camp for women concluded that the program was effective both in providing skills and lowering recidivism.[54]

In January 2005, the BOP unilaterally terminated the federal boot camp program.[55] The Director of the BOP sent a memorandum to federal judges, prosecutors, probation officers, and federal defenders stating that, due to budget constraints and supposed studies showing the program was not effective, the program was being eliminated, effective immediately.[56] In subsequent litigation, these representations turned out to be questionable: the BOP's assistant director over research and evaluation testified that no new studies had been conducted regarding the efficacy of the federal boot camp program; the state studies did not address federal boot camps, with their limitations on eligibility and the required followup in community corrections; and the change went into effect with little internal discussion.

The recipients of the Director's memorandum are the same actors who are supposed to provide comment on proposed potential changes in the federal sentencing guidelines under 28 U.S.C. § 994(o) and (p). The boot camp termination went into effect without even the notice and chance

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[51] 28 C.F.R. § 524.30 (1996).

[52] 28 C.F.R. § 524.30 (1996).

[53] U.S.S.G. § 5F1.7.

[54] 1996 Lewisburg ICC Evaluation, Federal Bureau of Prisons (1996).

[55] Message from Harley G. Lappin, Director, Federal Bureau of Prisons, to all staff (Jan. 5, 2005).

[56] Memorandum from Harley G. Lappin, Director, Federal Bureau of Prisons, to Federal Judges, United States Probation Officers, Federal Public Defenders and United States Attorneys (Jan. 14, 2005).

to provide comment appropriate under the Administrative Procedure Act. The resulting decision was bad policy – depriving courts of a needed alternative sentencing mechanism for nonviolent first time offenders facing needlessly long incarceration. The BOP should reallocate sufficient resources to reopen the federal boot camp program as contemplated by Congress in 18 U.S.C. § 4046, and as utilized by federal judges for over a decade.

The savings from reinstatement of federal boot camps could be extrapolated from the sentence reductions and increased community corrections while the program existed. The period of community corrections is especially significant because the expense of home detention – which is the preferred form of community corrections – amounts to only $3,743.23 per year rather than $25,894.00 for persons in prison.[57]

Sentence Computation Statutes

The BOP implementation of sentence computation statutes creates three areas of categorical problems that result in over-incarceration: creating de facto consecutive sentences, denying good time credit adjusted concurrent sentences, and not crediting prisoners with time spent in immigration detention prior to the federal prosecution.

One of the most common potentials for over-incarceration derives from the statute on concurrent and consecutive sentences. The federal court only has jurisdiction to impose a sentence consecutively to a sentence that is already in existence.[58] However, under BOP rules, given the vagaries of primary jurisdiction, the BOP can impose de facto consecutive sentences even where the later state sentence explicitly states in the judgment that the sentence is concurrent.[59] The BOP rules are simply inconsistent with the underlying statute, which provides the Executive Branch with no authority to violate the rules of comity by undercutting a state sentence through the manner in which a federal sentence is executed. The BOP should execute the statute to fully credit a later state sentence that is imposed to run concurrently with a previously imposed federal sentence.

Under the plain reading of § 3584(a), the federal court can only impose a consecutive sentence if the defendant "is already subject to an undischarged term of imprisonment," thereby assuring the sentences envisioned by both the state and federal courts. The BOP relies primarily on the last sentence of § 3584(a), which provides that multiple terms of imprisonment run "consecutively unless the court orders that the terms are to be run concurrently." However, the BOP ignores the fact that, for the statute to apply, the sentences must either be imposed at the same time, which could only apply to multiple federal cases, or "if a term of imprisonment is imposed on a

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[57] Memorandum from Matthew Rowland, Deputy Assistant Director, *supra,* note 24.

[58] 18 U.S.C. § 3584 (2000).

[59] Bureau of Prisons Program Statement 5880.28 at 1-32A (Feb. 14, 1997).

defendant *who is already subject to an undischarged term of imprisonment*."[60] Contrary to the plain meaning of the statute and the rules of construction, the BOP construes silence in a federal judgment as an order to have the federal sentence run consecutively to a subsequently imposed state sentence, even though the state judge ordered it to run concurrently to the previously imposed federal sentence.[61]

The BOP's rules are at odds with U.S.S.G. § 5G1.3. Section 5G1.3 is designed to provide guidance for a court considering sentencing options under § 3584(a). In the three subsections of § 5G1.3 and the accompanying commentary, there is no provision for concurrent or consecutive sentencing to an non-existent state sentence. If Congress had intended for § 3584(a) to apply to future sentences, there would be a corresponding guideline. The BOP should not create de facto consecutive sentences that contradict congressional statutes and the Guidelines entrusted to the Commission.

A problem with the implementation of the federal good time credit statute arises when a judge adjusts a sentence pursuant to U.S.S.G. § 5G1.3(b) to achieve a fully or partially concurrent sentence with state time served prior to the imposition of the federal sentence. For example, in order to achieve the fully concurrent sentence called for under the statute and Guidelines, a person charged in both state and federal court with the same gun would need the sentence reduced in federal court for a previously imposed state sentence for the same offense. The courts have held this provision applies even against a mandatory minimum sentence.[62]

When the federal good time credit statute is considered in conjunction with the provision for a fully concurrent sentence, the period of time served concurrently should, assuming good behavior by the prisoner, result in the good time credits against that period of incarceration. In violation of the plain meaning of the statutes, the BOP frequently ignores the period of time that was reduced, as indicated in the judgment in accordance with the commentary to § 5G1.3(b), and makes no assessment regarding good time credits. The relevant statutes require that such credit be given.[63]

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[60] 18 U.S.C. § 3584(a) (2000) (emphasis added).

[61] Bureau of Prisons Program Statement 5880.28 at 1-32A ("If the federal sentence is silent, or ordered to run consecutively to the non-existent term of imprisonment, then the federal sentence shall not be placed into operation until the U.S. Marshals' Service or the Bureau of Prisons gains exclusive custody of the prisoner").

[62] *United States v. Drake*, 49 F.3d 1438, 1440-41 (9th Cir. 1995).

[63] *Kelly v. Daniels*, 469 F.Supp.2d 903, 904 (D. Or. 2007); *see generally* Stephen R. Sady, *Full Good Time Credit For Concurrent Sentences*, The Champion, at 56 (May 2007).

The statute regarding credit for time served provides broad authority for counting time in custody in connection with an offense.[64] However, in immigration cases, with no statutory authorization, the BOP implements the jail credit statute to treat as dead time the time in the administrative custody of the Immigration and Customs Enforcement.[65] In the past ten years, the number of immigration offenses prosecuted in federal court has increased by almost three times.[66] In many of these cases, prisoners are held in immigration custody while the federal criminal prosecution is arranged. Under civil immigration law, the decision whether to proceed against the alien should be made within 48 hours.[67] Federal prisoners are frequently held longer than two days in immigration custody before their first appearance on an illegal reentry charge. Since the time in administrative custody follows the immigration service's knowledge of their presence, and during the time the federal prosecution is being arranged, the time easily falls within the scope of time in custody in relation to the offense.

Nonetheless, with no articulable reason in the administrative record, the BOP has adopted a rule that categorically denies credit for time spent in administrative custody of the immigration service. There is no conceivable justification for not counting all the time in administrative custody of the prosecuting agency against the ultimate criminal sentence imposed: the failure to credit the time not only violates the plain meaning of the statute, but undercuts the underlying policy of imposing no more incarceration than is necessary to accomplish the purposes of sentencing. The rule also introduces unwarranted sentencing disparities in the time similarly situated aliens spend in actual custody, depending on the vagaries of custodial decisions that are irrelevant to the purposes of sentencing.

Conclusion

Basic separation of powers doctrine limits the appropriate role of the BOP in determining the actual length of custody. Where Congress provides ameliorative measures that lessen the period of

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[64] 18 U.S.C. § 3585(b) ("A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . .").

[65] Bureau of Prisons Program Statement 5880.28 at 1-15A (Feb. 14, 1997) ("Official detention does not include time spent in the custody of the Immigration and Naturalization Service").

[66] *Compare* U.S. Sentencing Commission, 1997 Data Profile, Table 1, available at www.ussc.gov/JUDPAK/1997/NIN97.pdf (6,671 immigration sentences *with* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics 2008, Table 46, available at www.ussc.gov/ANNRPT/2008/Table46.pdf (19,333 immigration sentences).

[67] 8 C.F.R. § 287.3(d) (requiring ICE to make decision regarding deportation or prosecution within 48 hours of arrest).

prison and other custody, such programs should be executed in a manner that assures that terms of imprisonment are subject to the full lenity authorized by Congress. By misreading or grudgingly implementing ameliorative statutes, the BOP can seriously exacerbate actual time served. This practice, because it is not connected to the Sentencing Reform Act's purposes of sentencing, has become the engine for massive, unnecessary over-incarceration. The BOP, by failing to fully execute ameliorative laws, unilaterally and unfairly lengthens prisoners' sentences.

At the outset of the Guidelines era, the Supreme Court in *Mistretta v. United States* held that the Guideline's system had sufficient judicial participation and congressional oversight to survive a separation of powers challenge.[68] The BOP's chronic failure to fully implement Congress's ameliorative measures challenges that assumption. By increasing actual time in custody through executive fiat, the BOP added to the soaring incarceration numbers and expense of unnecessarily inflated prison populations. As Justice Kennedy pointed out: "Our resources are misspent, our punishments too severe, our sentences too long."[69] Redirection of the BOP's policy toward full implementation of ameliorative statutes would bring both justice and rationality to a system that incarcerates for longer than necessary to accomplish the purposes of sentencing.

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[68] 488 U.S. 361, 374 (1989).

[69] Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003).