

No. 09-5201

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**In the Supreme Court of the United States**

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MICHAEL GARY BARBER, *et al.*,  
*Petitioners,*

v.

J. E. THOMAS, Warden, FCI Sheridan,  
*Respondent.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF OF PETITIONERS**

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## QUESTIONS PRESENTED

The federal good time credit statute provides for credit “of up to 54 days at the end of each year of the prisoner’s term of imprisonment.” Throughout federal sentencing statutes, and elsewhere in the same sentence, “term of imprisonment” means the sentence imposed. The Bureau of Prisons (BOP) interprets “term of imprisonment” as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credit. The first question presented is:

Does “term of imprisonment” in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits based on the sentence imposed?

Most lower courts rejected the BOP’s claim that the statute was unambiguous, but deferred to the BOP interpretation under *Chevron*, finding the phrase “term of imprisonment” to be ambiguous. In the present litigation, the BOP conceded that the regulation implementing the good time credit statute was promulgated in violation of the Administrative Procedure Act. Nevertheless, the Ninth Circuit affirmed the BOP rule, applying *Skidmore* deference. The second question presented is:

If “term of imprisonment” in the federal good time credit statute is ambiguous, do the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

## **PARTIES TO THE PROCEEDING**

The petitioners, Michael Barber and Tahir Jihad-Black, are federal prisoners serving their sentences in the custody of the Attorney General and are subject to the provisions of 18 U.S.C. § 3624(b) for obtaining good time credits against the sentences imposed on them.

The respondent, J.E. Thomas, who is named in his official capacity, is the warden of the Federal Correctional Institution at Sheridan, Oregon, where the petitioners were serving their sentences at the time their petitions were filed. Mr. Jihad-Black has since been transferred to the Federal Medical Center at Devens, Massachusetts. The warden of FMC Devens is Carolyn Ann Sabol.

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## OPINIONS BELOW

The petitioners' cases come before this Court based largely on the incorporated record in *Tablada v. Daniels*, No. 08-11034, which remains pending before this Court on a petition for certiorari. In *Tablada*, the District Court denied habeas corpus relief in an unpublished opinion on May 11, 2007. JA-4, No. 44. The Ninth Circuit affirmed the denial of habeas corpus relief in a published opinion on July 3, 2008. JA-8, No. 28. While *Tablada* was pending, the petitioners filed their petitions, incorporating the *Tablada* pleadings. The District Court denied habeas corpus relief to Mr. Barber and Mr. Jihad-Black based on the Ninth Circuit's decision in *Tablada* on October 27, 2008. JA-1, No. 6; JA-2, No. 5. By agreement of the parties, the District Court incorporated by reference the record in *Tablada* and ordered that the Opinion and Order filed in *Tablada* be entered in the petitioners' cases. JA-13; 25. From that decision, the petitioners filed timely appeals.

On December 29, 2008, the Ninth Circuit granted the petitioners' motion to stay the appeals pending disposition of the petition for panel rehearing and rehearing en banc in *Tablada*. The Ninth Circuit denied rehearing in *Tablada* on March 20, 2009. JA-56. On April 10, 2009, the Ninth Circuit granted the parties' motion for summary affirmance based on *Tablada* and consolidated the petitioners' cases with *Tablada* for the purposes of filing a petition for writ of certiorari. JA-11. The petition for writ of certiorari in *Tablada* was submitted to this Court on June 16, 2009.

The petition in these cases was filed on July 8, 2009, and granted on November 30, 2009.

## **JURISDICTION**

This Court's jurisdiction rests on 28 U.S.C. §§ 1254(1), 2241, and 2253 (2006).

## **RELEVANT PROVISIONS OF LAW**

The federal good time credit statute states:

### **(b) Credit toward service of sentence for satisfactory behavior. –**

(1) Subject to paragraph (2), *a prisoner* who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, *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*, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward the service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be

appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

18 U.S.C. § 3624(b) (2006) (emphasis added).<sup>1</sup> The BOP regulation implementing this statute states in part that “the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.” 28 C.F.R. § 523.20 (2009). JA-60. The BOP’s Sentence Computation Manual,

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<sup>1</sup> Congress amended § 3624(b) in 1994 to provide that only non-violent offenders could earn good time credit. Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. No. 103-322, Title II, § 20405, 108 Stat. 1796. In 1996, Congress deleted those provisions and amended § 3624(b) to adjust the vesting provisions in the administration of good time credits. Prison Litigation Reform Act of 1996 (PLRA), Pub. L. No. 104-134, Title VIII, § 809(c), 110 Stat. 1321-76. The pre-1994 version of § 3624(b) is set out at JA-58.

Program Statement 5880.28, sets out the agency's method for calculating good time credits based on time served. JA-90.<sup>2</sup>

## STATEMENT OF THE CASE

This Court's review of the pure question of statutory construction, as well as the alternative question regarding administrative interpretation of § 3624(b), proceeds in the context of the history of the federal good time credit statute, the administrative record of the BOP's implementation of the statute, and previous litigation regarding the statute's interpretation.

### **The Sentencing Reform Act And The Good Time Credit Statute**

Congress enacted the Sentencing Reform Act (SRA) as Title II of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat. 2044-2052. The SRA made federal sentencing simpler and more determinate in three ways relevant to this case. First, the SRA eliminated suspended and split sentences, providing judges with two options: imposition of a term of probation or imposition of a term of imprisonment. *Compare* 18 U.S.C. § 3651 (repealed 1984) *with* 18 U.S.C. §§ 3561 (2006) and 3581 (2006).<sup>3</sup> Second, the

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<sup>2</sup> The full Manual is available at [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf).

<sup>3</sup> The SRA modified and continued the fine, restitution, and forfeiture components of sentencing and added a mandatory fee assessment.

SRA abolished parole, authorizing a term of supervised release to follow the term of imprisonment. *Compare* 18 U.S.C. § 4205 (repealed 1984) *with* 18 U.S.C. § 3583 (2006). Third, in § 212(a), Congress replaced the good time credit statute that provided graduated available credits per month, deducted “from the term of his sentence,” with a single rate based on “up to 54 days at the end of each year of the prisoner’s term of imprisonment.” *Compare* 18 U.S.C. § 4161 (repealed 1984) *with* 18 U.S.C. § 3624(b).

The fundamental innovation of the SRA was the authorization of sentencing guidelines that would provide a sentencing range for every offense punishable by more than six months incarceration. 28 U.S.C. § 994(a)(1), (b)(2), (c) & (m) (2006).<sup>4</sup> The SRA directed the Sentencing Commission to create sentencing ranges, leaving to the Commission whether the guidelines would be “in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices.” S. Rep. No. 98-225, at 168 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3351. Pursuant to congressional delegation, the Commission created a Sentencing Table that provides a sentencing range at the intersection of a horizontal axis for the criminal history and a vertical axis for the seriousness of the offense. U.S.S.G. ch. 5, pt. A, Sentencing Table (2009); *see* 28 U.S.C. § 994 (c) & (d) (2006). Congress instructed the Commission to calibrate the guidelines by amassing statistics

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<sup>4</sup> The United States Sentencing Commission exempted from the Guidelines Class B or C misdemeanors and infractions. U.S.S.G. § 1B1.9 (2009).

regarding the actual time spent in custody for various offenders and offenses. 28 U.S.C. § 994(m).<sup>5</sup>

In formulating the Sentencing Table, the Commission adjusted the raw time in custody in view of the potential to receive good time credits. Recognizing that 54 is almost exactly 15 percent of 365, the Commission adjusted for good time credit “that would be earned under the guidelines” by adding 15 percent to the baseline:

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).

United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987) (emphasis added). JA-146. The Sentencing Table was calibrated assuming that the actual time served would be 85 percent of the sentence imposed. The Sentencing Table and the rest of the first Guidelines manual received tacit approval from

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<sup>5</sup> Section 994(m) required “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 sentences to terms of imprisonment, the length of such terms actually served.”

Congress pursuant to 28 U.S.C. § 994(a) and (x) (2006) and became effective on November 1, 1987.<sup>6</sup>

During the early years of the Guidelines, the Circuits split on the SRA's constitutionality. In *Mistretta v. United States*, this Court explicitly referred to § 994(m) in approving congressional delegation to the Sentencing Commission of authority to formulate sentencing guidelines. 488 U.S. 361, 375 (1989). In the 1990 version of the introduction to the Guidelines manual, the Commission incorporated its interpretation of the good time credit statute in an explanation of the SRA's goal of truth in sentencing: "Honesty 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.*" U.S.S.G. ch. 1, pt. A, § 1, ¶3 (Nov. 1990), *reprinted in* U.S.S.G. § 1A1.1 comment. (2009) (emphasis added).<sup>7</sup>

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<sup>6</sup> Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920-02 (Feb. 6, 1987). Congress delayed § 3624(b)'s effective date until after promulgation of the Guidelines. Pub. L. 98-473, 98 Stat. 1837, 2031 (1984).

<sup>7</sup> Subsequently, the Parole Commission also proceeded on the assumption that 15 percent of the sentence imposed was available in good time credit. *See* Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Transferred to the United States Under Prisoner-Exchange Treaties, 58 Fed. Reg. 30703, 30703 (May 27, 1993) (final rule "requiring each release date to contain a 15 percent downward adjustment to reflect the potential good time that would reduce the sentence of similarly-situated U.S. Code offenders.").

## **Bureau Of Prisons Implementation Of The Good Time Credit Statute**

In this litigation, the parties for the first time focused on the administrative record of the BOP's implementation of § 3624(b), which revealed that the BOP both failed to consider the Commission's 85 percent rule and did not recognize that a choice existed on how to calculate good time credits. Review of the administrative record disclosed no rationale or exercise of discretion, only an unsupported claim that the statute required that credit only be provided against time served, not the sentence imposed.

### **• The Public Administrative Record**

The BOP's first reference to its "time served" rule occurred on November 7, 1988, when Clair Cripe, General Counsel of the BOP, issued an internal memorandum to "advise staff of the procedures for annual awards of good conduct time credit under Title 18 U.S. Code, Section 3624(b)." JA-120-21. Without explanation, the 1988 memorandum pronounced that "good time is earned on sentences of 1 year and 1 day or more at a rate of 54 days for each year of time served." JA-121. However, apart from this statement, the memorandum did not describe the BOP's method of good time calculation or how the BOP arrived at that method.

In February 1992, the BOP first issued Program Statement 5880.28, which set out the complicated process for calculating good time credit under 18 U.S.C. § 3624(b) currently employed. JA-90. Program

Statement 5880.28 based its computation formula upon time served, instead of upon the term of imprisonment ordered at sentencing. The BOP provided no opportunity for the public to comment on this Program Statement before it became effective.

On September 26, 1997, the BOP issued an interim regulation “for the awarding of good conduct time.” Good Conduct Time, 62 Fed. Reg. 50786 (Sept. 26, 1997). JA-62. The supplementary information that accompanied the interim rule stated: “The Bureau of Prisons is adopting interim regulations for the awarding of good conduct time for certain inmates. The awarding and vesting of good conduct time at a rate of 54 days per year . . . had been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984.” JA-63. The Federal Register notice did not advise that the BOP had adopted a “time served” methodology. Nor did it disclose whether the BOP had considered § 3624(b)’s use of “term of imprisonment” in the context of the SRA, or the Sentencing Commission’s use of the 85 percent rule in calibrating the Sentencing Table.

The interim rule was to become effective November 3, 1997, and comments were to be submitted by November 25, 1997. JA-63. The BOP received no comments before the submission date, and the interim rule became effective. In 2003, the rule was amended to incorporate changes made by the VCCLEA and the PLRA. Good Conduct Time, 68 Fed. Reg. 37776 (June 25, 2003). JA-70. Two years later, the BOP submitted changes related to aliens and literacy and finalized the rule. Good Conduct Time, 70 Fed. Reg. 66752 (Nov. 3,

2005). JA-80. The current rule is codified at 28 C.F.R. § 523.20, which provides that the BOP will award inmates 54 days of credit toward service of a sentence as good conduct time credit “for each year served.” JA-60.

- **The Implementation Of The Statute**

The BOP’s formula for implementing the good time credit statute explicitly rejects crediting good time against the sentence imposed. When the BOP implemented its regulation, the agency replaced “at the end of each year of the prisoner’s term of imprisonment,” the phrase used in § 3624(b), with “for each year served.” The Program Statement elaborates on this change by establishing a formula for awarding 54 days of good conduct time “for each full year served on a sentence in excess of one year.” JA-91.

The BOP explicitly instructs its personnel to ignore the sentence imposed by the trial judge: “It is essential to learn that [good time credit] *is not* awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served.” JA-99 (emphasis in original). The BOP’s method – which takes 28 pages to explain – involves a process that the BOP terms “arithmetically complicated.” JA-94. According to the BOP’s Program Statement, the following summarizes the formula for computing good time credits on a sentence of a year and a day:

$$366 \times .148 = \underline{54.168} \quad (366 + 54 = 420)$$

$$366 - 54 = 312 \times .148 = \underline{46.176} \quad (312 + 46 = 358)$$

$$366 - 46 = 320 \times .148 = \underline{47.36} \quad (320 + 47 = 367)$$

$$366 - 47 = 319 \times .148 = \underline{47.212} \quad (319 + 47 = 366)$$

Thus – 319 days actually served plus 47 days of good time credit equals 366 days, or a sentence of 1 year and 1 day.

JA-98. As applied to a 10-year sentence, the BOP will afford even an ideal federal prisoner no more than 470 days of good time credits, which is 70 days less than the prisoner would earn using the Commission’s interpretation of the statute (54 days per year on a ten year sentence imposed equals 540 days of good time credit).

The effect of this calculation on individuals is significant. Mr. Barber was sentenced to a term of 320 months imprisonment for drug trafficking and weapons possession. The BOP calculated his scheduled release as March 29, 2016. The BOP’s maximum award of good time credit based on time served is 1,254 days. If Mr. Barber’s good time credit is based on the sentence imposed, the maximum available good time credit would be 1,440 days. The difference in methods results in up to 186 additional days in custody.

Mr. Jihad-Black was sentenced to a 262-month sentence for being a felon in possession of a firearm. The BOP calculated his scheduled release date as May 21, 2016, based on a maximum award of 1,027 days of good time credit under its formulation. If his good time credit is based on the sentence imposed, the maximum available good time credit would be 1,179 days. The

difference to Mr. Jihad-Black is up to 152 days additional time in custody.

• **The Discovery In This Case On The Administrative Record**

Discovery provided by the BOP is significant for what is lacking. The BOP failed to provide documents explaining what consideration went into the BOP's development of the "time served" methodology. Specifically, the BOP did not produce anything from the administrative record to evidence that the BOP considered the broader sentencing context of which § 3624(b) is a part. In the litigation below, the BOP claimed it relied on several lengthy Operations Memoranda unrelated to the maximum available good time credits. JA-3, No. 32. These memoranda appear to have been issued seriatim to guide calculation, verification, and entry of good time credit for sentences imposed during the interregnum between the SRA's effective date and this Court's decision in *Mistretta*. These memoranda shed no light on, and provide no notice of, the method by which the BOP intended to calculate a prisoner's good conduct time.<sup>8</sup>

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<sup>8</sup> Following briefing, the BOP submitted an affidavit by a BOP lawyer stating he advised a Sentencing Commission lawyer regarding the BOP's time served methodology; he also stated that meetings were held by BOP officials in December 1984 and January 1985 where the calculation of good time was discussed in light of the SRA. JA-152. The petitioner objected that the affidavit was tardy, vague, and outside the administrative record. JA-156, 161. The district court concluded that the affidavit did not add any new information to the administrative record. JA-164-66. The BOP did not contest this conclusion. JA-165.

Nothing in the administrative record reflects that the BOP had a rationale for changing – or was even aware it was changing – the preexisting method of crediting good time against the sentence imposed. The administrative record establishes: 1) the BOP exercised no discretion, apparently thinking the statute only allowed 12.8 percent good time credit; 2) no rationale was offered to justify allowance of fewer good time credits if one assumed the statute was ambiguous; and 3) no notice was provided that a choice was being made to resolve any ambiguity.

### **Good Time Credit Litigation**

In previous litigation involving federal good time credit, the prisoners simply argued the unambiguous meaning of “term of imprisonment,” raising neither the Commission’s interpretation of the statute in its establishment of the Sentencing Table nor the violation of the Administrative Procedure Act (APA) in the promulgation of the BOP’s rules. In the first case at the Circuit level, the petitioner, who had received a year and a day sentence, argued the statute unambiguously provided 54 days annual credit calculated on the sentence imposed; the BOP argued the statute unambiguously allowed only 47 days. *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1267-68 (9th Cir. 2001). The Ninth Circuit found that “term of imprisonment” was ambiguous based on the last sentence of the statute providing that good time credit may be earned on partial years. *Id.* Then, rather than apply the rule of lenity to the penal statute, the court of appeals deferred to the BOP’s good time credit

regulation, declining to undertake a “fresh interpretation of the statute.” *Id.* at 1271-72.

After *Pacheco-Camacho*, the issue was litigated nationally. Three district courts ruled that § 3624(b) unambiguously required that the BOP provide up to 54 days of good time credit against the time imposed by the sentencing judge. *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. Dec. 22, 2005); *White v. Scibana*, 314 F. Supp. 2d 834, 841 (W.D. Wis. 2004), *rev'd*, 390 F.3d 997 (7th Cir. 2004). The most detailed analysis was provided in *Moreland*. All three opinions provided statutory analyses explaining why *Pacheco-Camacho* was flawed, even without considering the Commission’s interpretation or the APA. *See Williams*, 351 F. Supp. 2d at 415 (characterizing court of appeals opinions as finding “§ 3624(b) to be ambiguous, after giving a cursory nod to the rules of statutory construction and deferring to the agency’s interpretation”).

Most courts of appeals rejected the BOP position that § 3624(b) unambiguously requires only 47 days against the term of imprisonment imposed. Two courts agreed that “term of imprisonment” unambiguously means “time served;”<sup>9</sup> three courts found that “term of imprisonment” is ambiguous but declared that the statute is not penal so the rule of lenity does not

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<sup>9</sup> *Moreland*, 431 F.3d at 181-82; *Williams v. Lamanna*, 20 Fed. Appx. 360, 361 (6th Cir. 2001).

apply;<sup>10</sup> and all the courts that found ambiguity depended to some degree on *Pacheco-Camacho* to find that deference to the BOP's regulation trumped the rule of lenity.<sup>11</sup> The opinions in the various courts of appeals did not address the administrative record's lack of rationale for the BOP's harsher interpretation, nor did they consider the argument that the Commission had interpreted and applied § 3624(b) in calibrating the Sentencing Table.

The Ninth Circuit rejected the contention that this Court's intervening rulings in *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004), and *Clark v. Martinez*, 543 U.S. 371, 380 (2005), undermined *Pacheco-Camacho*'s holding that *Chevron* deference trumped lenity, describing both cases as referencing “the rule of lenity in dicta concerning unrelated points.” *Mujahid v. Daniels*, 413 F.3d 991, 999 (9th Cir. 2005). The purely statutory litigation ended with a call from Justice Stevens for further examination of federal good time credit issues. *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106 (2006) (Stevens, J., statement respecting denial of certiorari).

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<sup>10</sup> *Wright v. Fed. Bureau of Prisons*, 451 F.3d 1231, 1236 (10th Cir. 2006); *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005), *on petition for rehearing*, 439 F.3d 61 (2d Cir. 2006); *Perez-Olivo v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005).

<sup>11</sup> *Bernitt v. Martinez*, 432 F.3d 868, 869 (8th Cir. 2005) (per curiam); *Brown v. McFadden*, 416 F.3d 1271, 1272-73 (11th Cir. 2005) (per curiam); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 531-33 (4th Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 174 (3d Cir. 2005) (per curiam); *White*, 390 F.3d at 1002-03; *Brown v. Hemingway*, 53 Fed. Appx. 338, 339 (6th Cir. 2002).

Mr. Tablada's habeas corpus petition alleged for the first time facts that undermined the earlier courts of appeals decisions. JA-3, No. 21, 24. He challenged the regulation and program statements under the APA, providing evidence that the Commission had previously implemented the good time credit statute using the 85 percent rule; that the BOP had not exercised discretion; and that the administrative record lacks any rationale for the BOP's requirement that prisoners serve a minimum of 87.2 percent of the sentence imposed. Mr. Barber and Mr. Jihad-Black incorporated Mr. Tablada's litigation as the record in their cases. JA-13-25.

Prior to oral argument in the Ninth Circuit in *Tablada*, the BOP conceded that the good time credit regulation violated § 706 of the APA and asserted that any relief in this case should be limited to a procedural correction. JA-8, No. 20. Mr. Tablada responded, asserting that the concession required that relief be granted. JA-8, No. 22. Without considering the procedural validity of the program statement under the APA, the lower court upheld the BOP methodology based on *Skidmore* deference. JA-36; see *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court below asserted that the Commission's "silence" constituted approval of the BOP's requirement that prisoners serve a minimum of 87.2 percent of the sentence imposed. JA-54. The Ninth Circuit also held that the implied delegation to the BOP found by *Pacheco-Camacho* trumped the Commission's interpretation. *Id.*

## SUMMARY OF THE ARGUMENT

The petitioners are losing seven days of good time credit for every year of their sentence – up to 186 days for Mr. Barber and 152 days for Mr. Jihad-Black – because the BOP does not interpret “term of imprisonment” to mean the sentence imposed in 18 U.S.C. § 3624(b)(1)’s reference to “54 days at the end of each year of the prisoner’s term of imprisonment.” Under basic rules of statutory construction, “term of imprisonment” unambiguously means the sentence imposed, not time actually served. If there were ambiguity, the rule of lenity or, in the alternative, deference to the Sentencing Commission, would require that “term of imprisonment” be construed to mean the sentence imposed. Under no circumstances would deference to the BOP be appropriate because Congress did not delegate to the Executive agency the determination of the amount of available good time credits, the agency did not lawfully promulgate any rule construing the statute, and no rationale supports a construction of the statute that deprives prisoners of congressionally authorized good time credits.

“Term of imprisonment” means the sentence imposed, both as a term of art in federal sentencing and as the ordinary and natural meaning of the phrase. Virtually every federal prisoner hears the judge pronounce sentence with the words that the defendant is committed to the custody of the BOP for a “term of” a number of months “imprisonment.” Those words are derived from the sentencing statute, which authorizes judges to sentence defendants to a “term of imprisonment” in 18 U.S.C. § 3581(a) (2006), and the

Guidelines manual, which instructs judges on the “Imposition of a Term of Imprisonment” in U.S.S.G. § 5C1.1 (2009).

The plain meaning of “term of imprisonment” is reinforced by the rule of intra-statutory consistency. The phrase “term of imprisonment” appears three times in the first sentence of § 3624(b). The BOP agrees that the phrase means the sentence imposed in its first appearance, as it must also in the second appearance. Because the rule of intra-statutory consistency is at its strongest when dealing with the use of the same phrase in the same sentence, “term of imprisonment” must mean the same thing when used the third time to set the standard against which 54 days of good time credits are awarded. The BOP’s claim that “term of imprisonment” means time served, but only in one of its appearances in that sentence, contradicts the canon of construction that statutes generally do not use the same words to mean different things. In fact, Congress’s use of “time served” in between two uses of “term of imprisonment” demonstrates that Congress knew how to reference that concept. The phrase “term of imprisonment” is used dozens of times throughout the SRA and, as it does in § 3624(b), always means the sentence imposed.

This interpretation is further bolstered by the history of the good time credit statute. First, federal good time credits were previously calculated against the sentence imposed, and Congress indicated no intention to change that approach. Second, Congress intended to simplify the computation of good time credits, which is as easy as calculating 15 percent of

any number, but the agency's method takes many pages of complex mathematical formulas. Third, the words of the legislators explicitly demonstrate an intention that the 54 days be counted against the sentence imposed, requiring a minimum service of 85 percent of the sentence, or that no more than 15 percent in good time credits be awarded.

If any uncertainty remained, the rule of lenity would require that "term of imprisonment" be read to mean the sentence imposed. Section 3624(b) is a penal statute because it determines the actual amount of punishment by incarceration a defendant receives. The rule of lenity is one of the "traditional tools of statutory construction" that must be applied at *Chevron's* first step to determine whether the statute is so ambiguous that the agency can construe it. Even at *Chevron's* second step, the rule of lenity would trump agency deference to avoid separation of powers and other constitutional problems where an Executive agency would be determining the quantum of punishment.

Aside from the rule of lenity, the BOP interpretation violates *Chevron* requirements on delegation, proper promulgation of rules, and reasonableness. The BOP never received an express delegation from Congress to legislate in this area. On the other hand, this Court has held that the SRA included express delegations to the Sentencing Commission, authorizing creation of sentencing ranges implemented through the Sentencing Table, which required interpretation of the good time credit statute. In calibrating the Sentencing Table, the Commission increased the time for average

sentences by the good time credits that “would be earned under the guidelines,” using the 85 percent rule based on a definition of “term of imprisonment” that equated its meaning with the sentence imposed. In 1990, the Commission reiterated its interpretation by referring to the honesty in sentencing achieved by requiring full service of the sentence imposed, less 15 percent for good time credits.

Even if deference to the BOP were theoretically appropriate, no deference is owed to the BOP under standard administrative law. The BOP conceded that it promulgated the regulation in violation of § 706 of the APA, so *Chevron* deference does not apply. Further, discovery in these cases established that no discretion was exercised: the agency acted based on the mistaken assumption that the statute required good time credits to be calculated against time served, not the sentence imposed. The agency never believed there was a choice to be made and, therefore, never provided a rationale for choosing the harsher of two potential readings. Thus, there is no reason to provide even limited *Skidmore* deference to the agency’s decision. The rule is also unreasonable given the Commission’s interpretation and lack of rationale for a different reading. The invalidity of the BOP’s rules leaves the Sentencing Commission’s 85 percent rule or, in the alternative, the norm imposed by the previous statutes, as the applicable standard.

The construction urged by the petitioners is not only required by the rules of statutory interpretation, the 85 percent rule is good public policy. The transcending value of personal liberty is undermined by failure to

provide the full measure of credit that Congress authorized for good conduct in prison. Moreover, shorting prisoners seven days for every year of their sentences creates great social costs to inmates, their families, and the taxpayers who pay for incarceration. Interpreting the good time statute consistently with the Commission's 85 percent rule achieves the simplicity in administration and public understanding that Congress intended while respecting the fundamental interest in freedom from any excessive period of incarceration.

## ARGUMENT

### **I. "Term Of Imprisonment" Unambiguously Means The Sentence Imposed Based On The Statute's Language, The Rule Of Intra-Statutory Consistency, And The History Of The Statute.**

"[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "[T]he meaning of statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). In the context of the SRA, the phrase "term of imprisonment" is unambiguously synonymous with the sentence imposed. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

*Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

**A. “Term Of Imprisonment” Means The Sentence Imposed Because The Judge, Following Statutory And Guidelines Terminology, Sentenced Each Petitioner To “Imprisonment” For A “Term Of” Months.**

The phrase “term of imprisonment” is a term of art meaning the sentence of incarceration imposed by the judge. Congress used “term of imprisonment” to describe the judicial authority to impose sentence: “A defendant who has been found guilty of an offense may be sentenced to a *term of imprisonment*.” 18 U.S.C. § 3581(a) (2006) (emphasis added). Similarly, the Guidelines manual describes the judicial task as “Imposition of a Term of Imprisonment.” U.S.S.G. §5C1.1 (2009). In this context, although not explicitly set out in definitional sections, the repeated use of “term of imprisonment” in congressionally adopted descriptions of the judicial power to order incarceration implicates the rule that “[s]tatutory definitions control the meaning of statutory words . . . in the usual case.” *Burgess v. United States*, 128 S. Ct. 1572, 1577 (2008) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)).

The use of “term of imprisonment” for the sentence imposed is not only a term of art, the lay understanding of that phrase is the same based on public court proceedings. For example, Mr. Barber’s judge ordered that the defendant was committed to the

custody of the BOP for “a term of 320 months imprisonment.” Every time a judge orders incarceration on the Administrative Office’s judgment and commitment form, the sentencing judge pronounces sentence in similar words. The defendant and all those who attend such federal sentencings hear the judge impose imprisonment for a term of months, making the sentence imposed the ordinary and natural meaning of “term of imprisonment.” *Leocal*, 543 U.S. at 9 (“When interpreting a statute, we must give words their ‘ordinary or natural’ meaning.”) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

**B. “Term Of Imprisonment” Means The Sentence Imposed Under The Rule Of Intra-Statutory Consistency.**

The statutory text repeatedly refers to the “term of imprisonment”:

[A] prisoner who is serving a *term of imprisonment* of more than 1 year other than a *term of imprisonment* for the duration of the prisoner’s life, 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*, beginning at the end of the first year of the *term*. . . . [C]redit for the last year or portion of a year of the *term of imprisonment* shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b)(1) (emphasis added). Under the rule of intra-statutory consistency, the same word or

phrase should have the same meaning throughout the statute. *Sullivan v. Strop*, 496 U.S. 478, 484 (1990). “Term of imprisonment” is used to mean the sentence imposed each time in the text of § 3624(b) and throughout the SRA.

*1. Because “Term Of Imprisonment” Unambiguously Means The Sentence Imposed At Least Twice In § 3624(b), “Term Of Imprisonment” Unambiguously Means The Sentence Imposed In Its Other Uses In § 3624(b).*

In the first use in § 3624(b)’s opening sentence, the BOP itself interprets “term of imprisonment” to mean the sentence imposed: the BOP unequivocally allows for good time credit on a sentence – or term of imprisonment – of a year and a day. The BOP’s Program Statement provides, “[T]he very shortest sentence that can be awarded GCT is a sentence of 1 year and 1 day.” JA-95. To the same effect, the second use refers to a “term of imprisonment” for life, which again can only mean the sentence imposed. The third use in the same sentence should have the same meaning because the presumption favoring intra-statutory consistency is “at its most vigorous when a term is repeated within a given sentence . . . .” *Brown*, 513 U.S. at 118.<sup>12</sup>

The use of “time served” in the opening sentence of § 3624(b) also demonstrates that “term of

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<sup>12</sup> To the same extent, “term” in the first sentence and “term of imprisonment” in the last sentence of the subsection should mean the sentence imposed.

imprisonment” does not mean time served because Congress used “time served” when it meant time served. Between the second and third uses of “term of imprisonment” in the opening sentence, Congress employed the phrase “beyond the time served” to describe how the good time credit days would be awarded. Congress used “time served” to mean actual time in custody, and “term of imprisonment” to mean the sentence imposed. Under the BOP’s reading of the statute, however, the third reference to “term of imprisonment” means “time served” even though the phrase appears immediately following a reference to “time served” that means “time served.” Two different phrases should not have the same meaning in the same sentence. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) (when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended).<sup>13</sup>

*2. Throughout The Sentencing Reform Act, “Term Of Imprisonment” Is Synonymous With The Sentence Imposed.*

Beyond § 3624(b), “term of imprisonment” is used throughout the SRA to mean the sentence imposed. In Title 18, the phrase “term of imprisonment” is uniformly used to mean the sentence imposed in

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<sup>13</sup> *Accord Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”).

reference to maximum and minimum sentences, consecutive and concurrent sentences, modification of the original sentence, the classification of offenses, and in contrast to probationary sentences.<sup>14</sup> Congress sharply distinguished the “term of imprisonment” from earlier release from actual custody based on the good time credits:

A person who has been sentenced to a term of imprisonment pursuant to the provisions of [18 U.S.C. § 3581 *et seq.*] shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, *or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.*

18 U.S.C. § 3621(a) (2006) (emphasis added).<sup>15</sup> Section 3624(b)’s title references credit for “satisfactory behavior.”

Congress also used “term of imprisonment” in providing direct instruction on the factors to be

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<sup>14</sup> Excerpts from the approximately 100 uses of “term of imprisonment” in Title 18 are set out in Pet. Appx. 54-56. “Term of imprisonment” is also consistently used in post-1984 drug statutes to describe maximum and minimum penalties. *See, e.g.*, 21 U.S.C. §§ 841(b), 843(d), 844(a), 848(a), 856(b), 860(a), 960(b), and 962(a) (2006).

<sup>15</sup> Congress’s use of the past tense in “has been sentenced to a term of imprisonment” in § 3621(a) also establishes that “term of imprisonment” must mean the sentence imposed. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (“Congress’s use of verb tense is significant in construing statutes.”).

considered when the sentencing judge makes decisions regarding the imposition of sentence: “The court, in determining whether to impose a *term of imprisonment*, and, if a *term of imprisonment* is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) . . . .” 18 U.S.C. § 3582(a) (2006) (emphasis added).<sup>16</sup> Similarly, the statute on sentence computation refers to a starting date for the “term of imprisonment,” with a provision for credit “toward the service of the term of imprisonment for any time he has spent in official detention prior to the date the sentence commences.” 18 U.S.C. § 3585(b) (2006). The use of “term of imprisonment” to mean the sentence imposed is consistent throughout Title 18.<sup>17</sup>

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<sup>16</sup> In 18 U.S.C. § 3553(a) (2006), Congress also directed that the sentences imposed under the SRA “shall” be “sufficient, but not greater than necessary” to accomplish the purposes of sentencing. This provision militates against the BOP’s stinting interpretation of the good time credit statute because the parsimony principle is the “overarching instruction” in the sentencing process. *See Spears v. United States*, 129 S. Ct. 840, 843 (2009) (quoting *Kimbrough v. United States*, 552 U.S. 85, 111 (2007)).

<sup>17</sup> Of the many times “term of imprisonment” means the sentence imposed, one deviation has been suggested: “term of imprisonment” as meaning time served in 18 U.S.C. § 3624(d) (“Upon the release of a prisoner on the expiration of the prisoner’s term of imprisonment . . . .”). *Perez-Olivo*, 394 F.3d at 49. But close reading of that statute demonstrates that the phrase means the sentence imposed because the “term of imprisonment” expires upon completion of time actually served plus good time credit, allowing the prisoner to be released from custody.

The SRA’s authorizing statute for the Sentencing Commission also uses “term of imprisonment” as the sentence imposed. The statute delegates the creation of guidelines “for use of a sentencing court in determining the sentence to be imposed in a criminal case, including . . . a determination whether to impose a sentence to probation, a fine, or *a term of imprisonment.*” 28 U.S.C. § 994(a)(1)(A) (2006) (emphasis added). Consistent with this authorization, the Guidelines manual includes over 100 references to “term of imprisonment” as the maximum or minimum sentence, the concurrent or consecutive sentence, and the type of sentence imposed by the judge. The Commission has recently used “term of imprisonment” as a synonym for the sentence imposed in guidelines for “Reduction in Term of Imprisonment.”<sup>18</sup>

The intra-statutory use of “term of” confirms the unambiguous meaning of “term of imprisonment” as the sentence imposed. In § 994(a)(1)(A), Congress authorized Guidelines regarding imposition of probation, which is described as a “term of probation” in the statute authorizing probationary sentences. 18 U.S.C. § 3562(a). Congress also authorized the court, in a case involving a “term of imprisonment,” to impose a “term of supervised release” to commence upon the completion of imprisonment. 18 U.S.C. § 3583. In federal sentencing, a “term” or “term of” means the sentence imposed, regardless of whether

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<sup>18</sup> U.S.S.G. §1B1.10 (2009) (App. C, amend. 712) (March 3, 2008); U.S.S.G. §1B1.13 (2009) (App. C, amend. 683) (Nov. 1, 2006).

imprisonment, probation, or supervised release is involved.

**C. The History Of The Federal Good Time Credit Statute Demonstrates Congressional Intent That Good Time Credits Be Calculated Against The Sentence Imposed To Require In-Custody Service Of At Least 85 Percent Of The Sentence.**

If uncertainty remained after examining the language of the statute and its context, the history of the statute confirms that “term of imprisonment” means the sentence imposed. The 54 days of credit against the 365 days of a sentence imposed yields a minimum of 85 percent of the sentence imposed that must be actually served, or a maximum of 15 percent of the sentence imposed in good time credits. The chronology, purpose, and words of legislators – before and after the effective date – substantiate that Congress intended “term of imprisonment” to mean the sentence imposed. *See United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992) (relying on legislative history to construe statute).

*1. The History Of Federal Good Time Credit Statutes Demonstrates That Credit Is Measured Against The Sentence Imposed.*

Congress has consistently credited good time against the sentence imposed. The predecessor statutes to § 3624(b) date from 1867, when Congress enacted a law to provide that all prisoners convicted of federal

offenses serving their time in state facilities “shall have a deduction of one month in each year made from the *term of their sentence*.”<sup>19</sup> This structure continued for federal prisoners through the 1878 codification<sup>20</sup> until 1927, when Congress added graduated increased days of good time credit based on the length of the sentence. 18 U.S.C. § 710 (1927). The graduated version continued in the June 25, 1948, recodification with the deduction of good time credits “from the term of his sentence.” 18 U.S.C. § 4161 (repealed 1984). Historically, credit applied against the term of the sentence, not against the time actually spent in prison.

In 1948, Congress adopted new statutory language providing for the first time that the deduction be “credited as earned and computed monthly” to clarify when the credit accrued, not to diminish the amount of the credit. Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 853. Some courts construed this language “as requiring good time to be computed on the basis of actual time served rather than on the basis of the term of the sentence as imposed by the court.” H.R. Rep. No. 86-935 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2518, 2519. Thus, the present problem first occurred and was corrected almost 50 years ago: “The effect of this interpretation is to require well-behaved prisoners to serve longer periods of confinement than they would

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<sup>19</sup> An Act in Relation to Persons Imprisoned Under Sentence for Offenses Against the Laws of the United States, 14 Stat. 424, 424 (1867) (emphasis added).

<sup>20</sup> Revised Statutes of the United States, Title 70 §§ 5543, 5544, 43d Cong., 1st Sess. (1873-1874) (2d ed. published 1878).

under the method of computation which had been used through half a century.” *Id.*

To correct this flawed interpretation, Congress, in 1959, deleted the purported time-served language to clarify that good conduct credit was to be calculated against the sentence imposed, not time served. *Id.* Nothing in the legislative history of the present statute indicates an intent to change this approach. When Congress enacted the SRA, it continued the formulation that applied good conduct time to the sentence by using “term of imprisonment” to refer to the incarceration portion of the sentence.<sup>21</sup> “Congress’s long history of using an inmate’s sentence to calculate good conduct time supports a conclusion that Congress would have been more explicit if it had intended to adopt a different policy.” *White*, 314 F. Supp. 2d at 840.

*2. By Using The 85 Percent Rule, Congress Furthered Its Purpose Of Simplification.*

The simplicity of the 85 percent rule provided part of the rationale for the comprehensive sentencing reform legislation. Congress expressly referred to the need for change from “the complexity of current law” and the need to award good time credit at an “easily

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<sup>21</sup> “Term of imprisonment” also means the sentence imposed under the parole system. 18 U.S.C. § 4165 (repealed 1984) (providing for forfeiture of good time credits for misbehavior during the term of imprisonment); *Raines v. U.S. Parole Comm’n*, 829 F.2d 840, 844 (9th Cir. 1987) (per curiam) (“Term of imprisonment [in § 4165] includes time on parole.”).

determined rate.” S. Rep. No. 98-225, at 147 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3330. Congress believed § 3624(b) to “be considerably less complicated than under current law in many respects.” S. Rep. No. 98-225, at 146, *reprinted in* 1984 U.S.C.C.A.N. at 3329. The system for awarding good time credit at a rate of 15 percent of the sentence imposed best serves this purpose because it is as easy to calculate potential credit as it is to calculate a 15 percent tip. And the sentence to incarceration in excess of an even year is easily prorated as a fraction of 54: 180 days authorizes 27 days credit; 60 days authorizes 19 days credit;  $n$  days authorizes  $n/365$  days  $\times$  54 =  $x$  days credit.

On the other hand, the BOP program statement that implements the “time served policy” contains cumbersome and confusing formulas “that even the Bureau describes as ‘arithmetically complicated,’ and which few, if any, prisoners could ever be expected to decipher.” *Moreland*, 363 F. Supp. 2d at 888-89 (footnote omitted). The BOP formula is so complex because the prisoner cannot receive credit until the time is actually served, but the time served cannot include good time credits.<sup>22</sup> If the BOP had followed Congress’s manifest intent to simplify the calculation of available good time credits by basing good time credits on the term imposed by the sentencing court,

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<sup>22</sup> The complexity also involves the unfairness of the “fraction is always dropped” rule that denies prisoners any credit on partially earned days. JA-95.

the complex formulas set forth in the program statements would be entirely unnecessary.<sup>23</sup>

*3. Members Of Congress Repeatedly Referred To The 85 Percent Rule In A Manner That Demonstrated The Phrase “Term Of Imprisonment” Only Meant The Sentence Imposed.*

Before enactment, between enactment and effective date, and after the Guidelines were effective, statements of legislative purpose reflect Congress’s intention and working assumption that good time credits were to be awarded against the sentence imposed. Although subsequent legislative history is sometimes given little weight, the post-enactment history here demonstrates legislative intent to an unusual degree. Not only did legislators not know there was controversy regarding interpretation, Congress based subsequent legislation on the assumption that the federal system required incarcerated defendants to serve a minimum of 85 percent of the sentence imposed.

The 85 percent rule is based simply on the fact that 54 days is approximately 15 percent (14.8 percent) of the 365 days in a year. In an earlier draft of the good

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<sup>23</sup> Ironically, when estimating release dates, the BOP itself uses the 85 percent rule. BOP Program Statement 5100.08, Inmate Security Designation and Custody Classification, at ch. 4, p. 6 (Sept. 12, 2006) (“Based on the inmate’s sentence(s), enter the total number of months remaining, less 15% (for sentences over 12 months), and credit for any jail time served.”).

time statute, the proposed amount of good time credit would have been up to 36 days against the term of imprisonment, or “approximately 10 percent.” S. Rep. No. 98-225, at 147, *reprinted in* 1984 U.S.C.C.A.N. at 3330.<sup>24</sup> The final version simply added 5 percent to the maximum available good time credits. H. R. Rep. No. 09-1159, at 415 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 3710, 3711 (the amendment “increases ‘good time’ that accrues from 10 percent to 15 percent.”).

Shortly after the passage of the bill, members of Congress characterized the good time credit statute as granting a 15 percent reduction from the defendant’s sentence as imposed. *See, e.g.*, 131 Cong. Rec. S4083-03 (daily ed. Apr. 3, 1985) (statement of Sen. Kennedy) (under the Act, 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.’”);<sup>25</sup> 131 Cong. Rec. E37-02, E37-02 (daily ed. Jan. 3, 1985) (statement of Rep. Hamilton) (“Now sentences will be reduced only 15% for good behavior.”).

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<sup>24</sup> Although the Report refers to 36 days as “approximately 10 percent of the part of a term of imprisonment that exceeds one year,” Congress enacted a technical amendment to § 3624(b) “to clarify that the good time credit can be earned for the first year of a term of imprisonment.” Criminal Law And Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3592; H. R. Rep. 99-797, at 21, *reprinted in* 1986 U.S.C.C.A.N. 6138, 6144.

<sup>25</sup> Senator Kennedy’s statement included this language from an article he had published: Edward M. Kennedy, *The Sentencing Reform Act of 1984*, 32 Fed. B. News & J. 62, 63 (1985).

Nearly a decade after the effective date of the SRA, Congress passed a complementary statute that, as a condition of federal funding, purported to require the States to follow the federal system of limiting good time credits to 15 percent of the sentence imposed, mandating that States require service of no less than 85 percent of the sentence imposed to achieve “truth in sentencing.” VCCLEA, Pub. L. No. 103-322, § 20102, 108 Stat. 1796, 1816 (1994) (as amended by Pub. L. No. 104-134, § 20104, 110 Stat. 1321, 1321-16 (1996)). In five different places, the statute required States to demonstrate that state prisoners “serve not less than 85% of the sentence imposed” as a condition of federal assistance. 42 U.S.C. § 13704(a) (2005).

Then-Senator Biden, a coauthor of § 3624(b), not only believed the federal statute provided the full 15 percent against the sentence imposed, but also intended that the same methodology would provide a limit on State good time credits:

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, S2349 (daily ed. Feb. 9, 1995) (statement of Sen. Biden) (emphasis added); *see also* 140 Cong. Rec. S12314-01, S12350 (daily ed. Aug. 23, 1994) (statement of Sen. Biden) (“So my Republican

friends in a compromise we reached on the Senate floor back in November . . . said no State can get any prison money *unless they keep their people in jail for 85 percent of the time just like we do at the Federal level in a law written by yours truly and several others.*") (emphasis added). Contrary to Congress's clear expectation, the BOP requires federal prisoners to serve a minimum of 87.2 percent of the sentence imposed – or 8.72 years on a ten-year sentence – with good time credits available of only 12.8 percent of the sentence imposed.

The legislative history and subsequent statements of Congress's intent demonstrate that good time credits should be measured against the sentence imposed. The subsequent legislative history is especially significant because "Congress has spoken subsequently and more specifically to the topic at hand." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Because Congress appeared to be unaware of any uncertainty regarding the 85 percent rule, reliance on § 13704(a) and its legislative history does not carry the risks underlying this Court's general suspicion of subsequent legislative history. *See Doe v. Chao*, 540 U.S. 614, 626-27 (2004). Congress's specific and repeated use of "85% of the sentence imposed" as the measure of the State's maximum use of good time credits is strongly probative that the federal statute likewise requires minimum service of 85 percent of an imposed sentence of incarceration. In contrast, the BOP view that federal prisoners must serve at least 87.2 percent of the term imposed finds no support in the legislative history.

## **II. If Uncertainty Remains After Considering The Language, Context, And History Of The Statute, The Rule Of Lenity Requires That “Term Of Imprisonment” Be Construed To Mean The Sentence Imposed, Whether At The First Or Second Step Of *Chevron* Analysis.**

The appellate courts that relied on *Chevron* deference failed to properly account for the role of the rule of lenity in interpreting penal statutes like § 3624(b). “[W]here text, structure, and history fail to establish that the Government’s position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.” *United States v. Granderson*, 511 U.S. 39, 54 (1994). This Court requires that the traditional rules of statutory construction, which include the rule of lenity, apply at the first step of *Chevron* analysis. Even if applied to the second step of *Chevron* analysis, the separation of powers, liberty, and notice interests that animate the rule of lenity would trump deference to the Executive agency’s harsher interpretation.

### **A. The Federal Good Time Statute Is A Penal Statute Because Its Interpretation Determines The Actual Amount Of Incarceration A Defendant Serves.**

Good time credit statutes are penal because they affect the quantum of punishment – the time actually served by the prisoner. *Lynce v. Mathis*, 519 U.S. 433, 443 (1997) (legislation retroactively denying good time reductions implicated *ex post facto* restrictions because it “had the effect of lengthening petitioner’s period of

incarceration.”); *Weaver v. Graham*, 450 U.S. 24, 32 (1981) (good time statute is penal for *ex post facto* purposes because “it in fact is one determinant of petitioner’s prison term – and [] his effective sentence is altered once this determinant is changed”).<sup>26</sup> Similarly, good time statutes create liberty interests under the Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). In fact, because “custody” is at issue, disputes regarding good time credits must be resolved in habeas corpus proceedings. *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973).

Because the good time credit statute determines how much time is spent in custody, the standard definition of “penal” applies: “Of, relating to, or being a penalty or punishment, esp. for a crime.” BLACK’S LAW DICTIONARY 1246 (9th ed. 2009). In *Moreland*, the government conceded that § 3624(b) is a penal statute. 363 F. Supp. 2d at 892. This concession was well-founded because the statute, located in Title 18, “is the final factor determining the duration of punishment ultimately meted out for criminal behavior.” *Id.* For Mr. Barber, the interpretation of the statute determines whether he spends up to 186 extra days in prison; for Mr. Jihad-Black, the difference is up to 152 extra days incarceration.

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<sup>26</sup> A statute that is penal for *ex post facto* purposes is also penal for the purposes of the rule of lenity because the law “must disadvantage the offender affected by it.” *Weaver*, 450 U.S. at 29 (citing *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

Freedom from unwarranted governmental custody is one of the most profound constitutional interests. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects.”); *Glover v. United States*, 531 U.S. 198, 203 (2001) (“our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.”); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958) (liberty is “an interest of transcending value.”).<sup>27</sup> The rule of lenity embodies “the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.” *United States v. Bass*, 404 U.S. 336, 348 (1971) (citation omitted). If § 3624(b) is ambiguous, the precise question before this Court is whether the petitioners must serve an additional 186 and 152 days in custody that Congress – the lawmaker – did not clearly require.

Where there is ambiguity in the SRA “about the severity of sentencing,” this Court applies the rule of lenity. *R.L.C.*, 503 U.S. at 305; see *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (the rule of lenity “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties

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<sup>27</sup> See also *North Carolina v. Pearce*, 395 U.S. 711, 718-19 & n.13 (1969) (the constitutional guarantee against multiple punishments for the same offense requires that the punishment already exacted must be fully credited upon a new conviction for the same offense, “includ[ing] the time credited during service of the first prison sentence for good behavior”), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

they impose.”). In *R.L.C.*, the Court found that, if any ambiguity survived its construction of the SRA’s alternate maximum terms of imprisonment “authorized” for juveniles, “we would choose the construction yielding the shorter sentence by resting on the venerable rule of lenity.” *Id.* Because § 3624(b) is another aspect of the SRA implicating the severity of sentencing, the rule of lenity also applies to any ambiguity.

**B. The Rule Of Lenity Applies At The First Step Of *Chevron* Analysis, Resolving Any Residual Ambiguity For *Chevron* Purposes.**

This Court has provided a methodology for resolving residual statutory ambiguity at the first step of *Chevron* analysis: “If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron*, 467 U.S. at 843 n.9 (emphasis added). *Accord General Dynamics Land System, Inc., v. Cline*, 540 U.S. 581, 600 (2004) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron*, 467 U.S. at 843 n.9)). In *INS v. St. Cyr*, the Court relied on *Chevron*’s footnote 9 in refusing to apply *Chevron* deference unless statutes, after “applying the normal ‘tools of statutory construction,’ are ambiguous.” 533 U.S. 289, 320 n.45 (2001). In rejecting the agency’s interpretation that an immigration statute applied retroactively, the Court in *St. Cyr* stated: “Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, . . . there is, for *Chevron*

purposes, no ambiguity in such a statute for an agency to resolve.” *Id.*<sup>28</sup>

As with the doctrine against retroactivity, the rule of lenity is a “tool of statutory construction” that renders a penal statute unambiguous for *Chevron* purposes. See *R.L.C.*, 503 U.S. at 311-12 (Thomas, J., concurring) (citing *Chevron* footnote 9 in support of the proposition that the rule of lenity can “make clear an otherwise ambiguous penal statute”).<sup>29</sup> In *Leocal*, the Court addressed the rule of lenity in determining whether the immigration agency interpreted “aggravated felony” in an overly broad manner to include drunk driving. 543 U.S. at 11 n.8. The Court noted that, if there were any lack of clarity, “we would be constrained [by the rule of lenity] to interpret any ambiguity in the statute in petitioner’s favor.” *Id.* In keeping with the requirement of consistency for statutes with criminal and non-criminal applications, the Court found that the rule of lenity applies “whether we encounter its application in a criminal or non-criminal context.” *Id.* (citing *United States v.*

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<sup>28</sup> See also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574-75 (1988) (applying the doctrine of constitutional avoidance instead of *Chevron* deference); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 258 (1991) (applying the presumption against extra-territorial effect rather than *Chevron* deference).

<sup>29</sup> See also *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (suggesting that rules of construction “such as the rule of lenity” should be applied to determine whether a statute is unambiguous for *Chevron* purposes).

*Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion)). Similarly, the Court applied the doctrine of constitutional avoidance without deference to the agency’s interpretation that allowed the same statutory language to be applied differently to different classes of aliens. *Martinez*, 543 U.S. at 378-82.

Any uncertainty regarding the statute’s meaning should be resolved by applying the most ancient and well-established principle of statutory construction – the rule of lenity – at the first step of *Chevron* analysis. The rule of lenity has roots dating to the founding of the Republic and earlier. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.”); 1 WILLIAM BLACKSTONE, COMMENTARIES \*92 (“A man cannot suffer more punishment than the law assigns, but he may suffer less.”). When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the Court resolves the ambiguity in favor of lenity. *Ladner v. United States*, 358 U.S. 169, 178 (1958).

### **C. Even At The Second Step Of *Chevron* Analysis, The Rule Of Lenity Governs.**

Both *stare decisis* and the rationale for the rule of lenity require its application at the first step of *Chevron* analysis. Nonetheless, several lower courts have found that “deference [to the agency] trumps lenity.” *See, e.g., Yi*, 412 F.3d at 535 (quoting *Sash v. Zenk*, 344 F. Supp. 2d 376, 383 (E.D.N.Y. 2004));

*Pacheco-Camacho*, 272 F.3d at 1270 (after finding “term of imprisonment” ambiguous, “we proceed to the second step of the *Chevron* analysis.”). If the second step of *Chevron* is reached, the substantive rule of lenity trumps agency deference, especially where delegation to the agency is simply a legal fiction.

The rule of lenity arose to protect “the rights of individuals” and to protect Congress’s power to “ordain” the punishment for crimes. *Wiltberger*, 18 U.S. at 95; see *Mistretta*, 488 U.S. at 391 n.17 (placing sentencing power in the Executive Branch would raise separation of powers questions). The rule assures “that the society, through its representatives, has genuinely called for the punishment to be meted out.” *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring). Thus, it is Congress’s, not the BOP’s, role to set the scope of punishment for crimes. *R.L.C.*, 503 U.S. at 305 (rule of lenity prevents imprisonment “unless the lawmaker” has “clearly” provided for it); see *Whalen v. United States*, 445 U.S. 684, 695 & n.10 (1980) (to require consecutive sentences where Congress’s intent is unclear would offend separation of powers and the rule of lenity).

The BOP is emphatically an Executive agency, lodged in the same Department of Justice as the prosecutors in the petitioners’ underlying cases. See *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (purpose of the rule of lenity is to “maintain the proper balance between Congress, prosecutors, and courts”). Only the legislature can authorize punishment, so doubts must be resolved against additional punishment. *United States v. Santos*, 128 S. Ct. 2020,

2025 (2008) (plurality) (no citizen should be “subjected to punishment that is not clearly prescribed”). In *Crandon v. United States*, the Court rejected the Executive Branch’s construction of a penal statute and, relying in part on the rule of lenity, concluded that the statute did not extend as construed by the agency. 494 U.S. 152, 168 (1990). In a concurring opinion, Justice Scalia drew a clear line between the roles of the Executive Branch and the Judicial Branch in interpreting criminal statutes: deference to Executive Branch interpretation of penal statutes “would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.” *Id.* at 178 (Scalia, J., concurring).

In cases involving the Parole Commission, courts in the Sixth and Seventh Circuits have recognized the separation of powers problems inherent in accepting Executive construction of ambiguous statutes to increase potential punishment. The Sixth Circuit, citing the *Crandon* concurrence, declined to defer to the Parole Commission’s interpretation of a statute, stating: “Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases . . . . The rule of lenity requires a stricter construction of ‘ambiguity in a criminal statute,’ not deference.” *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (citations omitted). “Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts.” *Id.* See also *Evans v. United States Parole Comm’n*, 78 F.3d 262, 265 (7th Cir. 1996) (“[W]e have substantial doubt that the Judicial Branch owes any

deference to the Executive Branch when the question concerns the maximum term of imprisonment; certainly judges do not defer to the Attorney General's interpretation of Title 18."); *United States v. McGoff*, 831 F.2d 1071, 1077, 1080 n.17 (D.C. Cir. 1987) (interpretation of a criminal statute is "far outside *Chevron* territory," and "we owe no deference to the Government's interpretation").

All of the constitutional implications of the rule of lenity are at issue here. Congress never intended that federal prisoners who demonstrate good behavior should serve 2.2% more time than what the 85 percent rule would require. The most basic liberty interest is at stake for persons faced with additional days, weeks, or months in prison.<sup>30</sup> As demonstrated in the administrative record, the BOP provided no effective notice of any differential between alternative good time credit calculations. The danger that the Executive is determining the quantum of punishment without legislative authorization alone creates a sufficient risk of unconstitutional deprivation of liberty to foreclose application of *Chevron* deference. *See Martinez*, 543 U.S. at 381 (the canon of constitutional avoidance rests "on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); *see also Miller v. Johnson*, 515

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<sup>30</sup> The seven days a year, while individually significant, also has a massive cumulative effect when applied system-wide to the federal prison population. The BOP's flawed approach has resulted in up to 36,000 years of excessive incarceration, at a cost of close to \$1 billion, that Congress never clearly intended. Pet. 11.

U.S. 900, 923 (1995) (“we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department’s interpretation of the [Voting Rights] Act.”). If the choice in interpreting an ambiguous penal statute is between lenity and deference to the Executive, the interests underlying the separation of powers and protection of liberty, as well as notice interests, require application of lenity. *See Leocal*, 543 U.S. at 11-12 n.8; *Martinez*, 543 U.S. at 380-81.<sup>31</sup>

**III. If Any Agency Deference Were Appropriate In Determining The Meaning Of “Term Of Imprisonment,” Deference To The Bureau Of Prisons Would Not Be Appropriate Because The Sentencing Commission, Not The BOP, Properly Construed The Phrase, And The BOP Has Never Exercised Lawful Rule-Making Or Discretion Regarding Any Ambiguity.**

Even if the meaning of “term of imprisonment” could not be gleaned from statutory construction without resort to administrative deference, no deference to the

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<sup>31</sup> This Court’s decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), is distinguishable on a number of bases, most prominently that the agency acted within a clearly delegated area of expertise. *See also Lopez v. Davis*, 531 U.S. 230, 242, 244 (2001) (approving BOP regulation that filled statutory gap regarding unambiguously delegated discretion). Footnote 18 of the *Sweet Home* opinion, upon which *Pacheco-Camacho* relied, explicitly limited its discussion of the rule of lenity to a facial challenge to administrative regulations.

BOP is appropriate under well-established administrative law principles requiring clear delegation, proper promulgation, and reasonableness. *Chevron*, 467 U.S. at 844. Congress delegated the administration of the SRA to the Sentencing Commission, which used the 85 percent rule in calibrating the Sentencing Table. In contrast, while the BOP makes individual good time determinations for individual prisoners, the BOP received no mandate from Congress to determine the amount of available good time credits. Further, the administrative record establishes that, in formulating its good time calculation regulation, the BOP did not recognize any ambiguity in the statute and therefore exercised no discretion in construing the statute. The BOP has implicitly ceded this point in its concession that the regulation violated § 706 of the APA. Finally, the BOP's interpretation is unreasonable because it contradicts the Commission's application of § 3624(b) in the creation of the Sentencing Table upon which all federal sentences are predicated.

**A. Any Deference Should Be Afforded To The Sentencing Commission, Which Received And Acted Upon The Explicit Delegation To Implement The Sentencing Reform Act.**

The legitimacy of agency action depends on clear statutory delegation of authority. *Gonzales v. Oregon*, 546 U.S. 243, 255-58 (2006). As approved in *Mistretta*, Congress explicitly delegated to the Commission the administration of the SRA, of which § 3624(b) is a part. Prior to the Guidelines' effective date, the Commission acted on this delegation by utilizing "term of

imprisonment” as synonymous with the sentence imposed and by calibrating the Sentencing Table based on the 85 percent rule. In 1990, the Commission reiterated the 85 percent interpretation in amending the Guideline Manual.

In rejecting constitutional challenges to the SRA, this Court in *Mistretta* expressly approved Congress’s delegation to the Commission of the duty to implement the new sentencing laws. In 28 U.S.C. § 994(m), this delegation to the Commission explicitly included the setting of initial guidelines based on “the length of such terms actually served.” This in turn required the Commission to set the Sentencing Table based on actual time served plus the maximum good time credit, which necessarily required interpretation of § 3624(b). The Commission expressly calibrated the Sentencing Table to require higher sentences based on the “good time (resulting in earlier release) that would be earned under the guidelines.” JA-146. The Commission acted pursuant to the authority of Congress when it set the initial guidelines using a Sentencing Table predicated on the availability of good time credit equivalent to 15 percent of the sentence imposed.

To be clear, the Commission did not appear to be deciding between ambiguous readings of “term of imprisonment.” The Commission simply acted upon what it perceived to be the unambiguously expressed intent of Congress. However, to the extent Congress delegated any discretion regarding the amount of available good time credit, that delegation was to the Commission. Further, the Commission, unlike the BOP, is not an Executive agency, so deferring to the

Commission mitigates the constitutional problems surrounding Executive determination of the maximum actual incarceration a prisoner must serve to satisfy a term of imprisonment.

In contrast, the BOP received no statutory authorization to set the maximum amount of available good time credit.<sup>32</sup> Although Congress entrusted the BOP with the duty to determine whether a given prisoner earns good time credit based on behavior while in BOP custody, as well as how to resolve conflicts regarding the forfeiture of good time credit, Congress did not delegate to the BOP the power to set the maximum available good time credit. *See United States v. Wilson*, 503 U.S. 329, 335 (1992) (the BOP “has the responsibility for *administering* the sentence”) (emphasis added); *see also Gonzales*, 546 U.S. at 267 (Congress does not delegate in vague or ancillary terms). Deference under *Chevron* is warranted only when it appears that Congress delegated authority to an agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *Gonzales*, 546 U.S. at 258 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). The BOP never received a delegation to determine the amount of available good time credit, nor did it purport to exercise such authority in the administrative record.

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<sup>32</sup> The BOP received only general authority from the Attorney General to approve inmate disciplinary and good time regulations. 28 C.F.R. § 0.96(s) (2009).

In this case, the Ninth Circuit erred in assuming the Commission consented to the BOP's later interpretation of the statute. JA-54. The Ninth Circuit ignored the fact that Congress approved of the Commission's adoption of 15 percent as the available good time credit. By approving the Sentencing Table and the Guidelines' use of "term of imprisonment," Congress agreed to the 85 percent interpretation. Under the SRA, once approved, the guidelines can only be changed by formal amendment, which must be preceded by notice and comment. 28 U.S.C. § 994(o), (p) & (x) (2006). The BOP, although specifically named in § 994(o) as an institution required to report when a change in the Guidelines appears warranted, took no action to suggest that an amendment to the 85 percent rule be promulgated.

Further, this Court disapproves imputing legislative intent based on silence. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994). Reliance on the Commission's supposed silence is especially inappropriate where the BOP provided no notice it was deviating from the Commission's interpretation. Not only did the BOP violate § 706 of the APA, the notices accompanying the regulation provided no basis from which to infer that the Commission acceded to the BOP interpretation of § 3624(b).<sup>33</sup> Given the explicit delegation recognized in

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<sup>33</sup> This is especially true where the regulation simply said prisoners receive 54 days of good time credit "for each year served." JA-60. The regulation could reasonably be read as providing 54 days credit for every year of the sentence imposed. Only in the Program Statement does the BOP spell out the differentiation between actual time served and sentence imposed.

*Mistretta*, the Commission had no reason to believe the BOP could or would arrogate to itself the interpretation of the good time credit statute.

**B. The BOP’s Violation Of The Administrative Procedure Act Demonstrates That No Deference To The Agency Is Appropriate Because The Agency, Based On An Error Of Law, Never Exercised Discretion Or Articulated A Reason For A Harsher Interpretation Of The Statute.**

Even if the BOP had authority to construe an ambiguous statute, deference is not appropriate. The BOP conceded that its regulation violated § 706 of the APA. The BOP’s reading of the statute is based on a legal error – the BOP did not believe any ambiguity existed – and, therefore, involved no special expertise or exercise of discretion justifying agency deference. *Cf.* 5 U.S.C. § 706 (2006) (reviewing court “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action.”).

*1. An Agency Interpretation Is Not Entitled To Deference If Based On An Error Of Law.*

The BOP did not presume to make an administrative construction of the statute: the BOP’s position has been that it had no choice but to require service of 87.2 percent of the sentence imposed. The agency believed the statute unambiguously required that the 54 days be calculated against “time served,” not the sentence imposed. The record below includes citations to the

BOP's litigation position throughout the country in which the agency consistently asserted that § 3624(b) unambiguously requires the time served formulation. JA-8, No. 11 at 18. Rather than acting on a congressional delegation of authority to interpret the statute, the BOP simply – and incorrectly – thought it was implementing unambiguous statutory terms.

In earlier litigation, the courts determined that “term of imprisonment” was ambiguous and upheld the BOP's regulation as entitled to *Chevron* deference. However, the administrative record establishes that the BOP never exercised its discretion, but rather acted on the basis of an error of statutory interpretation, failing to recognize that there was an ambiguity requiring interpretation. Instead of invalidating the BOP's improperly promulgated rule, the Ninth Circuit instead repeated the error this Court identified in *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943), where a lower court had accepted the agency's post-hoc rationale for what was in fact a simple error of law.

In *Chenery*, the SEC had adjudicated a case, imposing a requirement on a corporation because the SEC believed the law required it. *Id.* at 88-89. The corporation appealed that decision, alleging the agency action was invalid. This Court held that the agency's determination as to what the law required was incorrect, and, even though there might be grounds upon which the agency could have reached the same outcome, the courts could not provide that justification for the agency. *Id.* at 90-94. It was the responsibility of the agency to articulate contemporaneously the

rationale for its decision, rather than in arguments later made to the reviewing courts.

Similarly, this Court declined to defer to an agency's error of law in *Negusie v. Holder*, 129 S. Ct. 1159, 1166 (2009). In *Negusie*, the immigration agency erroneously believed a statute categorically barred asylum to anyone who was compelled to assist in persecution. This Court undertook an independent interpretation of the statute and deemed it ambiguous. *Id.* at 1165-66. The Court did not defer to the agency's interpretation because the agency had not exercised its *Chevron* discretion to interpret the statute in question. *Id.* at 1167.

Here, as in *Chenery* and *Negusie*, the agency's interpretation of the law was incorrect. As a consequence, the agency never made a choice between available interpretations. The BOP's error of law, which formed the basis for the agency's actions, forecloses deference, even if the Court finds the statute to be ambiguous and the rule of lenity inapplicable.

*2. The BOP Correctly Conceded That, Because The Administrative Record Included No Rationale Or Record Support For Its Interpretation, The Regulation Was Invalid As A Basis For Reading "Term Of Imprisonment" To Mean Time Served.*

This Court provided the analytic framework for application of § 706(2)(A) of the APA in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). In *State Farm*, this Court held that, in adopting a rule, the agency is required to "examine the

relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc., v. United States*, 371 U.S. 156, 168 (1962)). The agency must “cogently explain why it has exercised its discretion in a given manner,” and the agency’s explanation must be sufficient to enable a reviewing court “to conclude that the [agency’s action] was the product of reasoned decision making.” *State Farm*, 463 U.S. at 48-49, 52. An agency rule is arbitrary and capricious under § 706 of the APA if the agency relied on factors Congress did not intend it to consider, “*entirely failed to consider an important aspect of the problem*,” offered an explanation inconsistent with the evidence before the agency, or provided a rationale “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 43 (emphasis added).

The BOP’s adoption of the “time served” interpretation fails to meet the *State Farm* standards. The administrative record does not reflect BOP consideration that the Sentencing Table required longer terms of imprisonment based on the Sentencing Commission’s increase in the actual incarceration baseline in reliance on its “sentence imposed” construction of the statute. Moreover, the administrative record contains no rationale or explanation for the agency action. Even if the BOP had considered the Commission’s contrary interpretation of the statute, its rejection of that interpretation is not supported by any reasoning or application of agency expertise.

The BOP concedes that its regulation violated § 706 of the APA under *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), which applied this Court’s *State Farm* precedent to invalidate a BOP regulation because the administrative record did not contain an adequate explanation the BOP’s administrative action. JA-45. *Arrington* has its roots in footnote 6 of *Lopez*, where this Court noted that statutory authorization for a BOP rule does not resolve whether the rule is invalid under the APA. 531 U.S. at 244 n.6. In *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005), the Ninth Circuit held the regulations at issue in *Lopez* to be invalid for violation of the APA’s notice-and-comment requirement. The Ninth Circuit recently reaffirmed the requirement that, for a BOP rule to be valid, the agency must establish an administrative record that supports the rule. *Crickon v. Thomas*, 579 F.3d 978, 988-89 (9th Cir. 2009).

Because the BOP provided no reasoned basis for its decision to calculate good time credit based on an interpretation different from that formulated by the Sentencing Commission, the BOP’s actions in calculating good time must be set aside as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The BOP has not demonstrated that it “examine[d] the relevant data” nor has it “articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168). Articulating a rationale was particularly necessary in this case because adoption of the time served methodology was

a departure from the prior “sentence imposed” calculation. The administrative record is devoid of support for the BOP’s decision to implement a “time served” method of calculating good time.

3. *Skidmore* Deference Does Not Save The Agency’s Rule Because The Program Statements Are Also Invalid Under § 706 And No Reasoning Supported The Program Statements.

After the BOP’s concession that its good time credit regulation violated the APA, the Ninth Circuit nonetheless upheld the BOP’s good time credit rules based on deference to the program statements describing application of those rules. The program statement suffers the same procedural invalidity as the regulation, however, because, as “agency action” affecting the rights of a class of persons and deviating from historical practice, they are legislative in effect, regardless of label. *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); see *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (“To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”). For the same reasons the regulation is invalid under *State Farm*, the program statements that purport to implement the regulation are also invalid.

Further, the 87.2 percent informal rule is entitled to no *Skidmore* deference by the standards of that case. None of the relevant factors supports deference: 1) “thoroughness evident in its consideration” (the BOP demonstrated no consideration of the Commission’s 85

percent rule); 2) “validity of its reasoning” (the BOP provided no reasoning); 3) “consistency with earlier pronouncements” (the BOP’s methodology is inconsistent with historical practice and the prior Sentencing Commission interpretation); and 4) “power to persuade” (the BOP has never proffered any argument as to why, if there is a choice, the harsher option is appropriate). *Skidmore*, 323 U.S. at 140. *Accord Mead Corp.*, 533 U.S. at 234-35 (limiting *Skidmore* to contexts where the power to persuade is based on the exercise of specialized experience and broader information than is normally available). *Skidmore* deference simply cannot be afforded to an informal agency statement, based on an erroneous understanding of the statute, that provides no rationale for the agency’s interpretation.

This Court addressed *Skidmore* deference and lenity in the context of informal BOP rules in *Reno v. Koray*, 515 U.S. 50 (1995). When applied to the present case, *Koray* provides no support for any level of deference. First, this Court’s discussion of *Skidmore* deference in *Koray* was dicta because the relevant statute was unambiguous when read in context and, therefore, the rule of lenity did not apply. *Id.* at 65.<sup>34</sup> Second, the Court allowed only “some” deference based on the articulated rationale for the interpretation of the

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<sup>34</sup> “The rule of lenity applies only if, ‘after seizing everything from which aid can be derived’ . . . we can make ‘no more than a guess as to what Congress intended.’ . . . That is not this case.” *Id.* (citations omitted).

statute, whereas here no rationale was provided.<sup>35</sup> Third, only after conducting a traditional analysis of the text, structure, and history of the statute did the Court conclude that the program statement reflected “the most natural and reasonable reading.” *Id.* at 61. The application of the *Skidmore* factors is an exercise in statutory interpretation; none of those factors warrants ratification of unlawful agency action simply because it has been allowed to persist over a long period of time.

**C. No Deference Is Warranted Under Any Standard Because The BOP’s Rule Is Unreasonable.**

Even if the BOP had authority to promulgate the 87.2 percent requirement, and even if the rule were properly promulgated, the rule is unreasonable under the second step of *Chevron* analysis. Every sentence to imprisonment is based on the Sentencing Table;<sup>36</sup> the Sentencing Table was calibrated based on an 85 percent rule; no rationale has been offered for requiring 2.2 percent greater incarceration than the Sentencing Table assumed; the interests of individual liberty and the expense of incarceration foreclose

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<sup>35</sup> Compare JA-45 (BOP concession that “it failed to articulate in the administrative record the rationale upon which it relied when it promulgated the good time regulation”) with *Koray*, 515 U.S. at 61 n.4 (setting out agency reasoning on why release to a halfway house is not “official detention”).

<sup>36</sup> *Gall v. United States*, 552 U.S. 38, 49 (2007) (the Guidelines are “the starting point and the initial benchmark” of every sentence).

unwarranted incarceration; and, therefore, the BOP rule is unreasonable. The rule is especially unreasonable given the irrational complexity of the alternate rule that the BOP has implemented in place of the 85 percent rule adopted by the Commission and contemplated by Congress.

## CONCLUSION

This Court's precedent provides a series of analytical tools, each of which independently requires that relief be granted:

- The plain language establishes that “term of imprisonment” means the sentence imposed;
- The statutory context substantiates that meaning;
- The statute's history confirms that meaning;
- The rule of lenity governs any remaining ambiguity at either the first or second step of *Chevron* analysis;
- Aside from the rule of lenity, the Court should accord any available deference to the Sentencing Commission, which interprets “term of imprisonment” to mean sentence imposed;
- No deference should be given to the BOP's interpretation because the agency acted on an error of law; the agency never exercised discretion or applied specialized expertise; and the agency never has offered a rational basis for the harsher interpretation of § 3624(b) it has imposed; and

- The BOP interpretation is fundamentally unsound and unreasonable in view of the Commission's reliance on the 85 percent rule in formulating the Sentencing Table.

If the petitioners prevail at any single level of this analysis, they are entitled to the grant of the writ of habeas corpus. By granting the requested relief, this Court protects values of individual freedom and the rule of law, while serving Congress's manifest purpose of simplifying the prediction and calculation of the minimum amount of actual incarceration resulting from imposition of a term of imprisonment.

Respectfully submitted this 14th day of January, 2010.

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