

Nos. 06-35855, 06-36092, 07-35013, 07-35023, 07-35082,
07-35084, 07-35085, 07-35086, 07-35087, 07-35088, 07-35089,
07-35090, 07-35091, 07-35092, 07-35093, 07-35094, 07-35097

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES ARRINGTON, ISMAEL RODRIGUEZ, ANTWANE BURRISE,
MICK WILLIAMS, DOMINIQUE E. JIMERSON, RICHARD E.
STURDEVANT, GREGORY VILLAFRANCO, OCTABIAN J. RILEY, ALVIN
GEORGE WALKER, NORMAN AGUILAR, JR., HANDI IBRAHIM, STEVEN
RAJ, THEODORE VANDERHOOF, JUAN DELOCHA VAUGHN, MILTON
THOMAS, BENNY RAY MARTIN, ERIC SISCO,

Petitioners-Appellants,

v.

CHARLES DANIELS, Warden, Sheridan FCI,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon

APPELLANTS' CONSOLIDATED REPLY BRIEF

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Introduction

The Bureau of Prisons' response brief is flawed by three basic misunderstandings:

- 1) the BOP claims that this action is an effort to "relitigate the same claim" that was before this Court in *Bowen v. Hood*, 202 F.3d 1211 (9th Cir. 2000), and the Supreme Court in *Lopez v. Davis*, 531 U.S. 230 (2001) (Resp. Br. at 7);
- 2) the BOP claims there is "no dispute" that the final rule cured the unlawfully promulgated 1997 interim rule (Resp. Br. at 2); and
- 3) the BOP claims that the petitioners failed to provide a citation for the proposition that an agency must explain its decision and support that explanation with "detailed analysis and/or empirical studies" (Resp. Br. at 10).

Each of these positions is fundamentally incorrect.

A. This Case Presents Issues Of First Impression Never Ruled On Before By This Court Or The Supreme Court.

No previous court has addressed the question whether, under the Administrative Procedure Act, the BOP's 1997 rule violates 5 U.S.C. § 706(2)(A). The BOP's reliance on *Bowen* and *Lopez* ignores controlling authority that courts only resolve the issue presented to them. *Lopez*, 531 U.S. at 244 n. 6 (reserving the APA challenge to same rule); *see also Texas v. Cobb*, 532 U.S. 162, 169 (2001) (prior Supreme Court decision only resolved the issue placed before it); *United States v. Booker*, 543 U.S. 220, 239-40 (2005) (finding four previous federal guidelines cases

did not address the issue raised in *Booker*). Because the BOP failed to cite any authority addressing the § 706(2)(A) claim, this Court is addressing a question of first impression.

Lopez and *Bowen* only addressed whether the BOP has statutory authority to create categorical exclusions. Under § 706(2)(A), a reviewing court will uphold agency action that is “rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute[.]” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (emphasis added). The § 706(2)(A) question only arises after a determination that the agency acted within the scope of its authority. *Rockbridge v. Lincoln*, 449 F.2d 567, 572 (9th Cir. 1971) (“Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). Whether the BOP’s decision to categorically disqualify a class of statutorily eligible prisoners was based on a rationale, supported by consideration of relevant factors, is a separate and distinct question that has not been addressed by any court.

Lopez and *Bowen* could not resolve the question before this Court because, in both cases, the courts did not address the administrative record. Instead, because the question was purely statutory, the courts addressed the BOP attorneys' *post hoc* rationalizations for the categorical disqualification. In contrast, in the APA context, the courts "may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . ." *Altamirano v. Gonzales*, 427 F.3d 586, 595 (9th Cir. 2005) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Reliance on *post hoc* attorney rationalizations establishes that *Bowen* and *Lopez* did not address or resolve the distinct APA question presented here: whether the absence from the administrative record of a rationale and underlying support rendered the categorical exclusion, which was permissible under the statute, in violation of § 706(2)(A) of the APA.

Just as this Court struck down the statutorily permissible interim rule for violation of § 553 of the APA in *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), the Court should now strike down the statutorily permissible final rule for violation of § 706(2)(A) of the APA.

B. The 2000 Final Rule Did Nothing To Cure The Unlawful Promulgation Of The 1997 Interim Rule.

The BOP does not contradict the administrative history set out by the petitioners, which reveals that the BOP never articulated a rationale in the interim rule *or* the final rule explaining its decision to categorically disqualify the petitioners, other than to vindicate a rejected legal position. The final rule did nothing to cure the notice-and-comment violation condemned in *Paulsen*. By failing to articulate a non-litigation rationale, supported by facts and policies, the BOP violated § 706(2)(A). The BOP's own citation requires that the agency state its rationale and provide empirical evidence in support. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. USDA*, 415 F.3d 1078, 1093 (9th Cir. 2005) (cited in Resp. Br. at 8).

In the administrative record, the BOP did not articulate the unsupported rationales its attorneys asserted during litigation. Instead, the BOP baldly asserted that the categorical exclusion was proper because the BOP had the power to exclude any category of offenders. 65 Fed. Reg. 80745-01, 80748 (Dec. 22, 2000). Compliance with both notice-and-comment and the §706 procedural requirements are mandatory and render invalid any rule not properly promulgated. *Paulsen*, 413 F.3d at 1008.

The use of attorney arguments on the statutory question does not “cure” the failure to articulate a rationale or to conduct any studies or otherwise to provide empirical support for the rule. The BOP’s reliance on *post hoc* litigation arguments emphasizes the distinction between the statutory and the APA question, which is in no way cured by lawyer arguments:

Th[e] administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely ‘post hoc’ rationalizations, which have traditionally been found to be an inadequate basis for review. And they clearly do not constitute the ‘whole record’ compiled by the agency: the basis for review required by §706 of the Administrative Procedure Act.

Overton Park, 401 U.S. at 419 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

In *State Farm*, the agency, as in the present case, submitted no reasons at all in the administrative record, relying solely on appellate counsel’s *post hoc* rationalizations for agency action. The Court held that “it is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself” and not on attorneys’ representations. *State Farm*, 463 U.S. at 49-50. Allowing *post hoc* attorney representations to substitute for the APA’s requirements – the agency must set forth in the administrative record its rationale for the decision made and the bases of support for the decision – would eliminate the need for APA compliance.

Bowen v. Georgetown University Hosp., 488 U.S. 204, 225 (1988) (Scalia, J., concurring) (rejecting an end run around rulemaking requirements that would make a “mockery” of the APA).

The final rule did nothing to cure the APA notice-and-comment violation and did not provide § 706(2)(A) compliance. Instead, the BOP recapitulated its failure to provide notice regarding its rationale and empirical evidence in support, which foreclosed the public from having the opportunity to effectively comment on the rule, and deprived the courts of the information necessary for meaningful review, rendering the rule invalid under the APA.

C. The Petitioners Provided Supreme Court Authority, Reinforced By This Court’s And Other Circuit Courts’ Precedent, In Support Of The Requirement Of An Agency Explanation For Its Decision, Supported By Analysis And Empirical Studies.

The BOP’s claim that the petitioners stated the standard under § 706(2)(A) “without citation” is not supported by the record. At page 21 of the Opening Brief, the petitioners set out the following Supreme Court holding: “[W]hen an agency adopts a rule, the agency is required under § 706 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.”’ *State Farm*, 463 U.S. at 41 (quoting *Burlington Truck Lines*, 371 U.S. at 168.” The brief then includes numerous citations

to Ninth Circuit and other circuit court authority elaborating on this blackletter administrative law requirement under § 706. Op. Brief at 21-24.

This rule is critical because the only rationale provided by the BOP is, once again, through its lawyers as previously argued in the statutory cases. The administrative record is devoid of any such statement or conclusion or empirical support. The BOP gave only one reason in the interim rule: to resolve the Circuit split consistently with the BOP's litigation position. 62 Fed. Reg. 53690-01 (Oct. 15, 1997). With the publication of the final rule, the BOP conceded that offenses related to this regulation are non-violent offenses but offered no non-litigation rationale for the disqualification. 65 Fed. Reg 80745-01 (Dec. 22, 2000).

Strict procedural compliance is necessary for several reasons. First, "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.* 318 U.S. 80, 94 (1943). Second, the notice-and-comment process is meaningless unless the public is apprised of the agency's reasoning and has an opportunity to support or challenge the agency's findings. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992). Finally, the human liberty at stake, especially given the statutory and administrative context, requires the most scrupulous adherence to administrative law principles (Op. Br. at 24-27).

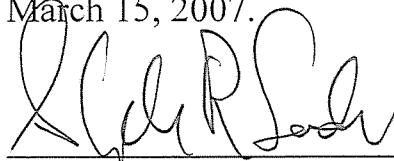
The BOP is not put to an unreasonable challenge when asked to articulate a rationale and provide a justification for, in effect, increasing the actual incarceration for two large classes of federal prisoners. This is especially true when Congress made an initial determination that all persons convicted of nonviolent offenses are categorically eligible for the benefit, and when the rule-change revokes the former eligibility of these statutorily eligible prisoners.

Conclusion

The petitioners are entitled to relief on this question of first impression regarding compliance with the APA in the promulgation of a rule revoking former eligibility for a sentence reduction. If this case involved the most mundane of administrative subjects, the rule would be summarily invalidated for lack of compliance with blackletter administrative law. The result should be no different in the present case where human freedom is at issue. For the foregoing reasons and those stated in the Opening Brief, the Court should reverse the denial of habeas corpus relief and remand for the grant of categorically eligibility for the § 3621(e)

sentence reduction and such other remedies as are appropriate in the interests of justice.

RESPECTFULLY SUBMITTED this March 15, 2007.

A handwritten signature in black ink, appearing to read "Stephen R. Sady". The signature is written in a cursive style with large, looped letters.

Stephen R. Sady
Attorney for Petitioners-Appellants

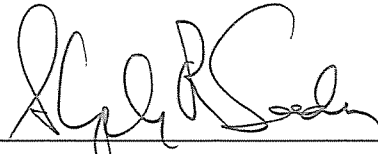
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CHARLES DANIELS, Warden,)	07-35089, 07-35090,
Sheridan FCI,)	07-35091, 07-35092,
)	07-35093, 07-35094,
Respondent-Appellee.)	07-35097

BRIEF FORMAT CERTIFICATION PURSUANT TO
RULE 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1,
I certify that the Appellants' Consolidated Reply Brief is proportionately spaced, has
a typeface of 14 points or more and contains 1,804 words.

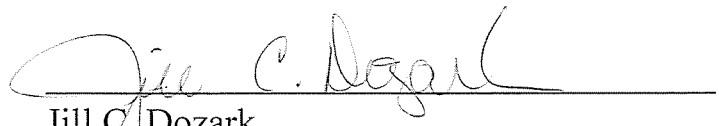
DATED: March 15, 2007.



Stephen R. Sady
Attorney for Petitioners-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I served **APPELLANT'S CONSOLIDATED REPLY BRIEF** on Assistant U.S. Attorney Kelly Zusman, by hand delivering on March 15, 2007, two true, exact, and full copies thereof addressed to: 600 U.S. Courthouse, 1000 S.W. Third Avenue, Portland, Oregon 97204-2902.


Jill C. Dozark