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National Association of Criminal Defense Lawyers
NACDL
50TH ANNIVERSARY
1958

December 22, 2008

Office of the General Counsel - Rules Unit
Bureau of Prisons
Attn: Sarah Qureshi, Esquire
320 First Street NW
Washington, D.C. 20534

RE: BOP Docket No. 1151-I
Interim Rule Change

Dear Ms. Qureshi:

This letter commenting on BOP Docket No. 1151-I, the interim rule change to 28 C.F.R. § 570 *et seq.*, is submitted jointly by the National Association of Criminal Defense Lawyers (NACDL) and Families Against Mandatory Minimums (FAMM).[1] The interim rule fails to give full force to Congress's express intent in promulgating the Second Chance Act: (a) that placement in a halfway house, among other things, be of "sufficient duration to provide the greatest likelihood of successful reintegration into the community," (b) that the Bureau of Prisons (BOP) ensure that, to the extent practicable, a prisoner is considered for halfway house placement or other conditions assisting in release preparation for up to 12 months, and (c) that the BOP exercise its full discretion under 18 U.S.C. § 3621 in making re-entry decisions. For reasons detailed below, the Bureau should reconsider and revise the interim rule, making clear that every federal prisoner will be considered for up to 12 months' pre-release confinement at a Residential Reentry Center (RRC) as well as for up to six months' home confinement – for up to the one-year total that Congress directs.[2] Furthermore, the Bureau should affirm that all otherwise eligible sentenced prisoners are once again being considered, on an individualized basis, for direct designation to an RRC, as they were before December 2002 and in those Circuits that invalidated the unlawful 10% Rule.

The NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,000-plus direct members in 28 countries - and 90 state,

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[1] BOP publishes its interim rule in final form based on claimed urgency, though the nature of the urgency is not clear since the rule does little more than state that BOP will comply with its obligations under the Second Chance Act with respect to community reentry placements. *See* 73 Fed. Reg. 62,440, 62,441 (Oct. 21, 2008). It is also not clear whether publication of the rule in this form complies with the Administrative Procedure Act.

[2] In 2005, during a wave of appellate challenges to the 2005 version of this rule, BOP began referring to halfway houses as Residential Reentry Centers even though the governing program statement referred to them as Community Corrections Centers (CCCs), which it does to this day. *See infra*.

provincial and local affiliate organizations totaling more than 40,000 attorneys - include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public about issues relating to sentencing justice and sentencing reform. FAMM, whose 14,000 members include criminal justice professionals as well as prisoners and their loved ones, promotes sentencing laws that are individualized, humane and sufficient but not greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. FAMM has a strong interest in ensuring that sentences are served in facilities that are appropriate and give the prisoner the best opportunity to reintegrate into society.

A. Residential Reentry Centers Are Places of Imprisonment that Have Been Used Traditionally to Address Prisoner Needs and Circumstances in a Manner Not Afforded by Other Correctional Institutions.

To appreciate our concern that the interim rule does not implement Congress's mandate of individualized consideration for halfway house stays of sufficient duration to promote successful reentry, it is useful to understand the background against which Congress legislated. The Second Chance Act sponsors understood the essential role that halfway houses play in the management of federal prisoners and rejected the Bureau's alteration of policies in 2002 and 2005 governing halfway house use. Sound correctional management philosophy long embraced the use of these penal facilities to address prisoners' varied and individual needs. Federal law has long recognized those practices and mandated that the Bureau of Prisons make individualized determinations about when and where to transfer federal offenders. When the BOP disturbed that practice by informal policy change in 2002 and then by categorical rulemaking in 2005, purportedly limiting its own discretion to choose when to designate an individual to a halfway house, courts rejected these changes almost uniformly. Those judicial opinions in turn informed the drafters of the Second Chance Act, who "restored" (or, more accurately, reaffirmed) the Bureau's discretion, and expanded the law's guarantee of consideration for pre-release programming from six to 12 months. The Act by implication also affirms that the BOP's authority to use a halfway house – long recognized as a kind of "penal or correctional facility" – exists at any stage in the designation process.

1. Halfway houses have been an integral component in the management of federal prisoners for more than 40 years.

The BOP has its origins in the Three Prisons Act of 1891 and the Federal Bureau of Prisons Act of 1930. Under the leadership of Director Myrl E. Alexander and pursuant to the Prisoner Rehabilitation Act of 1965, the Bureau expanded halfway house use in the 1960s for those in need of substance abuse treatment and, later, for any prisoner who, in its judgment, might benefit from structured confinement in the community and could be safely managed in that setting. See *Escaping Prison Myths: Selected Topics in the History of Federal Corrections* (John W. Roberts, ed., American Univ. Press, 1994); *Two Innovations: Three Decades Later Community Treatment Centers and Regionalization*, 1 Federal Prisons Journal 1, 36-42 (USDOJ-BOP, Summer 1989); *see also* Pub. L. 89-176, § 1, 79 Stat. 674 (1965). With the support of succeeding BOP Directors Norman Carlson and J. Michael Quinlan, community corrections grew during the 1970s and 1980s and became a

fundamental component of the agency's overall range of placement options. *Escaping Prison Myths*. In this regard, halfway houses were recognized as "institutions" or "facilities" -- among the BOP's available places of imprisonment.

Through the Sentencing Reform Act of 1984 (SRA), Congress promulgated 18 U.S.C. § 3621(b), which, in pertinent part reads:

> **(b) Place of imprisonment.—**The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau… that the Bureau determines to be appropriate and suitable, considering—
>
> (1) the resources of the facility contemplated;
> (2) the nature and circumstances of the offense;
> (3) the history and characteristics of the prisoner;
> (4) any statement by the court that imposed the sentence—
> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
> (B) recommending a type of penal or correctional facility as appropriate; and
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.
>
> In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another…

This provision reiterated pre-existing statutory authority, under 18 U.S.C. § 4082(a) (1982), regarding the Bureau's responsibility for the designation of federal prisoners. *See* Sen. Judiciary Comm., "Comprehensive Crime Control Act of 1983," S.Rep. 98-225, 98th Cong., 1st Sess., 141-42 (1983) ("Existing law provides that the Bureau may designate a place of confinement that is available, appropriate, and suitable. Section 3621(b) continues that …") (quoted in *Zucker v. Menifee*, 2004 WL 102779, at *3 (S.D.N.Y. Jan. 21, 2004) (Holwell, J.)); *see* Dan Eggen, *White-Collar Crime Now Gets Real Time: New Federal Prison Policy Criticized*, Washington Post (Jan. 7, 2003) (noting that BOP's General Counsel issued a legal opinion, in 1985, interpreting the phrase "penal or correctional facility," used in § 3621(b), as exactly coincident with "institution or facility" in the former § 4082(a)).. One notable aspect of § 3621(b) was Congress's new, express direction to the BOP to account for the above individualized factors, the majority of which are prisoner-specific.

By the late 1980s, the BOP, then under the leadership of Director Quinlan, sought to expand its confinement options, to increase the use of home confinement. Congress intervened, directing when and for how long BOP might use home confinement as "imprisonment" under § 3621(b), namely, to the final ten percent of a prisoner's time served, up to six months. *See* 18 U.S.C. § 3624(c) (1990 ed.). In so doing, however, Congress did not amend § 3621(b) or otherwise modify the Bureau's general designation authority, including to a halfway house. *See Monahan v. Winn*, 275 F.Supp.2d 196 (D. Mass. 2003) (excellent discussion of legislative history); 136 Cong.Rec. 27587-88 (Oct. 4, 1990); H.Rep. 101-681, pt. 1, 101st Cong., 2d Sess., 142-44 (1990).

Soon after this change, the BOP, through a written policy statement, announced its intention to "promote greater use of community corrections programs for low risk offenders." Operations Mem. 91-90 (7300), *Community Corrections Center Utilization* (June 13, 1990). The Bureau correctly recognized that **"[t]here is no statutory limit on the amount of time inmates may spend in CCCs**," and instructed that "[u]nless the warden determines otherwise, minimum security inmates will ordinarily be referred [for CCC placement at the end of their sentences] for a period of 120 to 180 days." *Id.* (emphasis added); *see* GAO, *Prison Alternatives: Crowded Federal Prisons Can Transfer More Inmates to Halfway Houses* (November 1991) (noting CCC practices). Pre-release transfer decisions thus were made without regard to sentence length.

The Office of Legal Counsel (OLC), in a 1992 legal opinion, upheld the Bureau's analysis and its flexible use of CCCs:

> **There is … no basis in section 3621(b) for distinguishing between residential community facilities and secure facilities.** Because the plain language of section 3621(b) allows BOP to designate 'any available penal or correctional facility,' we are unwilling to find a limitation on that designation authority based on legislative history. Moreover, the subsequent deletion of the definition of 'facility' further undermines the argument that Congress intended to distinguish between residential community facilities and other kinds of facilities.

USDOJ-OLC, *Statutory Authority to Contract With the Private Sector for Secure Facilities*, 16 Op.OLC 65 (1992) (emphasis added). A 1994 report to Congress elaborated on BOP's CCC practices, explaining that in an effort to enhance program opportunities – consistent with the objective of housing prisoners "in the least restrictive environment consistent with correctional needs" – the agency created a two-part community corrections model designed to manage those directly designated to CCCs and those placed there in preparation for re-entry. USSC/USDOJ-BOP, *Joint Report to Congress: Maximum Utilization of Prisons Resources*, 7-10 (June 30, 1994); *see also* USDOJ-BOP, *State of the Bureau: Accomplishment and Goals 2001*, at 49 (CCCs "allow pre-release inmates to gradually rebuild their ties to the community, and they allow correctional staff to supervise offenders' activities during this readjustment phase"); J. Klein-Saffran, Ph.D., *Electronic Monitoring vs. Halfway Houses: A Study of Federal Offenders in Alternatives to Incarceration* (Fall 1995). The report characterized the Bureau's efforts as "a proactive approach … to meet the demands of sentencing reform, the protection of public safety, and offender needs" and "an important aspect of Federal confinement [that] represent[s a] prudent use of resources." *Joint Report* at 9-10. It also observed that "[a] relatively constant percentage of the Bureau's population may be safely confined on community programs at any one time, given the typical range of security requirements among Federal offenders." *Id.* 10-11.

The BOP's view of CCC usage has remained constant in all versions of its official written policy statements derived from the original 1990 memorandum. *Compare* P.S. 7310.04, *supra*, *with* P.S. 7310.01 (Apr. 30, 1993) and intermediate versions; *see also Reno v. Koray*, 515 U.S. 50 (1995) (citing P.S. 7310.02 as recognizing halfway house as a place of imprisonment, such that pretrial CCC

detention merits full time credit against later-imposed sentence). Program Statement 7310.04, in effect since 1998, provides:

> [T]he Bureau is not restricted by § 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the 'last ten per centum of the term,' or more than six months, if appropriate. Section 3624(c), however, does restrict the Bureau in placing inmates on home confinement.

It was thus not uncommon for the BOP to commit newly sentenced prisoners directly to CCCs or to transfer prisoners from other institutions to CCCs for the last six months of their sentences, even if that period exceeded the last ten percent of their sentences. See *Cato v. Menifee*, 2003 WL 22725524 *2 (S.D.N.Y., Nov. 20 2003). So it was until December 2002.

2. The Justice Department's attempt to limit eligibility for halfway house placement to the final 10% of prisoners' sentences up to six months was declared unlawful, and the BOP never changed the fundamental mission of these community-based "places of imprisonment."

> In response to an inquiry from the Attorney General's Office, the Office of Legal Counsel issued a memorandum opinion, on December 13, 2002, that found the BOP's longstanding CCC practices to be unlawful. USDOJ-OLC, *Re: Bureau of Prisons practice of placing in community confinement certain offenders who have received sentences of imprisonment* (December 13, 2002). *See Levine v. Apker*, 455 F.3d 71, 74-76 (2d Cir. 2006) (setting out these events). Three days later, Deputy Attorney General Larry Thompson drafted a memorandum to BOP Director Kathleen Hawk Sawyer instructing the Bureau to immediately modify its CCC practices.

On December 20, 2002, Director Hawk Sawyer issued a Memorandum to Federal Judges announcing changes to the agency's CCC policy, including that judicial recommendations for direct placements would no longer be honored. Concurrently, BOP enacted restrictions on mid-sentence and pre-release transfers to CCCs, limiting them, with few exceptions, to the final 10% of a prisoner's time served, up to six months — mirroring the limitation § 3624(c) places on the BOP's use of home detention. This became known as the "10% Rule."

The Bureau's longstanding direct CCC commitment practice, as noted in the 1992 OLC memorandum, was of course legally predicated on the idea that a CCC was a place of imprisonment to which an inmate could be designated or transferred at any time during the sentence. The Solicitor General's May 2001 brief in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) acknowledged the same: "[T]he BOP employs [CCCs] … 'for certain short-term offenders'." For decades preceding 2003, federal criminal defense attorneys (including countless NACDL members), often with the prosecutor's concurrence, commonly requested non-binding, written recommendations in a defendant's judgment order for direct CCC designations Also, the BOP's direct commitment criteria included no preference for "white-collar felons." USDOJ-BOP, *Judicial Guide to the Federal Bureau of Prisons* at 12, 18 (1995) (detailing eligibility criteria and noting that

"those serving short sentences of imprisonment who would benefit by maintaining community ties"); *see* USDOJ-BOP, *Judicial Resource Guide to the Federal Bureau of Prisons* (2000) (same). Rather, "[BOP] officials said that halfway houses have been used for nonviolent offenders for at least 20 years. 'The point is that it's not just white-collar offenders who have benefited from this longstanding practice,' said … a spokeswoman for the bureau. 'There are a lot of drug offenders, single moms and ordinary folks who aren't wealthy people who have benefited from this. It's not just Enron types.'" Eric Lichtblau, *Criticism of Sentencing Plan for White-Collar Criminals*, NY Times (Dec. 26, 2002).[3]

The BOP's unexpected action, taken without notice or opportunity for comment, triggered intense litigation nationwide. District courts generally disfavored the attempts to restrict CCC use, ordering instead that BOP reconsider individual prisoner's halfway house eligibility consistent with pre-December 2002 practices. *See, e.g.*, *United States v. Arthur*, 367 F.3d 119, 121 (2d Cir. 2004) ("A district court of this Circuit has recently determined that 'the vast majority' of courts to consider the matter have 'held that the new policy was unlawful'."). When the issue eventually reached the Courts of Appeals, it was determined that nothing in the law restricted the use of CCCs, as places of imprisonment under 18 U.S.C. § 3621(b), at any time during a prisoner's sentence. *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004); *accord Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004); *see also Reno v. Koray*, *supra*.

Notwithstanding the overwhelming weight of judicial authority, the BOP, in August 2004, published proposed "new rules" in the Federal Register for notice-and-comment that mirrored precisely the December 2002 OLC opinion and the limits of the 10% rule. 69 Fed. Reg. no. 159, at 51215 (Aug. 18, 2004). These rules abandoned the reliance on misinterpretation of § 3624(c) and instead purported to reflect a "categorical" exercise of "discretion" in applying the BOP's prisoner placement authority. See *Levine v. Apker*, 455 F.3d at 82 n.8. The "new" 10% Rule, which the interim rule now proposes to change, was enacted the following summer. 28 C.F.R. §§ 570.20-.21 (July 1, 2005).

In less than a year, two federal Circuit Courts invalidated the 2004-05 iteration of the 10% Rule. *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005). The Second Circuit joined them in July 2006, the Tenth Circuit in 2007 and the Ninth Circuit just four months ago. *Rodriguez v. Smith*, 541 F.3d 1180 (9th Cir. 2008); *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007); *Levine v. Apker*, *supra*. Only the First Circuit affirmed the BOP's claimed categorical exercise of discretion for designating inmates to community confinement; all others declared this version of the 10% Rule unlawful. See *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008).

The late Chief Judge Becker, a long-time chair of the Judicial Conference's Criminal Law Committee, writing for the Third Circuit's *Woodall* panel, found that Congress never envisioned the type of irrational limitations the BOP sought to place on the nonexhaustive list of § 3621(b) factors:

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[3] Indeed, BOP officials later acknowledged that 45 of 132 individuals directly affected by the direct CCC rule change (34%) were women, who account for roughly seven percent of the total federal prisoner population. *Culter v. United States*, 241 F.Supp.2d 19 (D.D.C. 2003) (noting disproportional impact).

> A commonsense reading of the text – especially when combined with the legislative history – makes clear that the BOP is required to consider each factor …. [W]e believe the statute indicates that the BOP *may* place a prisoner where it wishes, *so long as* it considers the factors enumerated in § 3621.
>
> Our reading is bolstered by the statute's legislative history, which states that the BOP is 'specifically required' to consider the § 3621(b) factors…

Woodall v. Fed. Bureau of Prisons, 432 F.3d at 245 (emphasis in original; citation omitted); *accord United States v. Martin*, 438 F.3d 621, 631 (6th Cir. 2006) (supporting *Woodall*'s method of statutory interpretation). Said another way: "It follows from the plain grammatical construction of [§ 3621(b)] … that the BOP's discretion to designate an inmate to a penal or correctional facility, and its determination of which facilities are 'appropriate and suitable' for that inmate, must be informed by the list of five Congressional concerns." *Levine v. Apker*, 455 F.3d at 81 (*id.* 82, also supported by legislative history); *Fults v. Sanders*, 442 at 1090 (BOP's interpretation of § 3621(b) is "contrary to the statute's unambiguous language). The Tenth Circuit agreed: "Although § 3624(c) surely imposes an affirmative obligation on the BOP, whenever practicable, to place an inmate in a CCC or other form of community confinement as the inmate's release date nears, § 3624(c) has no bearing on whether a CCC may be considered as a place of imprisonment at some earlier point in a prisoner's period of incarceration." *Wedelstedt v. Wiley*, 477 F.3d at 1185.

Significantly, within those Circuits that invalidated the 2005 version of the 10% Rule, BOP announced not only would it consider prisoner's pre-release transfer eligibility without regard to the rule but it was also entertaining, once again, judicial recommendations for direct halfway house commitments. "Federal Bureau of Prisons Issues," Memorandum of BOP Regional Counsel to Federal Bar Ass'n, Crim. Law Cmte. E.D.Pa. (Oct. 2007), at 5; *see* Stuart Rowles, 48 *Community Update: Notes to BOP's Local Partners* 1 (May 2006) (in Circuits were 10 percent provision struck down, prisoners "can once again be directly designated to CCCs")..

B. The Second Chance Act Directs Even Greater Use of Halfway Houses Than BOP Had Afforded Routinely Prior to the Unlawful 10% Rule.

The President made prisoner re-entry a cornerstone of the 2004 State of the Union address, using the term "second chance." The following summer, the President reiterated this commitment and publicly declared a desire to assist the 600,000 men and women who are being released from prison each year: "Let's make sure we're the country of the second chance. Let's make sure people have got a chance to get an education and a job." President George W. Bush, Remarks by the President to the 2004 National Urban League Conference (July 23, 2004). The Attorney General, who oversaw a $100 million grant initiative designed to encourage states to focus on re-entry initiatives, echoed these sentiments:

> Effective re-entry programs also help individuals who have paid a debt to society to return to their communities, to make up for lost ground, and to redeem themselves. A strong and successful re-entry program presents the best opportunity for inmates to become solid

> citizens upon release. As President Bush has said, 'America is the land of second chances, and when the gates of the prison open, the path ahead should lead to a better life.'

Attorney General John Ashcroft, Prepared Remarks at the Department of Justice Offender Re-Entry Conference (Cleveland, OH Sept. 20, 2004).

Consistent with the Administration's stated interests and echoing the President's language, Illinois Congressman Danny K. Davis introduced legislation that eventually became the Second Chance Act. Discussing the Act's passage, Representative Davis stated:

> And so Second Chance is saying to America, quite frankly, that if we are willing to work with people, many of those individuals will respond in a very positive way. That those individuals will find ways to overcome whatever it is that got them in the predicament that they find themselves in…. It's opened the door. I look forward to continuing to walk through those doors, not only with inmates coming out of prison and jail, but with all of us who will know that at the end we will have shaped a better America.

The Honorable Danny K. Davis (Rep., IL-7th Dist.), Remarks at the United States Sentencing Commission Symposium on Alternatives to Incarceration (Washington, DC, July 15, 2008). The amended versions of sections 3621 and 3624 contained in the Second Chance Act confirm the consensus judicial understanding of pre-existing law while extending the statutory directive to ensure widespread use of community confinement as part of BOP's mission. The new regulations must reflect that congressional intent.

As amended, section 3624 reaffirms that the Bureau may under section 3621 designate "*any* available penal or correctional facility," 18 U.S.C. § 3621(b), not limited to secure prison-type facilities, and that the Bureau may "*at any time* direct the transfer of a prisoner from one penal or correctional facility to another." *Id.* (emphasis added). There can be no legitimate doubt that a *community* correctional facility is a type of "correctional facility" under this language, just as it has always been. And, in making either an initial designation or a subsequent transfer decision, the Bureau must "consider" "any statement by the court that imposed the sentence … recommending a type of penal or correctional facility as appropriate" (*id.*(b)(4)(B)) provided, however, that no court can "order" that a defendant serve the entire sentence in community corrections and, as has always been the case, that any judicial "recommendation or request" to that effect is not binding on the Bureau in its exercise of individualized discretion in making designations or transfer decisions. *Id.*(b). Subsection 3624(c), which we discuss in the next paragraph, sets forth the legal framework on the use of community corrections for re-entry purposes, but "[n]othing in [that] subsection" in any way "limit[s] or restrict[s] the authority" of the Bureau "under section 3621." 18 U.S.C. § 3624(c)(4). In short, the statutory framework now even more clearly affirms what most courts – and the Bureau itself prior to December 2002 – had understood § 3621(b) always to mean: there is no legal impediment to the Bureau's choosing a community corrections facility as a place of imprisonment for any portion up to and including the entirety of a prisoner's sentence..

In promulgating a new regulation on the use of halfway houses for re-entry purposes, then, the Bureau must be careful that the provision is not misunderstood to limit the Director's authority or discretion to house any inmate in a community corrections facility for other reasons and at other points in the sentence. To focus on re-entry/pre-release, however, the Second Chance Act emphasizes the individual *entitlement* of every federal prisoner to conditions of confinement during "the final months of" the term of imprisonment that will prepare the inmate for release. This entitlement extends to every prisoner unless not "practicable." Without limitation of the Bureau's discretion to allow a longer period of release preparation, no prisoner's legal *entitlement* exists for more than the last 12 months of the sentence. The statute specifically confirms that such release-preparation "conditions" may include placement in a community correctional facility, such as a halfway house. 18 U.S.C. § 3624(c)(1). While home confinement would not otherwise be considered a placement in a "penal or correctional facility," this limitation is still overridden by § 3624(c) for the final 10% of the imposed sentence, not to exceed six months.

The interim rule is wholly deficient in its failure to expressly direct consideration of community confinement as a part of a re-entry plan for periods that begin well before the prisoner's 10%/six month date, to allow a natural and graduated transition from secure correctional custody to supervised release. In this regard, we note that BOP has traditionally approached pre-release placement by considering prisoners for halfway house transfers of up to six months and then providing some subordinate portion of home confinement, most often substantially less than 10% of the sentence. The Second Chance Act revises this re-entry paradigm. Under the Act, the focus should be on maximizing each prisoner's period of imprisonment under home confinement (up to six months) and then ensuring an additional, preceding term of halfway house imprisonment for a total of up to one year in community custody prior to release.

Proper construction of these substantive statutory provisions is further informed by the statutory guidance on the content of regulations. Confirming our analysis presented above, section 3624 as amended directs that the regulations must provide that decision making about the timing of an inmate's "placement in a community correctional facility" be "conducted in a manner consistent with section 3621(b)" (18 U.S.C. § 3624(c)(6)(A)), that is, in part, without limitation on *when* a transfer is possible. Consideration, as provided in the regulation, must not be categorical but rather "determined on an individual basis." *Id.*(c)(6)(B). And the duration of each inmate's placement in a community facility must be "sufficient" to "provide the *greatest likelihood* of successful reintegration into the community." *Id.*(c)(6)(C) (emphasis added). Maximizing successful reentry is thus made a paramount factor during the final part of the term, overriding others such as punishment and deterrence.

C. The Interim Rule Reflects an Effort by the BOP To Continue Existing Restrictions on Halfway House Usage That Have Been Held Unlawful.

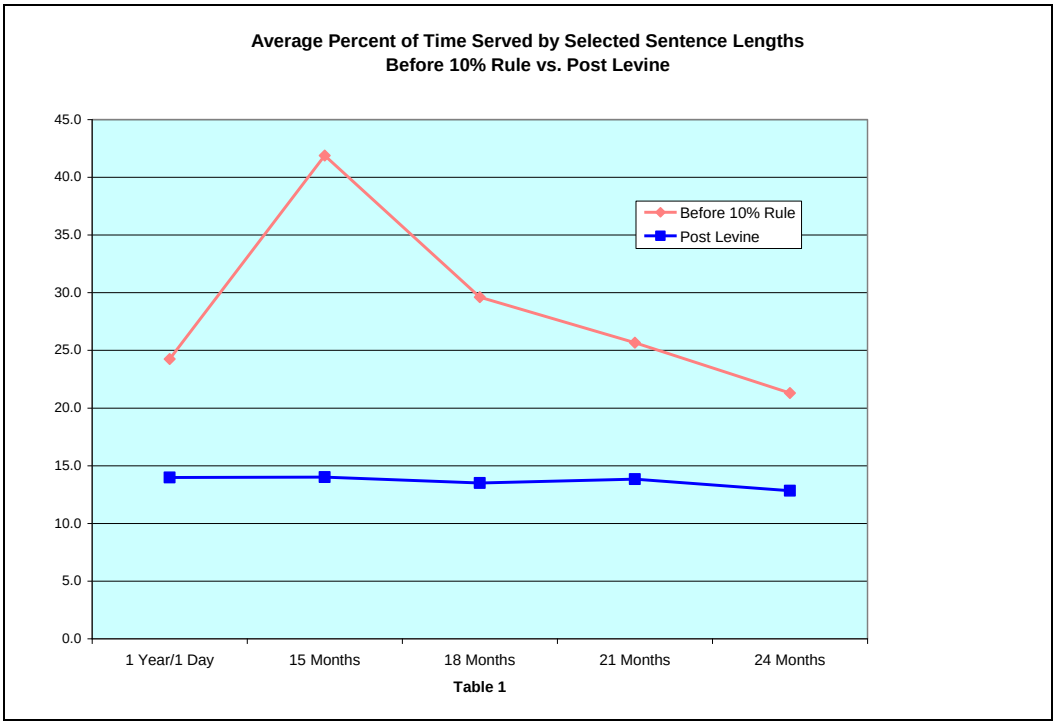
NACDL and FAMM submit that the interim rule reflects a continuing effort by BOP to limit unlawfully federal prisoners' eligibility for and placement at halfway houses, in the face of contrary congressional directives in the Second Chance Act. In this regard, the changes the rule produces must be viewed not only in light of the above history but also within the context of subtle shifts that have received too little public scrutiny. From an unnecessary change in facility nomenclature to at least one institution's efforts to implement temporal caps contrary to pre-2003 practices, the

Bureau's approach appears to be one of giving no more halfway house time that than which can minimally survive judicial scrutiny. Congress clearly did not intend such a miserly approach to assisting prisoners to reintegrate successfully into society.

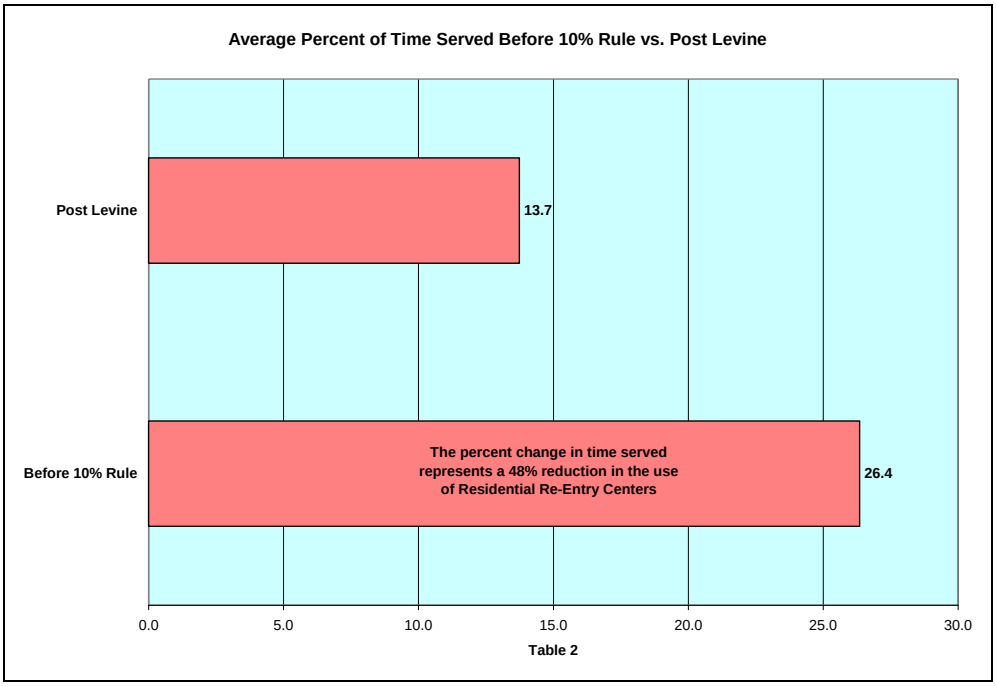
During the wave of appellate challenges to the 2005 version of the 10% Rule, BOP began referring to halfway houses as Residential Reentry Centers (RRCs) even though the governing program statement referred to them as Community Corrections Centers, as it does to this day. Public statements regarding the rationale for the new classification demonstrate an effort to shape public perception, rather than substantive change. BOP's Community Corrections Administrator asserted that the BOP "wanted to take advantage of the recent emphasis on reentry and we thought removing 'correctional' from the name might be better for our image." *See* Stuart Rowles, 47 *Community Update: Notes to BOP's Local Partners* 1-2 (Dec. 2005). Notably, Mr. Rowles did not specify to what "recent emphasis" he was referring, though, at that time, the 10% Rule was in full effect nationwide, meaning that the BOP refused categorically to honor any judicial recommendations for direct commitments of qualified, sentenced prisoners to CCCs. Regardless, six months later, Mr. Rowles made clear that the name change "will not effect existing facilities…. [W]e have used the terms halfway house and CCC synonymously for years and now we can add RRC." 48 *Community Update: Notes to BOP's Local Partners* 1. The RRC label appears thus little more than semantic gamesmanship and Bureaucratic window-dressing.

More troubling is evidence of evasion and outright defiance of court rulings rejecting BOP's efforts to limit the use of halfway houses. In litigation by NACDL and FAMM Litigation Advisory Board members that challenged pre-release practices at the Federal Prison Camp in Otisville, New York following invalidation of the 10% Rule, discovery was produced that supported petitioner's claim of an informal, pervasive 15% cap on prisoner halfway house placement. As reflected in Table 1 below, comparing discovery produced in prior litigation the petitioner established that following the Second Circuit's decision in *Levine*, on average, no FPC Otisville prisoner served more than 15 percent of his sentence (less Good Conduct Time) in a halfway house.[4]

[4] The percentage for those serving 15-month sentences before 2003 is skewed upward by approximately eight percent due to one prisoner being granted 304 days (76.4 percent of his time served) halfway house time. We are not familiar with the individual circumstances which were found to justify that aberrant decision.



Moreover, as seen in Table 2, the data showed that the "individualized" transfer decisions rendered by the staff at FPC Otisville, which purported to have cast aside the 10% Rule, represented a 48 percent reduction in the overall use of halfway houses (in terms of percentage of time served) for those prisoners serving between a year-and-a-day and 24 months' imprisonment, as compared with the individualized decision made prior to the initial announcement of the illegal 10% Rule.



Percentages tell an incomplete story, however. Because Program Statement 7310.04, which was in effect that the time that this data was disclosed and is as yet revised, directs that eligible prisoners are to be considered for up to six months in a halfway house without regard to sentence length, and deviations from that norm are only to occur in "extraordinary" circumstances, it necessarily follows that halfway house time as a percentage of time served will decrease, on average, the greater the sentence-length cohort studied. This explains the downward slope in Table 1's pre-2003 data, as opposed to the relatively flat line, with a slight decline, produced by the post-*Levine* data. The latter is a product of artificial, arbitrary limitations and shows that BOP, at least at FPC Otisville, did not return to pre-2003 practices following *Levine*.

Considering the number of days actually granted further highlights the disparity. For instance, as seen in Table 3, prior to 2003, FPC Otisville prisoners serving 18-month sentences were transferred, on average, with 141.4 days of their respective sentences remaining to serve. But, after *Levine* supposedly restored pre-2003 institution practice, that number dropped to an average 46.1 days, a 95.3-day (67.4%) reduction. The *most* halfway house time *any* prisoner serving an 18-month sentence received post-*Levine* (87 days) was, up to the point the discovery was produced, less than the *least* amount granted to anyone in the same cohort in 2000, 2001 or 2002 (89 days).

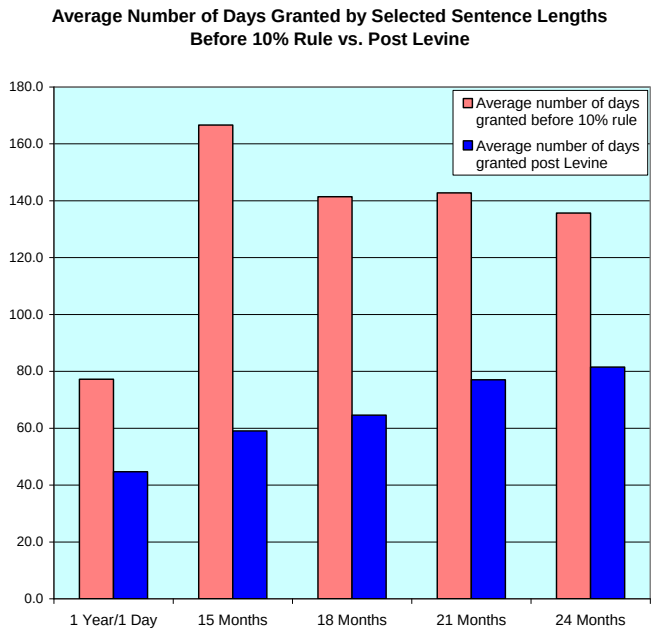


Table 3

Viewed in isolation, the resistance to judicial authority at Otisville might be seen as an outlier, a systemic anomaly. However, it mirrors anecdotal information received both by NACDL members and FAMM from other Bureau institutions. More significantly, it comports all too closely to the an inter-agency memorandum published on April 14, 2008, wherein the BOP Central Office announced that the Second Chance Act will not result in any change in its policy and practice regarding pre-release designations, that is, there continues to be an unlawful categorical presumption

limiting pre-release halfway house placements to six months or less. *See* Memorandum from Joyce K. Conley, Assistant Director Correctional Programs Division, Bureau of Prisons, Regarding Pre-Release Residential Reentry Center Placement Following the Second Chance Act of 2007, to Chief Executive Officers at 4 (April 14, 2008) (any pre-release placement in community confinement for a period greater than the six months provided in existing policy requires special written concurrence by the Regional Director).[5] Particularly disconcerting about this considered directive is the assertion that "Bureau experience reflects inmates' pre-release RRC needs can usually be accommodated by a placement of six months or less." *Id.* Clearly this contradicts the Bureau's unwavering adherence to the rationale of the 10% Rule this past six years. Moreover, the Bureau cannot presume the effects or efficiency of a 12-month approach to pre-release, especially if making greater use of home confinement. Even accepting BOP's experience claim (which we do not, since it is not documented in any known publication), it necessary follows that under the provisions of the Second Chance Act every prisoner serving a sentence of 60 months or more must be considered fully and fairly for six months' halfway house and six months' home confinement.

The final piece of public information that gives us pause is a statement BOP Director Harley Lappin made from the audience during the question-and-answer period of a plenary session on the Second Chance Act at the United States Sentencing Commission's Symposium on Alternatives to Incarceration. Specifically, Director Lappin asserted, "[O]ur research that we've done for many years reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better. The six months seems to be a limit for most of the folks, at which time if they go much beyond that, they tend to fail more often than offenders that serve up to six months." USSC, *Proceedings from the Symposium on Alternatives to Incarceration* at 267 (July 14-15, 2008). Ignoring that "for many years" the BOP has unlawfully tried to prevent affording all federal prisoners up to six months pre-release confinement in a halfway house, as it had done prior to December 2002, we are not aware that the Bureau has published this supposed research. We urge that if any such research results exist, they be disclosed immediately for public or peer review. Until then, we suggest that no weight can be given to any such results.

Two other points concerning Director Lappin's statements merit attention. First, he confirmed the six-month presumption set forth in the April memorandum. *Id.* ("we really wanted more flexibility to give offenders, on a case-by-case basis, as much opportunity to spend in a halfway house, up to six months, unless, on a case-by-case basis, there were offenders who came along that we believed would benefit from more than six months in a halfway house"). Second, he claimed that halfway house placement actually costs more per day than at a minimum- or low-security institution. *Id.* As to the latter, the assertion is plainly wrong. According to the Administrative Office of the Courts most recent data, the per day cost of placement at a halfway house is $62.66, as opposed to $68.28 at other BOP facilities. Memorandum from Matthew Roland, AO Deputy Assistant Director, Regarding Cost of Incarceration and Supervision, to Chief Probation and Pretrial Services Officers (May 6, 2008). And, as we understand it, the stated halfway house cost does not account for mandatory contributions that amount to 25% of each resident's paycheck.

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[5] Leaving aside the Justice Department's close involvement with negotiations surrounding promulgation of the Second Chance Act, that this memorandum was issued five days after the Act was signed into law calls the professed urgency of the interim rule into serious doubt. Indeed, no where does the Bureau offer or explain why it did not or could not publish regulations by July 8, 2008, as required. 18 U.S.C. § 3624(c)(6).

* * *

In conclusion, NACDL and FAMM submit that the interim regulation not be made final in its present form. Instead, it should be rewritten to reflect and fully embrace both the legal constraints and the correctional philosophy of the Second Chance Act.

Respectfully submitted,

Todd A. Bussert
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