Barber v. Thomas: The Supreme Court's Interpretation of the Federal Good Time Credits Statute is Undermining Sentencing Reform

Max Hellman
University of the Pacific, McGeorge School of Law

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Barber v. Thomas: The Supreme Court’s Interpretation of the Federal “Good Time Credits” Statute is Undermining Sentencing Reform

Max Hellman*

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2011; Bachelor of Arts, United States History, Philosophy, Wheaton College, J.D., Spring, 2011. I would like to thank my parents and Professor Emily Garcia Uhrig for their inspiration and support throughout my law school career, as well as the Volume 42 Board of Editors and the entire MLR staff. I would also like to thank Professor Lawrence Levine, Professor John Sims, and my study group. Finally, I want to especially thank my wife, Sierra Evans, who has supported me throughout law school without reservation.
I. INTRODUCTION

The United States locks up more of its citizens than any other country in the world, and incarceration rates are steadily rising.¹ In fact, the per-capita incarceration rate in the United States is the highest in the world, vastly outnumbering all other countries.² But the United States did not always favor retribution in the form of incarceration.³ Indeed, throughout most of the twentieth century, the criminal justice system’s primary goal was rehabilitation.⁴ Federal judges maintained wide discretion for criminal sentencing, and the availability of indeterminate sentences promoted “individualized rehabilitation-oriented sentences.”⁵ While this indeterminate sentencing scheme allowed the Board of Parole to determine a criminal’s actual incarceration time, it was largely criticized for creating unpredictable and arbitrary sentencing outcomes.⁶

A sentencing reform movement that swept the nation during the 1970s—ultimately culminating with the Sentencing Reform Act of 1984 (SRA)⁷—dramatically changed the federal sentencing landscape.⁸ Described by many

2. See id. at 5, 35 (reporting that the U.S. incarcerates 750 of every 100,000 residents, compared to just 148 in England and Wales and 93 in Germany).
4. Dillon, supra note 3, at 1038; Demleitner, supra note 3, at 777–78.
5. Dillon, supra note 3, at 1038 (quoting Douglas A. Berman, Conceptualizing Booker, 38 ARIZ. ST. L.J. 387, 389 (2006)).
6. Id. at 1039.
8. See Eva S. Nilsen, Decency, Dignity, and Desert: Restoring Ideas of Humane Punishment to Constitutional Discourse, 41 U.C. DAVIS L. REV. 111, 117–20 (2007) (arguing that the sentencing reform movement has “fueled ever longer and harsher sentences.”); Dillon, supra note 3, at 1040–42 (discussing the impact of the SRA and the Sentencing Guidelines); Demleitner, supra note 3, at 778 (arguing that federal sentencing law changes since 1970 have dramatically increased prison populations largely because their goals are incapacitation and retribution).
scholars as a reaction to the unpredictability of indeterminate sentencing schemes, the rising crime rates during the 1960s, and the war on drugs, the SRA established the United States Sentencing Commission (Commission) in an effort to constrain federal courts and judicial discretion in sentencing through the use of mandatory sentencing guidelines.9 The Commission ultimately promulgated the Sentencing Guidelines (Guidelines) in 1987, which, until recently, acted as a mandatory guide for federal judges when sentencing.10 Although the Guidelines have generated great debate concerning all aspects of federal sentencing law, this Comment addresses one small aspect of the federal sentencing debate: the Bureau of Prisons’ (Bureau) calculation of good time credits.

The SRA spawned a new federal “good time” system which, as the name suggests, is a system that allows prisoners to reduce their incarceration time for “exemplary compliance with institutional disciplinary regulations.”11 As part of the SRA, Congress enacted 18 U.S.C. § 3624, which developed a new method to calculate federal prisoners’ good time credits by establishing a maximum uniform rate of fifty-four days per year of possible good time credits that prisoners could receive.12 The interpretation of § 3624(b)(1), which remains in effect today, creates the controversy that forms the bulk of this Comment.13

Although the statute appears to mandate a maximum flat rate of fifty-four days per year of good time credits available to federal prisoners, the Bureau interprets the statute to calculate good time credits based on time served rather than sentence imposed.14 This effectively reduces the maximum days per year of good time credits available to federal prisoners from fifty-four days to forty-seven.15 Over the last few years, several prisoners have unsuccessfully challenged the Bureau’s interpretation of the statute.16 However, the time served versus sentence imposed debate recently reached the Supreme Court in Barber v.
This Comment addresses the federal good time credit debate and offers a discussion of the Supreme Court’s decision in Barber v. Thomas. Surprisingly, this case appears to have slipped through the cracks of the sentencing debate, as the issue involves a complicated mathematical formula promulgated by the Bureau to calculate federal good time. As of the date of this Comment, not much has been written on the issue. Yet, this case has enormously far-reaching consequences, not only for model prisoners and the prison system at large, but for the ordinary taxpayer as well. Indeed, Justice Kennedy’s description of the Court’s decision in Barber speaks volumes on the issue: “[I]f the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court’s interpretation comes at a cost to the taxpayers of untold millions of dollars.” Accordingly, this complicated case has serious economic and social implications for millions of taxpayers, and thus represents an important decision within the vast sentencing debate that is ripe for considerable discussion.

Part II provides a brief history of federal sentencing by discussing the major developments in sentencing law and explaining the development of 18 U.S.C. § 3624—the good time credits statute. Part III examines several circuit court decisions in which federal prisoners have unsuccessfully challenged the Bureau’s calculation of good time credits prior to Barber v. Thomas. Part IV sets forth a thorough analysis of Barber, detailing of the arguments made by each party and critiquing the Supreme Court’s ultimate decision to uphold the Bureau’s interpretation of § 3624 based on time served. Part V argues that the rules of intra-statutory consistency and lenity undermine the Bureau’s interpretation of the good time credits statute, and suggests that the Court gave short shrift to these two contentions of Barber’s petitioners. Finally, Part VI discusses the unfortunate social, economic, and racial implications of the Court’s decision to uphold the Bureau’s interpretation.

Although good time credits represent only one small part of federal sentencing policy, the Supreme Court’s ruling in Barber v. Thomas ignores the fundamental situation on the ground: the United States cannot maintain an expanding rate of incarceration. Increasing model prisoner time only burdens taxpayers and the prison system, and makes it more difficult for prisoners to rehabilitate and get on with their lives.

18. See Barber, 129 S. Ct. at 2502–03 (discussing the Bureau’s complicated formula).
19. See infra Part VI (discussing the decisions social and economic impact).
20. Barber, 129 S. Ct. at 2499 (Kennedy, J., dissenting).
21. Id. at 2511.
22. PEW CENTER REPORT, supra note 1, at 5.
23. See infra Part VI.B (discussing the economic impact of incarceration).
II. THE HISTORY OF U.S. FEDERAL SENTENCING

"Up until the 1970s, indeterminate sentencing dominated sentencing in the United States."

Indeed, sentencing followed a traditional "'medical' model in which criminal offenders were viewed primarily as patients in need of care and rehabilitation by the penal system." As one scholar noted, "[t]his model emphasized the rehabilitation of criminals, rather than punishment for or deterrence of crime, as the primary purpose of the penal system, and called upon sentencing judges and parole officials 'to craft individualized, rehabilitation-oriented sentences 'almost like a doctor or social worker exercising clinical judgment.'" As a result, sentencing judges enjoyed wide discretion in sentencing, and indeterminate sentences placed "the ultimate authority to determine the actual amount of time that a defendant would remain incarcerated with the Board of Parole."

A. The Sentencing Reform Act

Over the last forty years, the United States has witnessed a massive reform in federal sentencing. Because the public viewed indeterminate sentencing as unequal and ineffective, lawmakers pushed for reform in the shape of determinate sentencing schemes. This sentencing reform movement ultimately gave rise to the Sentencing Reform Act (SRA) of 1984.

[The SRA] expressly abandoned the goal of prisoner rehabilitation as a primary purpose of incarceration and established the United States
Sentencing Commission for the purpose of promulgating a set of binding
guidelines that would constrain the federal courts’ sentencing discretion
into a much narrower range of permissible sentences.\textsuperscript{31}

Following the SRA, the Commission promulgated the Guidelines,\textsuperscript{32} a rigid
sentencing table that severely restricted judicial discretion by setting a “narrow
sentencing range for each offender based on the offender’s ‘Criminal History
Category’ and the ‘Offense Level’ of the offense, subject to various
adjustments . . . .”\textsuperscript{33}

The Guidelines quickly generated widespread criticism from many who
believed it overly constrained judicial discretion and “imposed penalties that
were disproportionate to the offense.”\textsuperscript{34} Many scholars argue that the sentencing
reform movement in general, the SRA specifically, and the “politicization of
crime, have contributed to a dramatic build-up in the federal prison population”
as the penal system’s primary goal of rehabilitation has taken a back seat to
“retribution and incapacitation.”\textsuperscript{35} Indeed, many scholars and judges believe that
“the Guidelines result in extreme sentences that may or may not be related to the
defendant’s culpability.”\textsuperscript{36} In particular, “the Guidelines ensure ‘equal nonsense
for all,’” and “they provide a means of confining intuitive and nonrational
sentencing decisions to one decision-making body and then appl[ies] those
decisions equally to all criminal defendants.”\textsuperscript{37} As a result, “they also create an
illusion of rationality and, consequently, legitimacy.”\textsuperscript{38} While the present state of
the federal prison system (and the philosophical and ethical considerations of
punishment) deserves serious attention, this Comment addresses only one issue
that occurred as a direct result of the SRA: good time credits under 18 U.S.C.
\textsection 3624.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{31} Dillon, supra note 3, at 1040.
\item \textsuperscript{32} Id. at 1040–41 (noting the first edition of the Guidelines went into effect in 1987).
\item \textsuperscript{33} Id. at 1041.
\item \textsuperscript{34} Id. at 1041–42.
\item \textsuperscript{35} Demleitner, supra note 3, at 777–78; see also Nilsen, supra note 8, at 116–18 (asserting that
determinate sentencing schemes, mandatory minimums, and sentencing guidelines have led to a seven-fold
increase in the U.S. prison population since 1970).
\item \textsuperscript{36} Danielle DeMasi Chattin, Note, The More You Gain, The More You Lose: Sentencing Insider
\item \textsuperscript{37} Rebecca Krauss, Comment, Neuroscience and Institutional Choice in Federal Sentencing Law, 120
Yale L.J. 367, 375 (2010).
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Congress enacted 18 U.S.C \textsection 3624(b) in 1984. Tablada v. Thomas, 533 F.3d 800, 803 (9th Cir.
2008); Petitioners’ Brief, supra note 30, at 4–5; Respondent’s Brief, supra note 12, at 4.
\end{itemize}
B. 18 U.S.C. § 3624(b): Good Time Credits

Broadly speaking, good time credits refer to time earned through "compliance with prison rules and regulations." Typically, prisoners participate in drug rehabilitation or education programs, earning good time credits that are then deducted from a prisoner’s sentence. Good time credits can substantially reduce prisoners’ sentences and are considered valuable to inmates.

When Congress enacted the SRA in 1984, it replaced the existing good time credit statute, which "provided graduated credits available per month, deducted from the term of sentence," to be awarded "at different rates depending on the length of a prisoner’s sentence."

With the enactment of 18 U.S.C. § 3624(b), Congress established a uniform maximum rate of fifty-four days per year of possible good time credits. The Bureau now determines good time credits by assessing whether the prisoner "has displayed exemplary compliance with institutional disciplinary regulations," and whether the prisoner "earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree." In addition, "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."

Although § 3624(b)(1) specifically provides a maximum of fifty-four days per year of possible good time credits, the actual effect of the Bureau’s calculation provides only a maximum of forty-seven days per year. This is

40. Demleitner, supra note 3, at 780.
41. See id. at 781 (stating that good time credit schemes exist at both the state and federal levels).
42. Id.
[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 prisoners life, may receive credit toward the service of the prisoner’s sentence, beyond time served, of up to fifty-four 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.
Id.; Petitioners’ Brief, supra note 30, at 5; Respondent’s Brief, supra note 12, at 5.
45. 18 U.S.C. § 3624(b)(1). Prisoners sentenced after 1996 can only achieve the maximum days per year if they have earned or are progressing towards earning a high school diploma or its equivalent, but if this is not the case then those prisoners are only eligible for a maximum of forty-two days per year. Demleitner, supra note 3, at 784.
47. Tablada v. Thomas, 533 F.3d 800, 803–04 (9th Cir. 2008); Demleitner, supra note 3, at 785. The Bureau’s calculation applied to a ten year prison sentence awards a maximum of 470 days of good time credits to "exceptional" prisoners, though the plain language of the statute states that fifty-four days per year is available to "exceptional" prisoners, which would amount to 540 days over a ten year sentence. Petitioners’ Brief, supra note 30, at 11. See 18 U.S.C. § 3624(b)(1)(2008) (designating “up to 54 days at the end of each
because the Bureau calculates good time credits based on time served, rather than sentence imposed. \textsuperscript{48} In fact, for over twenty-one years the Bureau has calculated good time credits based on the time actually served instead of the sentence imposed. \textsuperscript{49} In 1985, between enactment of the SRA and the official effective date of § 3624(b), \textsuperscript{50} "members of the Bureau's Office of General Counsel and Regional Counsel Offices met to discuss the effect of the SRA on the calculation of good time," where "they concluded that, 'in light of the statutory changes made by the SRA,' good time credit once the SRA became effective should be based 'upon the amount of time an inmate had served, not upon the sentence imposed.'" \textsuperscript{51}

Since that decision, the Bureau has reaffirmed its methodology for calculating good time credits in a 1988 internal memorandum, and in 1992 the Bureau issued Program Statement 5880.28, which officially set out the complicated formula now used to calculate good time credits based on time served, rather than sentence imposed. \textsuperscript{52} Additionally, in 1997, the Bureau issued an interim regulation, which asserted that good time credits should be calculated based on time served. \textsuperscript{53} The Bureau's method for calculating good time credit is currently codified in 28 C.F.R. § 523.20, \textsuperscript{54} effective since December 5, 2005. \textsuperscript{55}

\textbf{III. SENTENCE IMPOSED OR TIME SERVED: CHALLENGES PRIOR TO BARBER v. THOMAS}

Over the last decade, several federal prisoners have unsuccessfully challenged the Bureau's interpretation, arguing that section 3624(b) requires that good time credits be calculated based on the sentence imposed. \textsuperscript{56}
“One of the most disputed issues pertaining to federal good time is the way in which the [Bureau] calculates it."57 Indeed, because the Bureau “deducts good time from the days actually served by the prisoner rather than the sentence imposed by the judge, the maximum amount of good time per year is effectively forty-seven days. Courts have deferred to the [Bureau’s] calculation of good time as [an] agency interpretation of an ambiguous statute.”58

A. Ninth Circuit Challenges

1. Pacheco-Camacho v. Hood

In Pacheco-Camacho v. Hood, a federal prisoner challenged the Bureau’s calculation of good time credits, arguing that the phrase “term of imprisonment” in § 3624(b)(1) refers to the sentence imposed by the judge.59 Pacheco asserted that the phrase “term of imprisonment” typically means penalty and sentence; as such, the prisoner argued that the Bureau’s interpretation of “term of imprisonment” as “time served,” instead of “sentence imposed,” conflicted with the plain language of § 3624(b)(1).60 The court disagreed.61

The Ninth Circuit determined that the plain language of § 3624(b)(1) did not point to whether “term of imprisonment” meant time served or sentence imposed.62 Moreover, the court concluded that the legislative history shed little light on this ambiguity.63 Finding the “meaning of ‘term of imprisonment’ as used in § 3624(b) to be ambiguous,” the court proceeded to examine whether the Bureau’s interpretation should be entitled to deference under Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.64

his view, when the statute awards fifty-four days ‘at the end of each year of the prisoner’s term of imprisonment,” this award should be based on the sentence imposed, without regard to the time actually served.”).

57. Demleitner, supra note 3, at 785.
58. Id.
59. Pacheco-Camacho, 272 F.3d at 1268. See also 18 U.S.C. 3624(b)(1) (“[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 prisoners life, may receive credit toward the service of the prisoner’s sentence, beyond the time served, of up to fifty-four days at the end of each year of the prisoner’s term of imprisonment . . . .”) (emphasis added).
60. Pacheco-Camacho, 272 F.3d at 1268.
61. Id. at 1271.
62. Id. at 1268.
63. Id. at 1269–70.
64. Id. at 1270; Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Under Chevron, courts will defer to Congress’ expressed intent when examining an interpretation of a statute that is in dispute. Id. at 842–43. If the intent of Congress is unclear, rendering the statute ambiguous, then the court will defer to an agency’s interpretation of the statute as long as it “is based on a permissible construction of the statute.” Id. at 843.
Following the analysis from *Chevron*, the court determined that the Bureau retained implied authority from Congress to award good time credits. Because interpretation of the phrase “term of imprisonment” fell within the implied authority given to the Bureau by Congress, the only remaining question under *Chevron* was whether the Bureau’s interpretation was reasonable. The court concluded that it was and declared, “even when viewed in the light most favorable to Pacheco, the meaning of the statutory language of § 3624(b) is at best ambiguous, and therefore we must defer to the reasonable interpretation adopted by the [Bureau].”

2. Tablada v. Thomas

Eight years later, in *Tablada v. Thomas*, a federal prisoner sought a writ of habeas corpus challenging the Bureau’s interpretation of § 3624(b)(1). Unlike Pacheco-Camacho, Tablada argued that when the Bureau promulgated its method for calculating good time credits, it “failed to articulate a rational basis for its interpretation” of § 3624(b)(1), embodied in 28 C.F.R. § 523.20 and Program Statement 5880.28, thus abusing its discretion under 5 U.S.C. § 706(2)(A). Interestingly, the Bureau conceded this issue for § 523.20, but not for Program Statement 5880.28.

In determining a remedy, the Ninth Circuit explained that even after invalidating § 523.20, the Bureau still acted reasonably in calculating good time credits based on time served under Program Statement 5880.28. The court refused, however, to accord Program Statement 5880.28 *Chevron* deference. Rather, the court asserted that 5880.28 was “an internal agency guideline, ‘akin to an interpretive rule’” that was “entitled to a measure of deference under

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65. *Pacheco-Camacho*, 272 F.3d at 1270.
66. *Id.* at 1270–71.
67. *Id.* at 1271.
68. *Tablada v. Thomas*, 533 F.3d 800, 802 (9th Cir. 2008).
69. *Id.* at 802, 804; The Administrative Procedural Act (APA) states:
To the extent necessary to [a] decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

70. *Tablada*, 533 F.3d at 805.
71. *Id.* at 806.
72. *Id.* According to the Court, *Chevron* deference is only applicable to an agency’s rules that are issued “within the ambit of the authority entrusted to it by Congress,” and that “[s]uch rules are characteristically promulgated only after notice and comment.” *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 226–27 (2001)). Accordingly, since Program Statement 5880.28 did “not purport to carry the force of law and was not adopted after notice and comment,” it could not be accorded *Chevron* deference. *Id.*
Applying the factors articulated in *Skidmore,*" the court concluded that "the methodology utilized in Program Statement 5880.28 [was] both persuasive and reasonable." Thus, the court affirmed the Bureau’s interpretation.

**B. National Challenges**

Over the last ten years, several other circuit courts have heard challenges to the Bureau’s interpretation of § 3624(b)(1). Three district courts determined that § 3624(b)(1) unambiguously obligated the Bureau to afford the maximum of fifty-four days per year of good time credit based on the sentence imposed by the judge. Each of these cases distinguished *Pacheco-Camacho.* Many appellate courts rejected the Bureau’s interpretation that § 3624(b) unambiguously calls for a maximum of forty-seven days a year based on time served. Two courts interpreted “term of imprisonment” to mean time served. Three other courts ruled that “term of imprisonment” was ambiguous but determined the rule of lenity did not apply. After many lower courts split on the issue, the Supreme Court finally granted certiorari.

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73. Id. Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court noted that, “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 140.

74. The court considered the “interpretation’s thoroughness, rational validity, consistency with prior and subsequent pronouncements,” the “logic and expertness” of an agency decision, the care used in reaching the decision, as well as the formality of the process used.” *Tablada*, 533 F.3d at 806 (quoting *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003)).

75. *Id.* at 806.

76. *Id.* at 809. *Tablada*’s habeas petition was denied. *Id.*


80. *Id.*


IV. BARBER V. THOMAS

In *Barber v. Thomas*, the Supreme Court confronted the Bureau’s interpretation of § 3624(b)(1) and its calculation of good time credits based on time served. Specifically, the Court answered the key question of whether “term of imprisonment” in 18 U.S.C. § 3624(b)(1) requires the Bureau to calculate good time credits based on the judge imposed sentence or the time actually served by a prisoner, ultimately siding with the Bureau’s interpretation. The petitioners included Barber and Jihad-Black, two federal prisoners convicted of various weapons and drug offenses, both of whom filed petitions for writs of habeas corpus challenging the Bureau’s calculation of their good time credits. The district court denied both habeas petitions, relying largely on the Ninth Circuit’s decision in *Tablada v. Thomas*.

To understand the importance of what was at stake, consider how interpreting the phrase “term of imprisonment” to mean time served or sentence imposed affects the petitioners’ time in prison. Barber is currently serving a sentence of 320 months for weapons possession and drug trafficking. Under the Bureau’s calculation, Barber will receive a maximum of 1254 days of good time credits, giving him a scheduled release date of March 29, 2016. However, should the Bureau calculate Barber’s good time credits based on the sentence imposed, he would receive a maximum of 1440 days, resulting in 186 fewer days in custody. If the Bureau calculated his good time credits based on sentence imposed, he would be released on September 22, 2015.

Similarly, Jihad-Black is currently serving a 262-month sentence for felony gun possession. The Bureau calculated that he could receive a maximum of 1353 days of good time credits, giving him a scheduled release date of June 7, 2015. If the Bureau calculated his good time credits based on time served, he would only be released on January 4, 2016, a difference of 186 days.

83. Wright, 451 F.3d at 1236; Sash, 428 F.3d at 134; Perez-Olivo, 394 F.3d at 49; Petitioners' Brief, supra note 30, at 14-15.
84. Barber v. Thomas, 130 S. Ct. 2499 (2010); Petitioners' Brief, supra note 30, at i; Respondent’s Brief, supra note 12, at i; Oral Argument, supra note 17, at 3-25.
85. Petitioners' Brief, supra note 30, at i; Respondent’s Brief, supra note 12, at i.
86. Petitioners' Brief, supra note 30, at ii, 1; Respondent’s Brief, supra note 12, at 2. The petitioners assert that the phrase “term of imprisonment” unambiguously means sentence imposed rather than time served. Petitioners' Brief, supra note 30, at 17.
87. Petitioners' Brief, supra note 30, at 1. The Ninth Circuit consolidated the “petitioner’s cases with *Tablada* for purposes of filing a petition for writ of certiorari.” Id. Tablada submitted his petition for writ of certiorari on June 16, 2009, while the consolidated petition of Barber and Jihad-Black was “filed on July 8, 2009, and granted on November 30, 2009.” Id. at 1–2.
88. Petitioners' Brief, supra note 30, at 11.
89. Id.
90. Id.
91. Id. Calculation based on the fact that September 22, 2015 is 186 days before Barber’s scheduled release date of March 29, 2016. Id.
92. Id.
1027 days of good time credit, suggesting a possible release date of May 21, 2016. If Jihad-Black’s good time credits were calculated based on the sentence imposed, he could receive a maximum of 1179 days, resulting in 152 fewer days in custody. If the Bureau calculated his good time credits based on sentence imposed, he would be released on December 21, 2015.

A. The Opposing Viewpoints: Arguments for Sentence Imposed and Time Served

1. Understanding the Petitioners: Calculating Good Time Credits Based on the Sentence Imposed

The petitioners’ strongest argument was rooted in the basic rules of statutory construction. Essentially, petitioners claimed the phrase “‘term of imprisonment’ unambiguously means the sentence imposed, not time actually served.” Accordingly, “the repeated use of ‘term of imprisonment’ in congressionally adopted descriptions of the judicial power to order incarceration implicates the rule that ‘statutory definitions control the meaning of statutory words.’” Thus, when Congress and the Guidelines provided that a guilty prisoner “may be sentenced to a term of imprisonment,” the phrase “term of imprisonment” logically translated to the actual sentence imposed by the court.

In addition, the petitioners pointed to the judicial proceeding itself, asserting that the commonly understood meaning of the phrase “term of imprisonment” is the sentence imposed. Consider, for instance, that “Barber’s judge ordered that the defendant was committed to the custody of the [Bureau] for ‘a term of 320 months imprisonment.’” Indeed, when a judge hands down a sentence, everyone in the courtroom “hear[s] the judge impose the imprisonment for a term of months, making the sentence imposed the ordinary and natural meaning of ‘term of imprisonment.’” Thus, the petitioners’ relied on the lay understanding of “term of imprisonment” to support their view.

Next, the petitioners invoked the rule of intra-statutory consistency. Under this rule, when a word or phrase is used repeatedly in a statute, the word or
phrase retains the same meaning throughout. Section 3624(b)(1) provides the phrase “term of imprisonment” three different times in the opening sentence. Notably, the Bureau interprets the first two uses of “term of imprisonment” to mean sentence imposed; however, the Bureau interprets the third use of the phrase in the same sentence to mean time actually served, in clear defiance of the statute’s plain language and the rule of intra-statutory consistency. As the petitioners pointed out, “[t]he 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.’" The petitioners also examined legislative history, declaring that since 1867, “Congress has consistently credited good time against the sentence imposed." The petitioners cited to “‘Congress’s long history of using an inmate’s sentence to calculate good conduct time’” to support their conclusion, and pointed out that “Congress would have been more explicit if it had intended to adopt a different policy.” The petitioners also noted that throughout the SRA, “term of imprisonment” is used to mean the sentence imposed. Moreover, when Congress enacted § 3624(b), it stated a “need for change from ‘the complexity of current law’ and the need to award good time credit at an ‘easily determined rate.’ Congress believed [§] 3624(b) to be ‘considerably less complicated.’" In fact, even before the enactment of § 3624(b)(1), Congress expressed a clear

104. Id. (citing Sullivan v. Stroop, 496 U.S. 478, 484 (1990)).
105. 18 U.S.C. § 3624(b)(1). “[A] prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of a prisoner’s life, may receive credit toward the service of the prisoner’s sentence, beyond the time served, of up to fifty-four days at the end of each year of the prisoner’s term of imprisonment . . . .” Id. “The [Bureau] unequivocally allows for good time credit on a sentence—or term of imprisonment—of a year and a day. The [Bureau’s] Program Statement provides, ‘[t]he very shortest sentence that can be awarded . . . is a sentence of 1 year and 1 day.’ To the same effect, the second use refers to a ‘term of imprisonment’ for life, which again can only mean the sentence imposed.” Petitioners’ Brief, supra note 30, at 24 (citation omitted).
106. Petitioners’ Brief, supra note 30, at 17. In their opening brief, the petitioners stated:
   The [Bureau] 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 fifty-four 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.
   Id.
108. Id. at 29.
109. Id. at 31 (quoting White v. Scibana, 314 F. Supp. 2d 834, 840 (W.D. Wis. 2004)).
110. Id. at 33 (“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.”).
intent for prisoners to serve eighty-five percent of the sentence imposed.\textsuperscript{112} Congress likely found this calculation relevant considering that § 3624(b)(1) calls for fifty-four days of good time credits per year, which happens to be fifteen percent of one year.\textsuperscript{113}

Lastly, the petitioners claimed that even if the Court found the language, context, and history of the statute ambiguous, the rule of lenity should still apply.\textsuperscript{114} Under this rule, any ambiguity of § 3624(b)(1) should be interpreted in the light most favorable to the petitioners.\textsuperscript{115} The petitioners asserted that this interpretation trumped the majority of courts that have ignored the rule of lenity in deference to the Bureau under \textit{Chevron} and \textit{Skidmore}.\textsuperscript{116} Moreover, the petitioners noted that the Bureau actually admitted that it failed to articulate a rational basis for calculating “good time credit based on an interpretation different from that formulated by the Sentencing Commission,” in clear violation of section 706(2)(A) of the APA.\textsuperscript{117} Thus, they argued, the Bureau’s interpretation should be set aside as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{118}

2. \textit{Understanding the Bureau: Calculating Good Time Credits Based on Time Served}

The Bureau began by explaining that the “statute’s requirements of annual calculation, good conduct and educational progress, and proration” in the last year of the sentence “indicate[d] that credit should be awarded on the basis of time served by each prisoner.”\textsuperscript{119} Under this theory, “term of imprisonment” must mean time actually served, since § 3624(b)(1) authorizes prisoners to receive good time credits “‘at the end of the first year of the term,’ and thereafter ‘at the end of each year.’”\textsuperscript{120} Thus, the “method of determination requires the passage of

\textsuperscript{112} See \textit{id.} at 29–36 (describing the history of the eighty-five percent calculation).
\textsuperscript{113} \textit{id.} at 33–34 (“The 85 percent rule is based simply on the fact that fifty-four days is approximately 15 percent (14.8 percent) of the 365 days . . . . In an earlier draft of the good time statute, the proposed amount . . . would have been up to 36 days . . . ‘or approximately 10 percent’ . . . . The final version simply added 5 percent to the maximum available good time credits.”).
\textsuperscript{114} Petitioners’ Brief, \textit{supra} note 30, at 37.
\textsuperscript{115} \textit{Thomas, supra} note 82, at 393.
\textsuperscript{116} Petitioners’ Brief, \textit{supra} note 30, at 42. The petitioners also argued that \textit{Chevron} deference is improper because the Bureau “never received an express delegation from Congress to legislate in this area.” \textit{id.} at 20. Petitioners’ claim that the Sentencing Commission did receive express delegation from the SRA, and thus any deviation from the Commissions eighty-five percent rule (fifty-four days based on sentence imposed) would be unreasonable under \textit{Chevron}. \textit{id.} at 20. Even if deference were appropriate, the Bureau’s violation of § 706 of the APA should void any \textit{Chevron} deference under general rules of administrative law. \textit{id.}
\textsuperscript{117} \textit{id.} at 55.
\textsuperscript{118} \textit{id.} (quoting 5 U.S.C. § 706(A)(2)). The Ninth Circuit rejected this argument in \textit{Tablada v. Thomas}, 533 F.3d 800, 809 (9th Cir. 2008).
\textsuperscript{119} Respondent’s Brief, \textit{supra} note 12, at 12.
\textsuperscript{120} \textit{id.} at 18 (citing \textit{Moreland v. Federal Bureau of Prisons}, 431 F.3d 180, 186 (5th Cir. 2005)).
time, as the prisoner serves his 'term of imprisonment,' and permits the prisoner to earn good time credit only in annual increments.\textsuperscript{121}

Additionally, the Bureau stated that every appellate court that has considered the petitioners' assertion of intra-statutory consistency concluded that the rule "is of no assistance here, because the statute does not use the phrase 'term of imprisonment' consistently."\textsuperscript{122} In terms of legislative history, the Bureau noted that, "[o]ne of the purposes of the SRA was to reverse" the default rule that "good time credit was a prospective entitlement rather than a retrospective award," and instead the SRA sought "to require prisoners to earn credit during their incarceration."\textsuperscript{123} As the Bureau views it, the "[p]etitioners' position would improperly roll back the clock to the pre-1987 era."\textsuperscript{124}

Even if the statute was found to be ambiguous, the Bureau argued that its interpretation resolves any ambiguity.\textsuperscript{125} Since Congress charged the Bureau "with [the] responsibility for prison administration generally and the computation of good time credit specifically," the Court should defer to its reasonable interpretation of § 3624(b)(1).\textsuperscript{126} To the Bureau's credit, the majority of lower courts deferred to the Bureau's interpretation and found that the rule of lenity does not displace the Bureau's interpretive authority.\textsuperscript{127}

Lastly, in response to the petitioners' assertion that the Bureau's interpretation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"\textsuperscript{128} the Bureau noted that the Ninth Circuit considered this issue and still upheld the Bureau's interpretation.\textsuperscript{129}

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121. \textit{Id.} A prisoner would therefore gain good time credits based on the time he or she is actually serving. \\
122. \textit{Id.} at 23. "Section 3624(b)(1)'s final sentence . . . states that '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.' Context here indicates that 'term of imprisonment' means time served." \textit{Id.} at 24. \\
123. \textit{Id.} at 30. \\
124. \textit{Id.} \\
125. \textit{Id.} at 13. \\
126. \textit{Id.} at 13, 37–51. Respondents cite dozens of cases supporting this argument. \textit{Id.} \\
127. \textit{Id.} at 37–51; Oral Argument, \textit{supra} note 17, at 47–48. \textit{See also Lopez v. Davis, 531 U.S. 230, 242 (2001) (deferring to the Bureau's interpretation of statutes dealing with prisoner time credits); Reno v. Koray, 515 U.S. 50, 60–61 (1995) (deferring to the Bureau's interpretation of statutes dealing with prisoner time credits). The main debate concerning the applicability of the rule of lenity is that it only applies to penal statutes that punish, that § 3624(b) is a reward (non-penal), and thus the rule of lenity does not apply. Respondent's Brief, \textit{supra} note 11, at 41–42. \textit{See supra} Part III.A. One wonders if many of the courts deferred to the Bureau's interpretation as an easy solution to a complicated problem. \\
128. Petitioner's Brief, \textit{supra} note 30, at 55. \\
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B. The Supreme Court's Decision

To the dismay of over 200,000 federal prisoners, and at a cost of “untold millions of dollars” of taxpayer money, the Supreme Court, in a six-to-three decision, agreed with the Bureau. In doing so, it ruled that the Bureau’s interpretation of the statute—based on sentence imposed—reflected “the most natural reading of the statutory language” and was “most consistent with [the statute’s] purpose.” The Court rejected the petitioners’ arguments, explaining that it felt uncomfortable with the idea that model prisoners would receive good time credits for time not actually served in prison.

As the Court pointed out, under the petitioners’ interpretation, a prisoner sentenced to ten years would receive fifty-four days a year for each of his or her sentence (540 days). As a result, and assuming the prisoner received maximum credits for exemplary behavior, the prisoner would be released after only eight and a half years. The Court expressed concern that the Bureau would then be unable to “determine whether the prisoner had behaved in an exemplary fashion ‘during [Year 10],’” as the statute requires.

By discussing the competing interpretations through the use of the hypothetical ten year sentence, the Court noted that the petitioners’ view could not be reconciled with the basic intent of the statute: the Bureau should calculate good time credits for each prisoner “at the end of each year” a prisoner serves, and should also determine if a prisoner behaved in an exemplary fashion “during that year.” Under the petitioners’ interpretation, “[t]he good time calculation for Year 10 would not be made ‘at the end of’ Year 10,” and the Bureau would similarly be unable to “determine whether the prisoner had behaved in exemplary fashion ‘during that year.’” The Court explained, “[w]e cannot say that this language (‘at the end of,’ ‘during that year’) found its way into the statute by accident.” Thus, the Court concluded that the Bureau’s interpretation, which

131. Id. at 2511.
132. Id.
133. Id. at 2502–06. It should be noted that the Court agreed with the Bureau’s arguments laid out in Part III.B.2, supra.
134. Barber, 130 S. Ct. at 2504.
135. Id.
136. Id.
137. Id. Yet, this fear seems unfounded, considering the fact that prisoners would not serve the last year and a half of their sentence precisely because they behaved in an exemplary fashion during their total time incarcerated and were thus released as a result of their model behavior.
138. Id. at 2504 (emphasis original).
139. Id. (emphasis original).
140. Id. (emphasis original).
effectively prorates good time credits for each year the prisoner actually serves, comported with the actual intent of Congress.\[^{141}\]

The Court also concluded that the Bureau’s interpretation furthers the objective of § 3624 “because ‘[i]t ties the award of good time credits directly to good behavior during the preceding year of imprisonment.’”\[^{142}\] The Court noted that the petitioners’ interpretation, “insofar as it would award up to fifty-four days per year of time sentenced as opposed to time served, allows a prisoner to earn credit for both the portion of his sentence that he serves and the portion of his sentence that he offset with earned good time credit.”\[^{143}\] The Court reasoned that the petitioners were really asking the Bureau to “award good time credit not only for the days a prisoner spends in prison and behaves appropriately, but also for the days that he will not spend in prison at all, such as Year 10 in our example.”\[^{144}\] According to the Court, this would “loosen[] the statute’s connection between good behavior and the award of good time and transform[] the nature of the exception to the basic sentence-imposed-is-sentenced-served rule,” which “is inconsistent with the statute’s basic purpose.”\[^{145}\]

Concerning the petitioners’ intra-statutory consistency argument, the Court noted that “[t]he problem for petitioners, however, is that this presumption is not absolute,” and that “it yields readily to indications that the same phrase used in different parts of the same statute means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion.”\[^{146}\] The Court concluded that indeed, “[t]he phrase ‘term of imprisonment’ is just such a phrase,” and that because “the statute uses the same phrase ‘term of imprisonment’ in two different ways, the presumption” could not help the petitioners.\[^{147}\]

Additionally, the Court rejected both the petitioners’ reliance on legislative history and statements by the Commission, noting there was no indication that the Commission had ever considered the precise question at issue.\[^{148}\] Finally, although the Court did admit that the statute could be “construed as imposing a criminal penalty,” thus invoking the rule of lenity, the Court concluded that after its decision, “there remains [no] ‘grievous ambiguity or uncertainty’ in the

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141. Id. at 2511.
142. Id. at 2505.
143. Id. (emphasis original).
144. Id.
145. Id. at 2505–06.
146. Id. at 2506. Does it not seem that there was, for a long time before this decision, considerable confusion as to how the term should be interpreted?
147. Id.
148. Id. at 2508 (“Again, however, we can find no indication that the Commission, in writing its Supplementary Report or in the Guidelines themselves, considered or referred to the particular question here before us, that is whether good time credits is to be based on time served or the sentence imposed.”).
statutory provision..." Thus, the rule of lenity could not help the petitioners.149

V. INTRA-STATUTORY CONSISTENCY AND THE RULE OF LENIETY SHOULD TRUMP THE BUREAU’S INTERPRETATION

By all accounts, the Bureau’s method for calculating good time credits based on time served “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.’”151 In fact, during oral arguments for Barber v. Thomas, the Supreme Court had trouble understanding the effect of the statute under both interpretations.152 Several of the Justices even appeared to imply that the Bureau’s method was less plausible and more confusing than the petitioners’ proposed method.153 The confusion generated by the Bureau’s calculation lends support to the argument that the rule of intra-statutory consistency should apply.154 Indeed, intra-statutory consistency, lenity, and common sense should probably outweigh a method that takes 28 pages to present and that even the Supreme Court had difficulty explaining.155

A. Intra-statutory Consistency

Specifically, the Court gave short shrift to the petitioners’ intra-statutory consistency argument. It admitted, as the Bureau did, that the first two uses of the phrase “term of imprisonment” in § 3624(b) actually mean sentence imposed.156 The Court concluded, however, that the third use of the phrase “term of imprisonment” in the same sentence had to mean “time actually served.”157 It did so even recognizing the “presumption that a given term is used to mean the same thing throughout a statute.”158 Nonetheless, the Court explained that the presumption “is not absolute,” and that “[i]t yields readily to indications that the

149. Id. at 2508–09.
150. Id. at 2509.
152. See Oral Argument, supra note 17, at 3–57. “[Congress] [p]robably . . . didn’t understand it because it’s an awfully hard statute to understand.” Id. at 52 (quoting J. Roberts). “[I]f we consider both methods plausible, the number comes out at 15 percent—85 percent. . . . It’s a more workable number, and there are some hints in the legislative history that Congress thought 85 percent, not 87.2 . . . [is] the easier number to work with.” Id. at 38–39 (quoting J. Ginsburg).
153. Id. at 52.
154. One word or phrase used three times in one sentence generally has one meaning. See supra text accompanying notes 98–101.
155. Petitioners’ Brief, supra note 30, at 10–11.
156. Id. at 24.
157. Barber, 130 S. Ct. at 2507–08.
158. Id. at 2506 (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).
same phrase used in different parts of the same statute means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion. 159

While the Court makes a valid point, it completely misses the crux of the petitioners’ argument: while the presumption is not absolute, it is at its strongest “when a term is repeated within a given sentence.” 160 The Court, in doing away with the presumption, references § 3624(d) where the phrase “term of imprisonment” is clearly used to mean time actually served. 161 While it is true that the statute uses term of imprisonment differently in other sections, the Court overrules the intra-statutory consistency presumption by referencing a different section of the statute, and ignores the bizarre inconsistency of its conclusion, which allows two meanings of the phrase “term of imprisonment” in the same sentence. 162

This conclusion stands in clear defiance of the presumption that a word or phrase used multiple times within the same sentence should be given the same meaning. 163 Instead, the Court seems to disregard this rule and do away with its logic by pointing out that different sections use the phrase “term of imprisonment” differently, and thus giving it two different meanings within the same sentence is not a problem. 164 The dissent aptly noted:

According to the Court, the phrase “term of imprisonment” must mean “time actually served” the third time that it appears in this particular subsection. But the Court gives the phrase a different interpretation the first two times it is used in the very same sentence. This in itself indicates that something is quite wrong here. 165

B. The Rule of Lenity

Additionally, the Court glossed over the petitioners’ contention that the rule of lenity should apply in this case because § 3624(b) is (1) ambiguous, (2) subject to multiple interpretations, and (3) penal in nature, as it acts as a punishment. 166 The rule of lenity applies when a statute is ambiguous and penal in nature, and it “requires courts to limit the reach of criminal statutes . . . and

159. Id. (citation omitted).
161. Barber, 130 S. Ct. at 2506.
162. Id. at 2506–07.
163. Brown v. Gardner, 513 U.S. 115, 118 (1994) (“Since there is a presumption that a given term is used to mean the same thing throughout a statute, [the] presumption surely [is] at its most vigorous when a term is repeated within a given sentence . . . .”).
164. Barber, 130 S. Ct. at 2506–07.
165. Id. at 2512 (Kennedy, J., dissenting).
166. Id. at 2508–09 (majority); Petitioners’ Brief, supra note 30, at 37.
construe any ambiguity against the government." In addition, "[t]he rule ensures that defendants have notice of what conduct may subject them to criminal liability." The Supreme Court has noted that "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the] rule," and "[t]he rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . [the Court] can make 'no more than a guess as to what Congress intended.'"

First, the idea that § 3624(b) is "an administrative reward" that "sets forth neither a criminal prohibition nor a criminal penalty" seems contrary to common sense when one considers that deference to the Bureau's method subjects Barber to an additional six months of prison time, time that is harsh, violent, and degrading. Indeed, this additional time affects Barber's individual liberty, especially because the initial sentence imposed was based on the idea that prisoners would serve eighty-five percent of their sentence. The Bureau's interpretation requires Barber to serve 87.2 percent of the sentence imposed, which is a punishment covered by the rule of lenity. Interestingly, the majority even noted that § 3624 could "be construed as imposing a criminal penalty" on prisoners, thus implicating the rule of lenity, though it rejected the petitioners' use of the rule.

Second, if there has ever been a statute where the rule of lenity was appropriate because of a "grievous ambiguity" in the statute, § 3624(b) surely must be it. Note that (1) the Ninth Circuit called the statute "at best ambiguous," and (2) many lower courts split on the meaning of the statutory phrase "term of imprisonment." As such, the rule of lenity seems most appropriate to deal with the ambiguity, as the rule of lenity has been described as a "tiebreaker" that "resolves [a] circuit split." Furthermore, the Court's

167. Thomas, supra note 82, at 393 (citation omitted).
168. Id.
170. Respondent's Brief, supra note 12, at 41–42.
171. Oral Argument, supra note 17, at 57.
172. See Nilsen, supra note 8, at 123 ("Today's prisoners enters a world marked by racial unrest, gang warfare, and abusive guards.").
173. Oral Argument, supra note 17, at 57; Petitioners' Brief, supra note 30, at 30–37 ("Members of Congress characterized the good time credit statute as granting a 15 percent reduction from the defendant's sentence as imposed."); Demleitner, supra note 3, at 785 ("The guideline ranges are 15% longer than the time Congress intended for prisoners to stay incarcerated. This meant . . . prisoners should serve . . . 85% of the sentences imposed.").
174. Oral Argument, supra note 17, at 57; Petitioners' Brief, supra note 30, at 30–37 ("Members of Congress characterized the good time credit statute as granting a 15 percent reduction from the defendant's sentence as imposed."); Demleitner, supra note 3, at 785 ("The guideline ranges are 15% longer than the time Congress intended for prisoners to stay incarcerated. This meant . . . prisoners should serve . . . 85% of the sentences imposed.").
175. Oral Argument, supra note 17, at 57.
177. Pacheco-Camacho v. Hood, 272 F.3d 1266, 1271 (9th Cir. 2001).
179. Pacheco-Camacho v. Hood, 272 F.3d 1266, 1271 (9th Cir. 2001); Thomas, supra note 82, at 400;
interpretation means the phrase “term of imprisonment” has two different meanings within the same sentence, a result that is hard to believe Congress intended, especially when one considers that this interpretation adds almost a year of prison time to the petitioners’ sentence. However, the Court explained that after its ruling, there remained no “‘grievous ambiguity or uncertainty’ in the statutory provision,” and thus the rule could not help the petitioners. It is hard not to agree with the dissent when it stated: “the rule of lenity should tip the balance in petitioners’ favor. . . . We should not disadvantage almost 200,000 federal prisoners unless Congress clearly warned them they would face that harsh result.”

VI. POLICY IMPLICATIONS

No matter where one stands on the statute’s ultimate meaning and construction, there can be no doubt that the Supreme Court’s decision will have far-reaching implications, many of which appear to be disastrous for the taxpayers, prisoners, and the prison system at large. Indeed, the petitioners in Barber v. Thomas will spend an additional 338 combined days in prison as a result of the Bureau’s interpretation. At least the dissent willingly recognized that many prisoners are now subjected to more time in our troubled federal prisons at the taxpayers’ expense. As Justice Kennedy stated:

The Court has interpreted a federal sentencing statute in a manner that disadvantages almost 200,000 federal prisoners. . . . Absent a clear congressional directive, the statute ought not to be read as the Court reads it. For the Court’s interpretation—an interpretation that in my submission is quite incorrect—imposes tens of thousands of years of additional prison time on federal prisoners according to a mathematical formula they will be unable to understand. And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court’s interpretation comes at a cost to the taxpayers of untold millions of dollars. The interpretation the Court adopts, moreover, will be devastating to the prisoners who have behaved the best and will undermine the purpose of the statute.
Unfortunately, the Supreme Court’s ruling will continue to perpetuate a system that ignores the idea of rehabilitation at an enormous cost to taxpayers, all while having a disproportionately harsh effect on model prisoners and the racial minorities that make up the majority of our prison system.\(^{186}\)

A. Prison Population and Prison Costs

The SRA and the subsequent Guidelines have vastly increased the number of prisoners across the country.\(^{187}\) In fact, "since the 1980s, federal inmate [prison] populations have increased by more than 600\%."\(^{188}\) As one scholar noted, "[a]t or near the root of virtually every serious criticism of the guidelines is the concern that they are too harsh, that federal law requires imposition of prison sentences too often and for terms that are too long," and that "[i]ncarcerative sentences are imposed far more often than they were before the guidelines, and the length of imposed sentences has nearly tripled."\(^{189}\) Indeed, at a time when incarceration rates are at an all-time high, the Supreme Court’s decision will only place a heavier burden on the prison system as prisoners remain incarcerated longer and do not receive the good time credits they have earned.

The *Barber v. Thomas* decision alone has cost taxpayers more than $20,000, as the average annual cost to house a prisoner is over $22,000 and the petitioners will serve close to an extra year in federal prison.\(^{190}\) To be sure, this decision will only increase the strain on prison budgets, which are already wreaking havoc on the financial stability of the federal budget and the country at large.\(^{191}\) Tax payers will be footing the bill for this additional prison time during a period when "the United States spends approximately 60 billion annually on corrections."\(^{192}\) Indeed, states are now spending four times more money on corrections than they did in 1987.\(^{193}\) By the end of year 2011, “continued prison growth is expected to cost states an additional $25 billion.”\(^{194}\) On average, states spend one out of every

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\(^{186}\) See Nilsen, *supra* note 8, at 120 (more than sixty percent of prisoners are minorities).


\(^{188}\) *Id.* at 1329.

\(^{189}\) *Id.* at 1328.


\(^{191}\) See *id.* at 80–84 ("The drastic increase in imprisonment has had significant financial consequences."); see also MICHAEL JACOBSON, *Downsizing Prisons: How To Reduce Crime and End Mass Incarceration* 8 (2005) ("Even with a slowly recovering national economy, states simply do not (and will not) have the revenue to continue prison expansion while simultaneously supporting Medicaid, maintaining low tax rates, and adequately funding education and health systems.").

\(^{192}\) *Id.* at 53.

\(^{193}\) See PEW CENTER REPORT, *supra* note 1, at 11 (reporting that States spent over $49 billion on corrections in 2007, up from $12 billion in 1987).

\(^{194}\) *Id.*
fifteen dollars from their discretionary budgets on corrections. Spending on corrections has increased dramatically to the point that it now is increasing faster than higher education spending, and five states actually spend more on corrections than higher education.

The enormous cost of state correctional spending would be "burdensome in the most affluent of times, but in the wake of the financial crisis of 2008, it has become unsustainable." Moreover, "between 1985 and 2008, national annual correctional expenditures from general funds alone increased from $6.7 billion to more than $47 billion dollars—an increase of 700 percent." If this statistic is not alarming enough, "[c]orrections now consumes one of every fifteen state general fund dollars, making it the second-fastest growing category of general fund expenditures, outpaced only by the growing cost of Medicaid." As the dissent in Barber recognized, the majority's decision will unnecessarily burden the taxpayer with the cost of housing model prisoners, which inevitably reduces the amount of money that will be used for other needed programs.

B. Rehabilitation and Incentives: Good Time Credits Should Be an Incentive to Model Prisoners Rather than a Punishment

At a time when recidivism rates are "discouragingly high," good time credits should provide prisoners with an incentive to participate in drug rehabilitation and educational programs. Studies suggest that "good time programs can both enhance public safety and save costs." Indeed, some evidence suggests that as the length of a sentence increases, there is an increased risk of recidivism, and that "continued imprisonment . . . may actually increase the risk for future recidivism." Extending prisoners' time in increasingly violent and inhumane prisons in direct defiance of § 3624(b)(1)'s clear language only hinders the effectiveness of good time programs and society's ability to

195. Id. at 14; Gershowitz, supra note 190, at 53 (2008); PEW CENTER REPORT, supra note 1, at 14.
196. PEW CENTER REPORT, supra note 1, at 15–16. These five states include Vermont, Michigan, Oregon, Connecticut, and Delaware. Id. at 16.
197. Cecelia Klingele, Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release, 52 WM. & MARY L. REV. 465, 470 (2010) ("State correctional costs are now estimated to exceed $50 billion annually.").
198. Id. at 482–83.
199. Id. at 483.
200. Barber, 130 S. Ct. at 2512, 2515–16 (Kennedy, J., dissenting).
201. See PEW CENTER REPORT, supra note 1, at 15 ("Some policy makers are questioning the wisdom of devoting an increasingly large slice of the budget pie to incarceration").
202. Id.
203. Demleitner, supra note 3, at 787.
204. Michael Vitiello, Reconsidering Rehabilitation, 65 TUL. L. REV. 1011, 1036 (1991) (low-risk inmates who are imprisoned may actually be at an increased risk for future recidivism).
cope with the increasing number of incarcerated individuals who will inevitably return to their communities.\textsuperscript{205}

By increasing a prisoner’s time, we further subject him or her to fear, “racial unrest, gang warfare, and abusive guards.”\textsuperscript{206}

He will live with the ever-present risks of being assaulted, raped, or even turned into a gang sex slave; contracting HIV, tuberculosis, or other diseases; being put into isolated confinement, or twenty-three hour a day lockdown; and being thrown into a cell with a severely mentally disturbed and potentially violent inmate.\textsuperscript{207}

Amazingly, the Bureau’s interpretation punishes precisely those model prisoners that it should be rewarding. The Bureau should calculate good time credits based on sentence imposed precisely so model inmates who have taken advantage of education and other minimal opportunities inside prisons are not exposed to the realities of prison any longer than necessary. By reducing a model prisoner’s good time credits, the Bureau punishes precisely the inmates whom it should reward by creating a disincentive for model prisoners to participate in rehabilitative and transitional programs.

Interestingly, the majority in \textit{Barber v. Thomas} even noted that § 3624 could “be construed as imposing a criminal penalty” on prisoners, though it ultimately rejected the petitioners’ use of the rule of lenity.\textsuperscript{208} At least Justice Kennedy acknowledged the harsh results of the Court’s decision—that many prisoners will now be subjected to more time in our troubled federal prisons at taxpayer expense.\textsuperscript{209} He stated:

To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake. To this time, the Court adds days—compounded to years. We should not embrace this harsh result where Congress itself has not done so in clear terms.\textsuperscript{210}

Aside from the consequences to taxpayers, the consequences for federal prisoners are very real. Millions of prisoners, those who are behaving in an exemplary fashion, will be subjected to continued time in harsh conditions. Imagine the frustration prisoners must feel who live in an exemplary fashion, yet

\textsuperscript{205} Nilsen, \textit{supra} note 8, at 117–22 (“[W]e turned to prisons to warehouse society’s undesirables. The combined effect of these developments has multiplied the U.S. prison population . . . from 300,000 in 1970 to 2.2 million in 2005.”).
\textsuperscript{206} Id. at 123.
\textsuperscript{207} Id. at 123–224.
\textsuperscript{208} Barber, 130 S. Ct. at 2509.
\textsuperscript{209} Id. at 2512 (Kennedy, J., dissenting).
\textsuperscript{210} Id. at 2517 (Kennedy, J., dissenting) (citations omitted).
now realize that they may be serving considerably more prison time behind bars than the statute requires based on the sentence imposed interpretation. The Bureau’s interpretation reduces incentives for prisoners who strive for the maximum amount of good time credits.

C. Racial Disparity

The Court’s decision also has a disproportionately harsh effect on minorities. Indeed, the country’s unique sentencing system, one that incarcerates more of its citizens than anywhere else in the world, affects minorities on a momentous scale.211 One scholar’s statement appears highly relevant:

The Court’s refusal to subject punishment to meaningful constitutional scrutiny is matched by its refusal to consider clear cases of racial bias in the criminal justice system. As we have seen, minorities are grossly overrepresented throughout the criminal justice system, and it cannot be explained by the fact that a higher percentage of minorities than whites commit crime. But the Supreme Court has repeatedly ignored this evidence by . . . find[ing] no constitutional infirmity in discriminatory effect, only in intentional discrimination.212

Although the Bureau never intended to discriminate through its interpretation of § 3624(b), the Court’s decision further compounds the disparate impact racial minorities face as a result of added prison time and our nation’s sentencing policies. For example, one commentator noted that in Washington D.C., “75% of black males can expect to go to prison or jail in their lifetime.”213 Racial minorities make up sixty percent of the general prison population, and “[n]early one in eight black men between the ages of twenty and twenty-nine are in prison.”214 For black males “finishing high school is the exception,” and “prison is almost routine.”215 Additionally, “Blacks and Latinos each comprise less than 15 percent of the U.S. population, but were 40 and 20 percent (respectively) of the jail and prison population in 2008.”216 Indeed, “[t]he 2008 imprisonment rate for Latino men (1,200 per 100,000) was more than double that of white men (487 per 100,000), and the imprisonment rate for black men (3,161 per 100,000) was six times higher than that of white men,” while the “incarceration rate for Latino women was one-and-a-half times that of white women (50 per 100,000), and

211. PEW CENTER REPORT, supra note 1, at 5–7; Nilsen, supra note 8, at 120.
212. Nilsen, supra note 8, at 155.
213. Id. at 118, 120–22 (almost seven percent of our population will go to prison).
214. Id.
215. Id. at 120–21 (citation omitted).
black women’s incarceration rate (149 per 100,000) was three times that of white women.” Although “racial disparities in incarceration rates have been fairly constant over time, the ratio of black to white prison admissions increased from 2.1 in 1930 to 7.0 in 2000,” and “[b]y 2004, nearly 60 percent of young black men without a high school degree had spend time behind prison bars.”

These statistics reflect the disparate impact sentencing policies have on minority communities as well. “Disproportionate prison sentences of African Americans and Latinos” that result from sentencing policies such as the disparity between crack and powder cocaine “effectively punish many more individuals than the convicted defendants.” Indeed, these disproportionate sentences “change the demographics and economy of inner city communities, leave children without fathers, parents without sons, and women without men of marriageable age.” Accordingly, the Supreme Court’s ruling in Barber impacts more than the minorities who will now serve longer prison sentences. By increasing the time minorities will spend in our nation’s federal prisons, families, sons, daughters, wives, and minority communities at large will be forced to endure even longer without their loved ones.

VII. CONCLUSION

The United States cannot continue to emasculate an entire class of citizens, nor can it continue to support our current penal goal of retribution at the expense of its tax revenue, prisoners, and citizens. Although the broader sentencing reform debate remains outside the scope of this Comment, the Supreme Court’s decision in Barber v. Thomas ignores the simple fact that the United States continues to incarcerate citizens at an alarming rate, spending taxpayer money with little or no return on the investment. To be sure, studies suggest “that a continual increase in our reliance on incarceration will pay declining dividends in crime prevention. In short, experts say, expanding prisons will accomplish less and cost more than it has in the past.”

Good time credits should act as an incentive for inmates to obtain an education or learn a trade to improve their chance of successfully reintegrating with the general population. Assuring model prisoners the maximum rate of

217. Id.
218. Id. (citation omitted).
220. Id. (“This occurs as a result of punishing those convicted of crack cocaine offenses with significantly harsher sentences than those convicted of powder cocaine offenses. Powder cocaine is more likely to be used by white offenders, whereas crack cocaine is more closely identified with black offenders. Thus, sentencing laws send a powerful and negative racial message.”).
221. See PEW CENTER REPORT, supra note 1, at 21.
222. Id.
223. Demleitner, supra note 3, at 787 (noting these programs reduce recidivism rates and save money).
forty-seven days of good time credit per year, which is in clear defiance of the plain language of the statute, will only perpetuate disincentives for rehabilitation. By calculating “term of imprisonment” based on time served, the Bureau and the Supreme Court move the federal sentencing system further away from the rehabilitation our prison system and those incarcerated desperately need.