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MICHAEL GARY BARBER, ET AL., :
Petitioners : No. 09-5201
v. :
J. E. THOMAS, WARDEN. :

Tuesday, March 30, 2010

APPEARANCES:

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General, Department of Justice, Washington, D.C.; on
behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in case 09-5201, Barber v. Thomas, the
5 Warden.

6 Mr. Sady.

7 ORAL ARGUMENT OF STEPHEN R. SADY

8 ON BEHALF OF THE PETITIONERS

9 MR. SADY: Mr. -- Mr. Chief Justice, and may
10 it please the Court:

11 The phrase "term of imprisonment" appears
12 three times in the first sentence of the Federal good
13 time statute. The first two times the parties are in
14 agreement. "Term of imprisonment" means "sentence
15 imposed." The third use, which sets the rate for good
16 time credit, also means the "sentence imposed" when it's
17 used in the phrase "up to 54 days of good time credit
18 towards the service of the sentence."

19 JUSTICE SCALIA: But it doesn't always mean
20 that. I think you say somewhere in your brief that it
21 always means that. It surely does not always mean that.
22 Because in -- what is it, 3624 -- wait a minute, now.
23 3624(d) says that, "Upon the release of a prisoner on
24 the expiration of his term of imprisonment, the Bureau
25 of Prisons shall give him clothes, money and

1 transportation."

2 Now there the expiration of his term of
3 imprisonment does not mean the -- the assigned term of
4 imprisonment. It means the assigned term of
5 imprisonment less all the good time credits he has had.

6 MR. SADY: Exactly.

7 JUSTICE SCALIA: Unless you think they are
8 supposed to give him his clothes, you know, several
9 months after he leaves.

10 MR. SADY: Your Honor, that is a perfect use
11 of "term of imprisonment" to mean actual time and any
12 good time credits earned.

13 JUSTICE SCALIA: Right.

14 MR. SADY: And it uses the term "release."
15 "Release" is defined in 3624(a), which says that you are
16 released when you have your actual time served and any
17 good time.

18 The flaw in the Bureau of Prisons system is
19 that they do not give credit towards the term of
20 imprisonment as this statute in 3624(b) dictates.

21 JUSTICE SCALIA: I'm not addressing that.
22 All I'm -- look, it -- the text says "upon the release
23 of a prisoner on the expiration of his term of
24 imprisonment." My only point is that that -- you have
25 to acknowledge that that is a use of the phrase "term of

1 imprisonment" that does not mean the sentence he was
2 given, but rather means the sentence that he served.

3 MR. SADY: I respectfully disagree because
4 it expires. A term of imprisonment, a ten-year
5 sentence, expires. When you have 311 days 10 times,
6 that means it has expired, because you also are giving
7 those 54 days of good time credits 10 times.

8 JUSTICE SCALIA: That's right.

9 JUSTICE ALITO: But why isn't the term of
10 imprisonment most reasonably understood to mean the term
11 that is imposed viewed at the time when it is imposed?
12 So that if someone is sentenced to a term of 360 days, 5
13 years, and begins serving his sentence on January 1st,
14 year 1 of the term imposed ends on December 31st of that
15 year; year 2 of the term imposed begins on January 1st
16 of the following year, and so forth.

17 MR. SADY: Justice Alito, that would be the
18 end of the time served for 1 year, but for the term of
19 imprisonment, because if we assume at the end of the
20 365 days that person has earned maximum good time
21 credit --

22 JUSTICE ALITO: Right.

23 MR. SADY: That he should receive credit
24 towards the service of the sentence. That means on the
25 365th day he should move back on the calendar a

1 adjustment for good time and a reset for the next year.
2 That way, if you have a ten-year sentence, you have ten
3 opportunities to --

4 JUSTICE ALITO: Well, hang on. I understand
5 what you are arguing, but I don't understand why the
6 term of imprisonment changes. We look at the -- we look
7 at the term of the imprisonment on the day when it is
8 imposed and the day when the defendant begins serving
9 the sentence, and you can say: Year one ends at the end
10 of 2010; year two ends at the end of 2011.

11 Why do you think that the term -- the phrase
12 "term of imprisonment" has to change as -- the
13 understanding of the "term of imprisonment" has to
14 change as the prisoner progresses in serving the
15 sentence? I totally fail to understand that.

16 MR. SADY: It doesn't change. It's still --
17 the two components of a term of imprisonment are actual
18 time and good time credits. So the way we are
19 presenting it is the first year of the term of
20 imprisonment is the 311 days of actual service and the
21 54 days --

22 JUSTICE ALITO: But you don't know whether
23 that -- you don't know whether that prisoner is going to
24 be eligible for the 54 days until the 365 days are over.

25 MR. SADY: That's fine. We -- if the Bureau

1 of Prisons determines that the person should receive up
2 to 54 days at day 365, then they receive credit towards
3 the service of their sentence. That means moving it
4 back 54 days because they didn't have to serve those
5 days. And then you reset --

6 JUSTICE ALITO: Well, I'm not sure where you
7 get that -- I'm not sure where you get that out of the
8 statute. But I still don't think you have answered my
9 question. I don't want to belabor it too much.

10 On the day when the prisoner in my
11 hypothetical begins serving his sentence, if you said,
12 When will your first year of imprisonment -- first year
13 of your term of imprisonment end? You would say
14 December 31st, 2010. When will the second year of the
15 term of imprisonment end? December 31st, 2011. That's
16 what you would have to say at that point, because you
17 don't know whether the prisoner will earn any good time
18 credits. So why do you think that the meaning of the
19 year of the term of imprisonment changes as the sentence
20 goes on?

21 MR. SADY: I do -- do not think it changes.
22 I think that it is adjusted for good time, which is
23 exactly what Congress intended. They said that every
24 day, you get credit beyond time served. They use the
25 phrase "beyond time served" for credit towards the

1 service --

2 JUSTICE SOTOMAYOR: Counsel, I'm -- perhaps
3 I can, if you will permit me, rephrase Justice Alito's
4 question in sort of the more simplistic way I looked at
5 it.

6 Why is it that we have to do the calculation
7 that you're talking about, which is start at 311 days
8 and take back days, which makes no sense to me, or their
9 very complicated ten-page number?

10 Why can't they just take 54 days at the end
11 of every year that there is actual service, and that the
12 time served, plus whatever number of days have been
13 earned, you subtract it from the term of imprisonment?
14 So if he was imprisoned for 10 years, he got 540 days
15 for whatever it is. At the end of the 9th year, he made
16 up whatever -- you added up 9 times 54, and you took it
17 away from 10. He serves 9 and that. That would make
18 sense of "beyond the time served" language that's in
19 this provision.

20 MR. SADY: Justice Sotomayor, we are not
21 asking -- 311 doesn't have to be the magic day of when
22 they determine whether they should receive it. We are
23 saying, go ahead, assume exactly what they are doing
24 now. Go up to 365 days.

25 But they do make a determination. At that

1 point of making the determination, that's when they go
2 back to 54 days and have to reset. That way on a
3 10-year sentence you have 10 blocks that Congress
4 intended to give prisoners to be able to earn 54 days in
5 each of those blocks.

6 Now, the way that we were hearing it posited
7 from Justice Alito, if we have the 54 days on top of
8 time served without any adjustment, then we end up with
9 a 419-year first day -- first year, and you can only fit
10 8 opportunities to earn the 54 days.

11 JUSTICE ALITO: No, not at all. No. At the
12 end of -- at the end of 2010, in my hypothetical, you
13 would take the 54 days off the end, just as Justice
14 Sotomayor suggested.

15 MR. SADY: And the --

16 JUSTICE ALITO: And -- but it doesn't mean
17 that the service doesn't -- your -- your argument is
18 predicated on the idea that service of year two begins
19 on the 311th day.

20 MR. SADY: If there is an adjustment for
21 good time, because "term of imprisonment" is a term of
22 art that doesn't mean time served only. It can mean --

23 JUSTICE ALITO: But I don't understand that.
24 I will not belabor it. I don't understand why the
25 parties have spent so much time sparring over that

1 issue, which seems to me to be totally unnecessary and
2 irrelevant.

3 MR. SADY: Justice Alito, if I could refer
4 you to 3621(a), 3624(a), and 3624(b), each of those
5 refers -- when they are talking about a term of
6 imprisonment, each refers to it as "less good time."
7 And -- and unless you do that, the reason --

8 JUSTICE SOTOMAYOR: Well, do you do it if
9 you take (a), and (a) says: A prisoner shall be
10 released by the Bureau of Prisons on the date of the
11 expiration of the prisoner's term of imprisonment -- 10
12 years, we are assuming, an imprisonment -- less any time
13 credited towards the service of the prisoner's sentence,
14 as provided in subsection (b).

15 MR. SADY: Exactly.

16 JUSTICE SOTOMAYOR: So each year that he
17 served, you add up the number of days he has served, the
18 good time credit, and you subtract them from the
19 120 months that you have given him, and you figure out
20 when he's going to get out. You work backwards, not
21 forward, the way everyone seems to be doing.

22 MR. SADY: If you do that, you only end up
23 with eight opportunities to -- to have 54 days. That's
24 why it's the difference between -- I think anybody
25 reading --

1 JUSTICE SOTOMAYOR: But that's the way the
2 language is written. So I mean you may want the greater
3 opportunity, but it says by its explicit phrase: Terms:
4 At the date of the prisoner's -- expiration of the
5 prisoner's term of imprisonment, take that day and
6 subtract from it time credited towards the service of
7 the prisoner's sentence.

8 MR. SADY: We are going to -- the rate
9 phrase is: Up to 54 days at the end of each year of the
10 term of imprisonment.

11 If there is a 10-year term of imprisonment,
12 that means there's 10 opportunities to earn 54 days.
13 The Bureau of Prisons' math ends up with 470 days,
14 70 days less. And the reason for that is that they do
15 not interpret "term of imprisonment" to encompass the
16 possibility of good time.

17 That is the only -- because you should have
18 10 blocks of 365 days. Each of those blocks, you may be
19 able to get 54 days. Then it's 311. But maybe you
20 didn't earn any time. Then it would be a 365-block.
21 But the -- actually, the very good idea that Congress
22 had was that you had an incentive at every stage of your
23 term of imprisonment for good behavior.

24 Even if you were misbehaving early in your
25 prison term, at the end you still have the opportunity

1 to earn 54 days against that last 365 days. It counts
2 for every word in the statute. It gives every statute
3 meaning. And it doesn't put us in the position of
4 giving two -- two phrases the exact same meaning in the
5 same sentence.

6 This Court has never found that phrases --
7 two phrases, uses of "term of imprisonment" in the same
8 sentence, mean different things.

9 JUSTICE KENNEDY: What do you do with --
10 if -- it's a very short sentence? A year and a day, in
11 your view, is a year and a day less 54.

12 MR. SADY: Yes.

13 JUSTICE KENNEDY: But 360 days, what do you
14 do with that?

15 MR. SADY: With 360 --

16 JUSTICE KENNEDY: Yes. If -- suppose it's
17 for -- just -- the whole sentence is 360 days.

18 MR. SADY: If it says 366 days, so that the
19 year --

20 JUSTICE KENNEDY: No, 360. In other words,
21 short of a year.

22 MR. SADY: Then it -- a 360-day sentence
23 would not be eligible, because we -- the parties are
24 agreed that "term of imprisonment" means a sentence of
25 more than a year. So it has to be more than 365 days.

1 JUSTICE KENNEDY: So the person that gets a
2 year and a day serves less than the person that gets
3 less than a year?

4 MR. SADY: That is correct. And district
5 courts frequently address that problem. When you have a
6 relatively short sentence, you say: Judge, could you
7 give us -- instead of an 11-month sentence, could you
8 give us a year and a day sentence, so that you could
9 earn the good time on that?

10 JUSTICE SCALIA: How can you earn the good
11 time? I mean you only earn the good time if -- if you
12 are a good prisoner for a year.

13 MR. SADY: That gets us to the --

14 JUSTICE SCALIA: So you are going to let him
15 out 54 days before the year, even though he hasn't
16 earned the good time in the year?

17 MR. SADY: He has.

18 JUSTICE SCALIA: What did he do? How has
19 he?

20 MR. SADY: He has because of the last
21 sentence in 3624(b) that says that for the last year or
22 portion of the year, that you go ahead and establish the
23 two-step process. First, you figure out the projected
24 release date, which is a release date with maximum good
25 time. Then you make the decision about whether the

1 prisoner should receive that within six weeks of that --
2 of that projected release date.

3 JUSTICE STEVENS: Yes, but that still
4 couldn't give him the full 54 days, because there's only
5 42 days in six weeks.

6 MR. SADY: That's only a measure when you
7 make the determination. They -- they were recognizing
8 that for the last period of time, or for a year and a
9 day sentence, that you are not going to be able to do
10 the time all the time, but you will, so that's why there
11 is a special mechanism at the end.

12 JUSTICE STEVENS: But I'm saying the special
13 mechanism can't give the full 54 days.

14 JUSTICE SCALIA: Exactly.

15 JUSTICE STEVENS: Because they don't make it
16 until 42 days before the end of the sentence.

17 MR. SADY: They make it until 311 days at
18 the end of the sentence, because what they do is they
19 make the -- they figure out what the maximum good time
20 would be, which would be 312 days on a 300 and -- on a
21 year and a day sentence, and they make that
22 determination earlier.

23 They say, okay, you have been good for that
24 period of time. We recognize that this is going to be a
25 problem, the same problem you would have on a sentence

1 of 10 years and 6 months, where you have to prorate the
2 credit, 27 days instead of 54, half, and then figure out
3 the projected release date with 180 days, subtract the
4 27 days, and then make the determination sometime within
5 the 6 weeks up to that last point.

6 So that there is a mechanism for
7 understanding that it is -- that in the last year there
8 is going -- going to be an assumption that if you are
9 behaving all the way up to -- in the full sentence --
10 day 311, you should get the full 54 days.

11 CHIEF JUSTICE ROBERTS: I'm sure there is
12 something wrong with this predicate to this question,
13 but the -- the statute allows the Bureau to make a
14 determination of good time credit within 15 days after
15 the end of each year of the sentence.

16 MR. SADY: Yes.

17 CHIEF JUSTICE ROBERTS: They cannot make
18 that determination within 15 days of the 311 days. And
19 so "each year of the sentence" must mean each -- the
20 full year, the 365 days.

21 MR. SADY: Our position is that the Bureau
22 of Prisons can make its determination as it pleases.
23 We -- we are asking the Court to do -- to construe a
24 statute, not write a policy statement. So we understand
25 that there are going to be some mechanics of it. But

1 the mechanics in this work very easily with the
2 assurance that they are receiving good time credit
3 against the period of the sentence imposed by the judge.

4 CHIEF JUSTICE ROBERTS: You treat each year
5 of the sentence as the 311 days if there has been good
6 behavior, no?

7 MR. SADY: Not necessarily. We are --
8 I'm -- if the Bureau of Prisons wants to make that
9 determination at day 365, that's fine, as long as they
10 adjust by doing exactly what the statute says: Credit
11 towards the service of the sentence, move it back 40 --
12 54 days, and then reset. If you do that, you have 10
13 blocks of 365 days.

14 JUSTICE BREYER: Well, why do you do have to
15 do that? I mean you read it. It so complicated. Just
16 reading this, I -- I think the language should say this:
17 10 years, he's got a 10-year sentence. At the end of
18 the first year you write the number 54 on a piece of
19 paper if he has done well.

20 Suppose he comes in on January 1, okay? So
21 January 2, after the first year, you write the word
22 50 -- the number 54. And you do that each year. And by
23 the time you get to the year 8, what you have done is
24 you have got 432 days.

25 So then you subtract the 430 days from 10

1 years, and what you get is you are 67 days short of 9
2 years. So now you look at the last sentence, and what
3 you do is you take 67 days, subtract that from 365, and
4 you've got 298, and you simply prorate for those 298.
5 And you subtract that, too, so he gets another 10 days
6 or so, or 15 days credit, and that's it.

7 And that's following the statute, it seems
8 to me, absolutely literally. And it also seems to me to
9 make sense, because you don't want to give him credit
10 for time he never serves.

11 MR. SADY: Justice Breyer, I think it
12 doesn't make sense, because what it does is it creates
13 an 87.2 minimum sentence that is served, and we note
14 that the sentencing table upon which every Federal
15 sentence is predicated is based on 85 percent. That
16 being --

17 JUSTICE BREYER: No, that isn't what the --
18 if you want to know what the sentencing commission did,
19 I think the best evidence of that is you read the
20 introduction to the guidelines. And what the
21 introduction to the guidelines says is that, roughly
22 speaking, many of the sentences approximate the time
23 actually served before.

24 Now, what to me that suggests is that the
25 sentencing commission never considered this question.

1 And if there's something more specific than that, that
2 shows they did, I would like to know what it is, because
3 I don't trust memory.

4 MR. SADY: Your Honor, we are relying very
5 heavily on the supplemental report at -- at page 140 of
6 the joint appendix that says we -- we divide it by .85
7 in order to calibrate the sentencing table to include
8 good time. That means that every sentence has been
9 calibrated based on assuming 10 opportunities to earn
10 54 days, which --

11 JUSTICE SCALIA: Of course, the government
12 contends it's none of the sentencing commission's
13 business. It's up to the Bureau of Prisons. Isn't that
14 the government's position?

15 MR. SADY: That is their position. And our
16 position is that it's -- administering the statute is
17 the Bureau of Prisons's business, but deciding what the
18 minimum sentence that can -- minimum time that can be
19 served to satisfy a term of imprisonment is a policy
20 decision, and that the policy is properly placed --

21 JUSTICE BREYER: But there is nothing in
22 there -- that's not a policy statement; that's not a
23 guideline. That's a staff conclusion. And the staff
24 conclusion, I think, is conflicting with what it says in
25 the -- in the introduction to the guidelines, which is

1 that all of this was very approximate. I don't see
2 how -- how -- a court would be bound by that.

3 MR. SADY: I think that the court could be
4 advised by it in terms of knowing that we are looking at
5 a harsher sentence. Everybody is serving more time than
6 -- the sentence that the judge imposed was -- whether it
7 was advisory guidelines or mandatory guidelines, the
8 sentencing table provided the initial baseline.

9 And that initial baseline was boosted by 2.2
10 percent, which is not an insignificant amount, and there
11 is a very simple way for the court to construe the
12 statute consistently throughout to conform the two, so
13 that people are not serving 2.2 percent more time in
14 custody than the sentencing table that every judge uses
15 in imposing their sentence.

16 We are institutionalizing a harsher system
17 in a way that doesn't meet the statutory language,
18 because the statutory language says "term of
19 imprisonment."

20 And if it's term of imprisonment, 10 years
21 of a term of imprisonment, I think a reasonable plain
22 meaning is that you have 10 opportunities to earn
23 54 days.

24 JUSTICE GINSBURG: Mr. Sady, you -- you said
25 something about 15 percent or 85 percent is a more

1 workable system than -- was it 12.9 percent?

2 Do we have any information on, (A), the
3 number of Federal prisoners who get good time and in
4 that universe, the ones who get good time, how many get
5 the full credit and how many get something less than the
6 full 54 days?

7 MR. SADY: Justice Ginsburg, there are
8 approximately 200,000 prisoners, and of those about
9 195,000 of them are eligible for good time credits.

10 My anecdotal experience is that most
11 prisoners get most of the -- the good time credits, so
12 it's not at all unusual for prisoners to achieve most of
13 that. There is some that have minor amounts, and there
14 is a relatively smaller number, at least in my
15 experience, who do not get a lot of it.

16 JUSTICE BREYER: Is this right? I'm -- I'm
17 sorry to ask you this question, but I get lost in the
18 math of this sometimes.

19 Do you remember my example I just gave, you
20 know, with the 9 years you go and put it on a piece of
21 paper?

22 MR. SADY: Yes, the 419 --

23 JUSTICE BREYER: I take it what you want is
24 you, in -- in essence, want him to get credit for
25 54 days for that tenth year?

1 MR. SADY: Yes.

2 JUSTICE BREYER: Yes. And the argument
3 against that, reading the language and so forth, is,
4 well, look this is an imaginary 10th year. He is not
5 actually in prison for 10 years. He is going to be
6 released sometime late in year 8. And so why should we
7 add 54 days? I mean maybe it would be a nice thing
8 because sentences are awfully long, but -- but why would
9 anybody want to add 54 days in respect to a year that's
10 never going to be served?

11 MR. SADY: Each year is served in the -- if
12 you take away the 54 days, if you credit it towards the
13 service of the sentence and do the adjustment and reset
14 that we are asking the Court to do so that you have 10
15 opportunities, then in the last year, you are -- when
16 you are in -- you go to the last sentence that
17 acknowledges that you are going to have to make some
18 arbitrary time that you are going to, say, okay, we are
19 going to decide that you have done well enough that you
20 are going to be able to get the full credit for the last
21 year.

22 But the flaw in the Bureau of Prisons is by
23 having the 54 days and actual time and that that's what
24 happens at the first year, that's a 419-day first year.
25 You can only squeeze 8 of those in. The prisoners look

1 at it and they see, plain statute, what was your term of
2 imprisonment, how many ends of each year of a term of
3 imprisonment should you have in a 10-year sentence. Ten
4 years.

5 JUSTICE ALITO: Well, the statute says that
6 it is -- the credit, it can be received, quote, at the
7 end of each year of the prisoner's term of imprisonment
8 beginning at the end of the first year of the term.

9 MR. SADY: Yes.

10 JUSTICE ALITO: Now, when does -- when is
11 that point, in your opinion?

12 MR. SADY: The Bureau of Prisons probably
13 has discretion in administering. I'm accepting as a
14 proposition on the day 365 they make that determination.

15 JUSTICE ALITO: Okay. So the -- day 365 is
16 the end of the first year of -- of the term of
17 imprisonment?

18 MR. SADY: That's -- that's when they are
19 making the determination. If they make a determination
20 that he is -- should receive credit, then the end of the
21 first year becomes day 311, because he has received --

22 JUSTICE SOTOMAYOR: And then what do --

23 MR. SADY: -- 311.

24 JUSTICE ALITO: The statute says that
25 they -- that the prisoner may receive credit at the end

1 of each year of the prisoner's term of imprisonment
2 beginning at the end of the first year of the term.

3 MR. SADY: No.

4 JUSTICE ALITO: And what I'm asking is, when
5 is the end of the first year of the term within the
6 meaning of that language?

7 MR. SADY: The meaning of that language is
8 day 3 --

9 JUSTICE ALITO: Is it day 3 --

10 MR. SADY: Excuse me.

11 JUSTICE ALITO: Is it day 365, or is it day
12 311?

13 MR. SADY: It depends. And the reason it
14 depends is because the language of the statute says
15 "credit toward the service of prisoner's sentence beyond
16 time served," so if you do it beyond time served and you
17 give him credit towards that sentence -- the Bureau of
18 Prisons is making a determination. Once we -- they make
19 their determination, and we respect that determination,
20 we then have to go -- from the 365th day, back, because
21 for 54 of those days he doesn't have to be there. He
22 has earned that time and you can --

23 JUSTICE SOTOMAYOR: So the next year --

24 MR. SADY: -- adjust and reset at the next
25 365.

1 JUSTICE SOTOMAYOR: -- you start it at 311?

2 MR. SADY: No.

3 JUSTICE SOTOMAYOR: And he now serves
4 another year and you back him up again at the end of
5 that year? To 300 --

6 MR. SADY: Yes, that is -- that is certainly
7 one way of mechanically doing it so that you have 10
8 blocks of 365 days each as a term of imprisonment.
9 Because term of --

10 JUSTICE SOTOMAYOR: And you -- and you think
11 that their system is easier?

12 MR. SADY: Yes.

13 (Laughter.)

14 JUSTICE SOTOMAYOR: That their system is --

15 MR. SADY: No, absolutely not. Their --
16 their system makes -- nobody can understand the math.

17 JUSTICE BREYER: Another way to think, and I
18 think probably you'll -- if you look through the records
19 of the commission, they even thought about this problem,
20 and the -- the -- you will see a lot of talks given by
21 various people who were there, which say that for this
22 reason you are bringing up, that it might have been
23 thought there was no credit for the first year.

24 In other words, you don't cut the sentence
25 in the first year. You don't begin cut until the second

1 year has been served, so he has to serve 365 days. Now
2 when you point that out, that is not the Bureau of
3 Prisons's interpretation, that's nobody's
4 interpretation. They're all going to let him out if
5 it's a year and a day. They are going to let him out
6 several weeks before the end of the first year, aren't
7 they?

8 MR. SADY: Yes. There was a technical
9 amendment.

10 JUSTICE BREYER: Everybody's going to do
11 that. Oh -- there was a technical amendment.

12 MR. SADY: To address that first year, to
13 make sure that they did that.

14 JUSTICE BREYER: That's what happened. In
15 other words, the statute made before --

16 MR. SADY: Exactly.

17 JUSTICE BREYER: Ah, I better get that --

18 MR. SADY: -- when it was at 36 days. And
19 it's interesting, so page 56 of the -- of the Senate
20 report on this, they used the term "adjust for good
21 time." Now that -- then it was 36 days. But Congress
22 was using exact same thought as the language here that
23 says that the time is -- that you give credit towards
24 the service of a sentence.

25 And with the Court's permission I will

1 reserve the remaining time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.
3 Mr. Wall.

4 ORAL ARGUMENT OF JEFFREY B. WALL
5 ON BEHALF OF THE RESPONDENT

6 MR. WALL: Mr. Chief Justice, and may it
7 please the Court:

8 Justice Breyer, I think you stole my
9 thunder. I wanted to explain how the bureau does it,
10 and you laid it out exactly right. If you have -- and I
11 think just looking at the language of the statute, it
12 tracks perfectly. If you have a prisoner serving a
13 10-year sentence and he comes in on January 1st, the end
14 of his first year of imprisonment is December 31st, and
15 on that date he gets 54 days taken off the back end of
16 the sentence. That cycle repeats itself for the next 8
17 years. And --

18 JUSTICE BREYER: But the trouble with that,
19 and I'm glad to know about that technical amendment,
20 because then --

21 MR. WALL: Right.

22 JUSTICE BREYER: -- we never considered it
23 when I was on the -- nobody thought about it at that
24 time because the language was different.

25 But now that you had have got this language

1 now, it's hard to reconcile with that first year. He is
2 sentenced for a year and a day, you see. So literally,
3 it says calculated on January 2 of the next year. But
4 he's already been in for longer than he should be by
5 that point. So you really have to calculate it before
6 the year ends; you have to calculate it at least by
7 October.

8 And -- and -- and once you start calculating
9 it before, the statute literally says, we are into a
10 more complicated thing than I thought.

11 MR. WALL: Well, and that's why they have
12 the sentence at the end, as you pointed out about the
13 proration. So when the -- when the statute says, what
14 it says -- starts by saying is, if you are serving a
15 sentence of longer than a year you are eligible for good
16 time credit. So you are earning credit as you go
17 through that first year.

18 Congress knew then if you had have a year
19 and a day sentence, you wouldn't be actually serving a
20 full year because of the credits bringing you below the
21 year mark. So what it does in the last sentence, it
22 says if you are in your last year and that's a partial
23 year, we prorate. So on your 319th day you have earned
24 47 days of good time credit. Those combined equal a
25 sentence of a year and a day, and you are out after your

1 319th day. On the hypothetical --

2 JUSTICE SOTOMAYOR: There is a premise flaw
3 there. And that premise flaw is that you have told us
4 that you don't earn the credit until the end of the
5 year.

6 MR. WALL: Well --

7 JUSTICE SOTOMAYOR: So your answer about
8 this probation is not an answer, because it's -- your
9 premise is not the same.

10 MR. WALL: That's why for each full year
11 served, so for a 10-year sentence, you are right that
12 you are making a determination at the end of the year
13 for the first 8 years, but when you get to that ninth
14 year, as Justice Breyer pointed out --

15 JUSTICE SOTOMAYOR: I'm not worried about
16 sentences that are more than 2 years. I'm worried about
17 the prisoner who is sentenced to a year and a day. How
18 does that proration help that individual, since they are
19 not going to get the good time credit until they've
20 served a year?

21 MR. WALL: So, the way this works is that
22 for the prisoner sentenced to a year and a day or
23 13 months or 14 months, because they are receiving
24 credit through that first year, their good time credit
25 brings them below a year. They'll never serve a full

1 year.

2 JUSTICE SOTOMAYOR: Counsel, I --

3 MR. WALL: And what the law --

4 JUSTICE SOTOMAYOR: That's what I'm saying
5 to you. The whole brief says to us, they measure the
6 entitlement to good time credit at the end of the first
7 year.

8 MR. WALL: Except for the last year or
9 partial year. And what the final sentence of B1 says
10 is, credit for the last year or portion of a year of the
11 term of imprisonment shall be prorated and credited
12 within the last 6 weeks. So for the prisoner who has a
13 year and a day sentence, his sentence is literally all
14 proration. He is just serving a partial year.

15 JUSTICE SOTOMAYOR: He is not going to get
16 54 days? He's going to get --

17 MR. WALL: That's right. On the 319th day
18 he has come through about nine tenths of the year, he
19 has accrued 47 days.

20 JUSTICE SOTOMAYOR: I just want to make
21 absolutely sure because I hadn't done the math forward;
22 I did the math backwards.

23 MR. WALL: Right.

24 JUSTICE SOTOMAYOR: Which was the one that
25 Justice Breyer and Justice Alito set forth --

1 MR. WALL: Right.

2 JUSTICE SOTOMAYOR: Which is 54 days are
3 earned back for each year, and you take it off the full
4 term of imprisonment.

5 The -- you are representing to me that the
6 math that is in your program statement is accomplishing
7 that result?

8 MR. WALL: Absolutely. Which is to say when
9 the prisoner gets to his last year, if that's a partial
10 year, he is not going to get the 54 days, he's going to
11 get some portion of the 54 days, based on what part of a
12 year he served. And that is prorated and credited
13 within the last 6 weeks. Now, it's normally done on the
14 release date. So in that 9th year for the 10-year
15 prisoner --

16 JUSTICE STEVENS: May I just interrupt with
17 one question? If he got a total of 540 or whatever it
18 is, he should never enter the 9th year because he would
19 finish the 10-year sentence in less than 8 years.

20 MR. WALL: Well --

21 JUSTICE STEVENS: Or less than 9 years,
22 rather.

23 MR. WALL: That's -- that's right. 540
24 wouldn't be quite 2 years, but setting that to the
25 side --

1 JUSTICE STEVENS: So how does he -- how does
2 he get his 10th block of good time? How does he ever
3 get it under your --

4 MR. WALL: Well, under the government's view
5 he can only earn good time credit when he is actually
6 incarcerated. And what Petitioners are coming in and
7 saying --

8 JUSTICE STEVENS: Right. I understand. But
9 explain to me how -- how he can get more than a year of
10 good time credit before the 10th year begins?

11 MR. WALL: Well, so, if you take a 10-year
12 prisoner -- a prisoner with a 10-year sentence, the way
13 it currently works, at the end of the 8th year he has
14 accrued 432 days of good time credit.

15 JUSTICE STEVENS: Which is more than a year.

16 MR. WALL: Right. So he knocked off his
17 full 10th year and he's knocked off a part of his 9th
18 year. Now we are at that final 9th year, which is a
19 prorated year. He has got 298 days left and by the
20 260th day he earned 38 days of credit. So he is
21 released after the 260th day of his 9th year.

22 And as Justice Breyer pointed out, that
23 precisely tracks the language of the statute. You do it
24 at the end of each full year until you get to the last
25 partial year, and then you prorate and you do it in the

1 last 6 weeks.

2 JUSTICE KENNEDY: And each of those 4 years
3 included 54 days of credit?

4 MR. WALL: That's right. So the -- the
5 Petitioners here, Petitioner Barber, for instance, has
6 been incarcerated for over 17 years. At the end of each
7 of his 17 years in prison, he has gotten 54 days of
8 credit. What Petitioner Barber is here saying is, I am
9 going to get 3 whole years knocked off the end of my
10 sentence; I want the 54 days for those years, too.

11 I want 54 days for every year of my sentence
12 as imposed by the court, not as served by me behind
13 bars, and that's what doesn't track the language of the
14 statute. Because the only way you can do that, as
15 Justice Alito pointed out, is to read "year" to mean
16 311 days, and it is no answer to say, as Petitioners do,
17 well, you can do the determination whenever. What they
18 are saying is at the end of a 311-day period, you should
19 determine whether the prisoner gets the credit.

20 But what the statute says is the
21 determination itself has to occur at the end of the
22 year. So you can't fold the 54 days into the year
23 because you haven't made the determination yet.

24 JUSTICE ALITO: Well, I didn't understand
25 them to be saying that. I understood them to be saying

1 that the determination could be made at the end of
2 365 days, but if it's determined that the prisoner is
3 entitled to 54 days of credit, then year 1 should be
4 regarded as having begun on the 312th day, rather than
5 the 366th day.

6 MR. WALL: I think that's right, which first
7 it is inconsistent with the language of the statute,
8 which says at the end of each year, so that reads "year"
9 to be an 311-day cycle. But it also sets up a very odd
10 system. What happens if the prisoner misbehaves during
11 days 312 and day 365?

12 On Petitioner's approach, it seems to me,
13 the new year has started on day 312. Now, but take the
14 example, he says, well, you can do it on the 365th day.
15 Well, if the prisoner's misbehaved on day 340, is that
16 coming out of the first year or out of the second year.

17 JUSTICE ALITO: Well, I think that they
18 would say you won't know when the second year has begun
19 until the full calendar year has been completed.

20 MR. WALL: And I guess the -- the difficulty
21 with that approach is that it seems to me that once the
22 311-day cycle is finished, you have to start a new
23 311-day cycle on day 312.

24 JUSTICE KENNEDY: Well, they are just not
25 vested until the year has -- the full year has passed.

1 MR. WALL: Well, so vesting is a little bit
2 unique, Justice Kennedy, under the statute, because none
3 of the time vests under (b)(2) until they are actually
4 released. But --

5 JUSTICE KENNEDY: Well, I -- I use it just
6 in the calculating sense.

7 MR. WALL: I see -- I see what you're
8 saying. They could do the bookkeeping determination on
9 day 365. But I don't think that's what's important.
10 What is important is that on Petitioner's view, the
11 second year, for credit purposes, has to start on day
12 312. You have to have 10 blocks of 311 days and you
13 have to be measuring after every 311th day.

14 JUSTICE SCALIA: No, no, you don't
15 measure -- I don't think that -- you -- you begin
16 measuring on 311, but you measure 365 days from -- from
17 311. And if he has behaved well during all -- all of
18 those 365 days, then you knock off another 51 days or
19 whatever it is. And you begin the third year from then,
20 but you give him another 365 days to determine whether
21 he has behaved well.

22 MR. WALL: Justice Scalia, if you are
23 measuring 365 days from day 311 --

24 JUSTICE SCALIA: Right.

25 MR. WALL: -- then you should equally be

1 measuring 365 days from day 1. Which is to say, if
2 you're doing --

3 JUSTICE SCALIA: He did. He did. You
4 didn't give him the credit until he served the whole
5 365 days. At that point, he gets the credit and you
6 count the second year as though it begins on day 311.

7 MR. WALL: Well, the -- I was half with you
8 there.

9 The bureau does do it by looking at what
10 they do during the full year, from January 1 to
11 December 31, and then it determines whether you get
12 54 days knocked off the end of your sentence. What
13 happens between day 311 and day 365 is not different
14 than what happens during the rest of the year.

15 JUSTICE SCALIA: Exactly.

16 MR. WALL: What the -- what the statute asks
17 the bureau to determine is, at the end of each year,
18 has, during that year, the prisoner demonstrated
19 exemplary compliance with institutional regulations? So
20 the prisoner has got to go a full year, a full 365 days,
21 and be well-behaved. Then he gets 54 days taken off the
22 back end of the sentence. And if that's the way that
23 you're saying it should work, that is precisely how the
24 bureau interprets the statute.

25 JUSTICE SCALIA: Except that they're not

1 taking it off from the back end. They are taking it off
2 from the next year. So that in the second year, if he
3 -- if he behaves well for 365 days from 311 -- okay? He
4 behaves well for the next 365 days. The next year will
5 begin at 622.

6 But then he has to serve another 365 days
7 before he gets good time credit. And then the next year
8 will begin three times 311: 933. And so forth.

9 MR. WALL: Justice Alito, I think that sets
10 up an odd system.

11 JUSTICE SCALIA: Isn't that right? See, he
12 agrees with me.

13 (Laughter.)

14 No, I'm not saying that's right. I'm saying
15 that that's -- that is what he is proposing.

16 MR. WALL: No, I -- I agree. That is the
17 difference. Petitioners think that you measure credit
18 over these 311-day cycles, and if you -- you know, you
19 get to the 311th day, you take the 54 days of credit,
20 and together, they equal a year of the sentence imposed.

21 But what the statute says is you make the
22 determination at the end of the year. And we don't read
23 "year" to be a 311-day period. We read it to be a
24 365-day period.

25 JUSTICE STEVENS: Yes, but as Justice Scalia

1 says, you know, you do make the determination on the
2 365th day, but what you determine is that the -- having
3 been a good prisoner, his first year expired 54 days
4 earlier, and then you start over.

5 MR. WALL: But what -- that's right. But
6 what the statute -- the statute doesn't just say,
7 Justice Stevens, you make the determination at the end
8 of the first year of the term. The determination is
9 that during that year, the prisoner has displayed
10 compliance. So he has got to display compliance through
11 day 1 through day 365.

12 JUSTICE STEVENS: Let me interrupt and get
13 one thing off my mind that I just -- supposing he
14 misbehaves in year 3. Does that just affect his good
15 time credits in year 3, or does it mean he is canceled
16 for years 1 and 2?

17 MR. WALL: No. He can lose credit that he
18 has accrued up to that point, but he can't lose credit
19 that he has -- that he is eligible for in future years.
20 So let's say that we are coming up on the end of the 3rd
21 year. He's earned his full 108 days for his first two
22 years, and he has earned some prorated portion. He can
23 lose any of that, but he is still eligible going forward
24 to keep getting 54 days at the end of each year.

25 JUSTICE STEVENS: But he can lose his

1 108 days?

2 MR. WALL: Yes.

3 CHIEF JUSTICE ROBERTS: How can he do that?

4 I'm looking at page 14A of your appendix. It says:

5 Such credit toward service of sentence vests at the time
6 that it is received. Credit that is vested may not
7 later be withdrawn.

8 MR. WALL: I'm sorry, Mr. Chief Justice. I
9 should have been more clear.

10 For prisoners sentenced subject to the SRA,
11 which was in effect from 1987 to 1994, you are right.
12 And that is the SRA according to your brief.

13 Their credit vests. That vesting
14 requirement was eliminated in the PLRA, which governs
15 prisoner's sentences since 1986. So for the vast bulk
16 of prisoners in the Federal system who are subject to
17 the PLRA, their credit does not vest until they are
18 released.

19 JUSTICE GINSBURG: Mr. Wall, the -- if we
20 consider both methods plausible, the number comes out at
21 15 percent -- 85 percent, 15 percent. It's a more
22 workable number, and there are some hints in the
23 legislative history that Congress thought 85 percent,
24 not 87.2 or whatever it is.

25 So in choosing between those two methods,

1 why not take the easier number to work with?

2 MR. WALL: Well, two reasons. I think to
3 the extent that you are suggesting the statute is
4 ambiguous, the Bureau of Prisons is charged by Congress
5 with administering the statute in both *Reno v. Koray* and
6 *Lopez v. Davis*. This Court deferred to the bureau's
7 interpretation of other prisoner credit statutes. We
8 think the bureau is equally entitled to the same
9 discretion here to interpret this statute.

10 JUSTICE KENNEDY: We -- if we disagree with
11 that, if we disagree that the BOP has authority in this
12 area, then -- as Justice Ginsburg's question, I think,
13 suggests -- does not the Rule of Lenity apply?

14 MR. WALL: Well, this Court's been clear --
15 and I -- I can't put it any better than Justice
16 Sotomayor did in her first opinion in *Sash* -- that this
17 is not a criminal statute. It neither imposes a
18 criminal prohibition on conduct nor --

19 JUSTICE KENNEDY: Well, how do you explain
20 the *Granderson* case?

21 MR. WALL: I'm sorry?

22 JUSTICE KENNEDY: The *Granderson* case.

23 MR. WALL: I'm not familiar with that case,
24 Justice Kennedy.

25 JUSTICE KENNEDY: I had thought that in that

1 case, Justice Ginsburg, for this Court, established the
2 proposition that the Rule of Lenity is applicable. I
3 know it wasn't cited in the Petitioner's brief, either.
4 That was a parole revocation case.

5 But in -- in any event, the -- shouldn't the
6 Rule of Lenity apply? If the Rule of Lenity is thought
7 of as a notice requirement insofar as giving you warning
8 to what conduct is punishable, that's one thing, but
9 doesn't the Rule of Lenity mean more than that? It's a
10 check against the power of the State, so that you simply
11 mitigate the -- the power of the State in favor of the
12 individual. In a case like this, apply the Rule of
13 Lenity.

14 MR. WALL: I think it's a check against the
15 power of the State when it's penalizing conduct or when
16 it's putting forth a penalty for a criminal prohibition.
17 But in both *Koray* and *Lopez*, this Court was considering
18 what prisoner credit statutes meant, other prisoner
19 credit statutes. 18 U.S.C. 3585 and 3621. And in both
20 of those, it deferred to the bureau's interpretation.
21 And in both, it specifically rejected application of the
22 Rule of Lenity.

23 And I think the notion there is that this
24 statute is not a criminal statute. It's about an
25 administrative reward for compliance with institutional

1 regulations. And that's different from setting forth a
2 prohibition on conduct where the penalty that someone is
3 sentenced to by a court once they have been convicted of
4 a criminal offense --

5 JUSTICE KENNEDY: Well, the Granderson case
6 is cited in the brief for the National Association Of
7 Criminal Defense Lawyers, and as I read it, it applies
8 to this area and it seems to me that it ought to.

9 I mean, you tell us this is not a criminal
10 statute. I -- I certainly think it has -- it has all
11 the impact and force of the State detaining a person for
12 a criminal act.

13 MR. WALL: Well, it is a statute that
14 determines in some sense how long you will be in prison,
15 so I take your point. But it does so not by extending
16 the penalty applicable to the conduct, but by offering
17 an administrative reward; sort of relieving you of part
18 of the burden of that -- that penalty.

19 And I am not aware of any case -- and I am
20 obviously not familiar with Granderson, but I am not
21 aware of any case from this Court, or indeed any lower
22 court, finding that section 3624 is a criminal statute,
23 as this Court's cases uses the term.

24 JUSTICE STEVENS: No, but isn't there
25 another consideration? It's not the Rule of Lenity, but

1 it's something else we should take into account.

2 In the -- in their reply brief, they say it
3 costs about 25 or \$26,000 to house a particular
4 prisoner, and the number of prisoners involved is --
5 something like \$100 million in taxpayers' money is at
6 issue in this case. It -- is -- you don't disagree with
7 that general figure, do you?

8 MR. WALL: I'm -- I think the basis for that
9 is just math that the Petitioners have done. I don't
10 have any independent basis for confirming or denying it.

11 JUSTICE STEVENS: But in any event, it's
12 clear it's a lot of money. And -- and is that not a
13 factor that we should be aware of in this case, because,
14 all other things being equal -- assume the statute is
15 totally ambiguous, and if you -- if one -- one -- one
16 version will save the -- the government \$100 million a
17 year and the other version will cost it, is that --
18 isn't that a factor we -- we should take into
19 consideration?

20 MR. WALL: I think it's a factor that the
21 bureau could, should and has taken into consideration in
22 the developing its interpretation as the agency in
23 charge of administering the statute. But what the
24 bureau has found is that its method allows you to earn
25 good time for all the time you are incarcerated, so you

1 always have incentive to follow prison regulations.

2 And what Petitioners haven't responded to
3 and the government's point in our brief that if you
4 start measuring by 311-day cycles, you are assuming that
5 they getting the full 54 days of credit. And to the
6 extent that they don't, no matter how they calculate it,
7 Justice Scalia, no matter what their matter of
8 bookkeeping is, if they don't get the 54 days of credit
9 for each cycle, there will be some corresponding period
10 at the end of the sentence when they are serving time
11 and they have already had their ten -- you know, their
12 reviews and they are no longer eligible for the --

13 JUSTICE BREYER: That's true. But the
14 strongest argument -- I -- I don't want to put words in
15 his mouth because this is complicated. But I see it as
16 this. Let's call that time you are talking about, that
17 tenth year, phantom time.

18 MR. WALL: Okay.

19 JUSTICE BREYER: Now, you are saying don't
20 put in any phantom time. And he's saying let's put some
21 in.

22 Now, the strong -- a strong argument, I
23 think, for his is the following -- think about that
24 first year. That first year we are going to calculate
25 54 days, subtract it, everybody seems to agree we get to

1 the number 311, right?

2 But if you were to apply the last sentence
3 to that first year, the prorating sentence, you wouldn't
4 get 54. You would get like 45 days, or 47 or something
5 like that. But everybody agrees under the Bureau of
6 Prisons system that it is 54. And, therefore, in
7 respect to the first year, they are calculating phantom
8 time, i.e., not the first year, but a person who had a
9 sentence to a year and a day. If you had a sentence to
10 a year and a day, you agree it's 54 days, and everybody
11 agrees with that, and that includes phantom time.

12 So he said, well, if you include it for the
13 first year, since the statute says nothing about the
14 first year, why not include it for the other years, too?
15 How can you possibly justify phantom time being included
16 in the first year but not in the other years?

17 MR. WALL: Justice Breyer, I disagree with
18 your premise. Someone sentenced to a year and a day is
19 eligible for credit, but because that person is accruing
20 credit as he serves, he will never actually get 54 days.
21 By the time he gets to the 319th day, he has accrued
22 47 days of credit, those combine to equal his 366-day
23 sentence.

24 JUSTICE BREYER: So, in other words, they
25 don't let him out under 311?

1 MR. WALL: That's -- that's exactly --

2 JUSTICE BREYER: In other words, the Bureau
3 of Prisons for a person whose has a sentence of a year
4 and a day does not let him out 54 days short, rather
5 they let him out 47 days short, because they apply the
6 last sentence in the prorating of that sentence?

7 MR. WALL: And that's exactly our difference
8 with Petitioner's view. Exactly. What Petitioner --

9 JUSTICE BREYER: Is that -- is that what
10 happens?

11 MR. WALL: Yes. Yes. He is released after
12 the 319th day.

13 And I think what Petitioners actually want
14 is phantom time even in the first year. What they are
15 saying is fine, he may only serve 311 days, 312 days,
16 319 days, we want the full 54. So, instead of letting
17 him out at 319, back him up to 312, we want the phantom
18 week in the first year.

19 And, so, I think the way the bureau
20 interprets it, there is no phantom time in any year.
21 The way the Petitioners interpret it, there is phantom
22 time in every year, no matter the length of the
23 sentence. As I said I think it creates a gap in
24 coverage. It rests on this assumption that prisoners
25 are always getting 54 days. That is just not the case.

1 JUSTICE GINSBURG: Do you disagree with your
2 colleague that that is the case most of the time, that
3 most Federal prisoners get good time credit, and of the
4 ones who get credit, most of them get the full 54 days?

5 MR. WALL: There are no statistics on this,
6 but, yes, Justice Ginsburg, I think the majority of
7 prisoners do earn the full credit, certainly these
8 Petitioners have. But I would say that there are, say,
9 15 to 20 percent Federal prisoner who tend to be repeat
10 offenders, and they are often being docked to good time
11 credit.

12 So, I think what you will see is that the
13 ones getting 54 days do it consistently, and the ones
14 not getting 54 days, often do that pretty consistently.
15 And, you know, the difficulty on Petitioner's method is
16 that no matter when you want to do that calculation,
17 Petitioners at bottom are saying what you should be
18 looking at is a 311-day period, and you take the
19 311 days served, you take the 54 days of credit, and
20 together they give you a year of the sentence imposed.

21 And not only does that not serve penological
22 interest, as the bureau has found, but it just doesn't
23 track the language of the statute, which says during
24 each year you have got to comply with the regulations.
25 The statute cares not just about your conduct from days

1 1 to 311, but your conduct from day 312 to 365. All of
2 those days are equal in the statute's eyes. If you want
3 54 days of credit knocked off the back end of your
4 sentence, you have got to behave and comply with the
5 rules for a full year each time you want the credit.

6 JUSTICE SOTOMAYOR: Counsel, this
7 explanation that has been given in your brief and the
8 one you are giving to us now as to why BOP chose what it
9 did, is there any statement outside of the penned
10 affidavit that explains why this choice was made?

11 MR. WALL: Other than the positions --
12 positions that the bureau has taken before the 11 courts
13 of appeals in which it has prevails, no, the --

14 JUSTICE SOTOMAYOR: But in each one of them
15 they have taken the position that the statute was
16 unambiguous. Assuming that that is not accepted by us,
17 that it's ambiguous, what and where are we giving
18 Chevron or Skidmore deference to what set of facts or to
19 what --

20 MR. WALL: Two points, Justice Sotomayor. I
21 don't think the bureau has always taken the position
22 that the statute is unambiguous. It has taken the
23 fallback position, and it has prevailed on this position
24 in a number of courts of appeals. And it is worth
25 pointing out the bureau has prevailed in the First

1 through the Eleventh Circuits. It has won in 11 court
2 of appeals. And it has often prevailed on the ground
3 that it had discretion to interpret the statute to the
4 extended it was ambiguous.

5 Your second point, what would you defer
6 to --

7 JUSTICE SOTOMAYOR: Well, did they exercise
8 discretion when they took the position that it was
9 unambiguous?

10 MR. WALL: As the pen declaration makes
11 clear, and this is at page 154 of the Joint Appendix,
12 when the bureau promulgated its rule in 1997, it did
13 that based on the statutory language and on making a
14 policy choice to accommodate penological interest,
15 ensuring that credit would always be an incentive to
16 good behavior and providing clear notice to inmates of
17 their projected release dates. So, I think -- you know,
18 the government has --

19 JUSTICE SOTOMAYOR: We have never given
20 deference, have we, to an affidavit submitted in
21 litigation to explain something that on its face is not
22 explained either in an agency's regulation or in its
23 policy statement that -- that -- this is giving
24 deference to an affidavit.

25 MR. WALL: Well, it's giving deference to

1 the rule, because the affidavit informs the court that
2 the rule is an exercise of the bureau's discretion. So
3 far as I know, the court has never faced that question
4 but the lower courts have. And a number of courts of
5 appeals faced with rulemaking and informal adjudication
6 have accepted supplementation of the record with
7 affidavits and declarations very much like this one.
8 Because what we are talking about here is an affidavit
9 from one of the agency's original decisionmakers.

10 If this was just a post hyperactualization,
11 I grant you it might not be enough. But this is one of
12 the bureau's lawyers involved in the decisionmaking in
13 the mid-1980's coming in and saying, here is why we
14 adopted the interpretation --

15 JUSTICE SCALIA: Subsequent legislative
16 history, so to speak, right?

17 (Laughter.)

18 JUSTICE SCALIA: I mean, we -- we wouldn't
19 allow that -- those of us who use legislative history
20 don't allow a congressman to come in several years after
21 the bill has passed and say, oh, by the way, the reason
22 we voted for that is thus and such. We would kick that
23 out.

24 Why is it any different for an agency's
25 subsequent statement?

1 MR. WALL: Justice Scalia, I think it is
2 different because that would be broadside in Overton
3 Park. And what this Court said is if there is not
4 enough in the agency action itself to enable judicial
5 review, the right answer is not to set it aside, the
6 right answer is to send it back to the agency to let the
7 agency decision makers explain why they did what they
8 did.

9 And while that might normally be the right
10 course here, the agency has already done that. It has
11 put forward its explanation, so I think this is one of
12 the rare circumstances where we don't need to remand on
13 Overton Park. We know why the agency adopted the rule,
14 and it did it both because of the statutory language and
15 because they thought it was the most sensible policy
16 choice.

17 And I guess I would turn it around a little
18 bit and say you have a rule promulgated by the agency
19 charged with administering the statute, an agency to
20 which this Court has twice deferred in the
21 interpretation of similar statutes. That rule has been
22 upheld as a substantive matter now in 11 courts of
23 appeals.

24 The Ninth Circuit set the rule aside on a
25 procedural basis, which has now been corrected by the

1 agency. It's a republished rule which corrects the
2 infirmities that the court of appeals identified.

3 And, so, the question is, faced with those
4 facts, what would be the point of asking the government
5 to recalculate 195,000 Federal sentences?

6 JUSTICE SCALIA: I don't think we sent cases
7 back under Overton Park for an agency's description of
8 history. I think we sent it back for the agency to give
9 a reason for its rule, whether that's its current reason
10 or its past reason. It -- it's the current reason that
11 counts.

12 MR. WALL: Justice Scalia, even -- even if
13 you thought as the court of appeals did that the rule
14 was procedurally invalid, you would still, as the court
15 of appeals did, defer to the program statement under
16 some level of deference, at least Skidmore.

17 JUSTICE SCALIA: You don't have to worry
18 about me.

19 (Laughter.)

20 JUSTICE SCALIA: I'm -- I'm willing to
21 accept the -- the government's assertion here that
22 that's the government's position.

23 MR. WALL: And I --

24 JUSTICE SCALIA: I don't think you are
25 lying.

1 MR. WALL: I -- I --

2 (Laughter.)

3 MR. WALL: My only point, Justice Scalia,
4 was that whether you get there by deferring to the rule
5 or by deferring to the program statement, as the court
6 of appeals did, every court of appeals to consider it
7 has come out in the same place, which is that by hook or
8 by crook, the bureau has exercised its discretion to
9 answer this question. And I --

10 JUSTICE STEVENS: You say there are 195,000
11 sentences affected by this rule. I don't know which way
12 that cuts. If there are 195,000 people spending more
13 time in -- you know, significantly more time in jail
14 than they should, that's kind of troublesome.

15 MR. WALL: Justice Stevens, I think what I
16 would say is the bureau has been doing it the same way
17 since 1987. Congress has amended this statute five
18 times in the last 20 years. It has never moved to alter
19 the bureau's methods.

20 JUSTICE KENNEDY: But the cumulated --

21 JUSTICE STEVENS: Probably they didn't
22 understand it because it's an awfully hard statute to
23 understand.

24 MR. WALL: Justice Stevens, with all
25 respect, Justice Breyer got it in the first 5 minutes.

1 So I think the --

2 (Laughter.)

3 JUSTICE STEVENS: Well, he's a lot smarter
4 than I am.

5 JUSTICE SCALIA: Even Justice Breyer has got
6 it! Whoa!

7 (Laughter.)

8 JUSTICE KENNEDY: But what -- what we
9 were -- what we were saying, is this is 36,000 years of
10 prisoner time, I mean -- 36,000, that is older than
11 Marbury versus Madison.

12 MR. WALL: Justice Kennedy, that's true. I
13 think the point is that the language of the statute has
14 remained unchanged, and for the last 20 years the bureau
15 has interpreted that in a reasonable way. The language
16 is unambiguous, but even if it weren't, at least the
17 bureau's interpretation is reasonable, which is why 11
18 courts of appeals have deferred to it.

19 And so I take your point that they are
20 serving more time than under Petitioner's
21 interpretation, but I don't think that that policy
22 rationale is properly before this Court. It is properly
23 before the bureau, which has found that policy
24 consideration outweighed by other penological interests,
25 and I think that's the judgment to which this Court

1 should defer, not its own judgment about how much time
2 these prisoners should -- should be serving.

3 And I do think it's important in that regard
4 that Congress has returned the statute several times.
5 And I take your point that it is complicated, Justice
6 Stevens, but --

7 CHIEF JUSTICE ROBERTS: You can finish
8 the --

9 MR. WALL: -- but Congress has made a number
10 of technical amendments and I don't think there is any
11 evidence it did not understand of how this longstanding
12 system works.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Wall.
15 Mr. Sady, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF STEPHEN R. SADY

17 ON BEHALF OF THE PETITIONERS

18 MR. SADY: Thank you.

19 The -- the idea that there could be time at
20 the end of the sentences is premised on "term of
21 imprisonment" mean "time served," which it cannot mean
22 in the same sentence where it says "beyond time served."

23 If you make the adjustment for good time
24 credit that is earned at the end of the year, it is
25 credit towards the service of the sentence; that means

1 that it's blocks of 365 days, that at the last day of
2 Mr. Barber's sentence if it's properly computed, he
3 would be looking at 365 days. If he behaved well until
4 close to the end, if we go to the last statute that says
5 prorate the remaining period of time, the 30 --
6 remaining 36 days he could earn, and credit it in the
7 last 6 weeks, because they are doing that simply as an
8 administrative technique.

9 JUSTICE SOTOMAYOR: Just so -- in your
10 system they do the measurement at the end of the
11 365 days. He misbehaves on the 340th day. And they say
12 for that reason, I'm only going to give you 10 days of
13 full time -- of good time credit.

14 MR. SADY: Yes.

15 JUSTICE SOTOMAYOR: So now your year starts
16 at 350?

17 MR. SADY: 355. Yes.

18 JUSTICE SOTOMAYOR: No, they said they are
19 only giving you 10 days of good time credit. Because at
20 the end of -- 355.

21 MR. SADY: Right. And so the 355 --

22 (Laughter.)

23 JUSTICE SOTOMAYOR: That was pretty bad.

24 (Laughter.)

25 JUSTICE SOTOMAYOR: 355. Now, your year

1 starts again on 355 days --

2 MR. SADY: 365, and if he behaves very badly
3 he has to go all the way to the end of that 365 and
4 doesn't get any adjustment, but if he -- next year he
5 starts all over again for 365 days, and if he is very
6 good he gets the 54 days.

7 If I could address the question that was
8 raised by Justice Ginsburg on the Rule of Lenity. I
9 would like to point out that in the -- we have relied on
10 both R.L.C. and in -- on Granderson for your
11 articulation of the Rule of Lenity as it would apply in
12 this case. Which, if after we're looking at all the
13 other -- the statute, the history, the context, and if
14 we cannot -- if we apply the Rule of Lenity, if the
15 government's position cannot be shown to be
16 unambiguously correct, we have at least ambiguity here,
17 and then we go to Chief Justice Marshall's seminal
18 discussion of lenity.

19 And what he said was that we look at lenity
20 for the proposition -- to back the principle that the
21 power of punishment belongs to the legislative
22 department; and the tenderness of the law for the rights
23 of individuals, both of --

24 JUSTICE GINSBURG: But the argument -- one
25 of the arguments is it is not punishment at all. This

1 is a reward; this is a reward for good behavior.

2 MR. SADY: The Court in -- in Lynce and in
3 Weaver used the term "increase in punishment" when there
4 was no longer available good time credit. For -- to say
5 that somebody has to serve 87.2 percent of the term of
6 imprisonment imposed by the judge instead of 85 percent,
7 that is imprisonment.

8 For Mr. Barber that's over 6 months'
9 additional time behind bars in a prison. That's --
10 that's penal; that is affecting individual liberty, it's
11 the type of liberty that was intended to be covered by
12 the Rule of Lenity; and especially in the situation
13 where the initial sentence was imposed based on a grid
14 that was calibrated assuming 85 percent, he's ending up
15 serving 2.2 percent more time than the sentencing judge,
16 in imposing the sentence. So that aspect of punishment.
17 And in actual raw time behind bars in a prison.

18 Unless there are further questions, I would
19 reserve my --

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Sady.

21 MR. SADY: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 12:02 p.m., the case in the
25 above-entitled matter was submitted.)

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