
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 04-6206-pr

ELIOT S. SASH,

Petitioner-Appellant,

-against-

MICHAEL ZENK, Federal Bureau of Prisons,

Respondent-Appellee.

APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ELIOT S. SASH

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Garaufis, J.) denying a petition for writ of habeas corpus. Jurisdiction of this action was in the district court pursuant to 28 U.S.C. § 2241. This Court's jurisdiction is invoked under 28 U.S.C. § 1291. Appellant filed a timely notice of appeal on November 17, 2004, and this Court continued The Legal Aid Society, Federal Defender Division, Appeals Bureau, as counsel to Mr. Sash on

appeal under the Criminal Justice Act.

QUESTION PRESENTED

1. Whether the plain language of 18 U.S.C. § 3624(b)(1) requires that a good conduct time credit of 54 days be awarded for "each year" of the "term of imprisonment" imposed, not for each year "actually served."

2. Whether, if the statute is ambiguous, the rule of lenity, rather than Chevron deference, must be applied to resolve its construction in Petitioner's favor, and whether, in any event, Chevron deference should not be granted the Bureau's interpretation.

3. Whether, if Chevron deference applies, the Bureau's construction of the statute is "unreasonable."

STATEMENT OF FACTS

A. The Dispute Over Petitioner's Sentence

Eliot Sash pled guilty to one count of identification document fraud, 18 U.S.C. § 1028(a)(7), and one count of possessing 15 or more counterfeit or unauthorized access devices, 18 U.S.C. § 1029(a)(3), before the Hon. Douglas Eaton, United States Magistrate Judge, in the Southern District of New York on September 30, 2003. The plea was accepted by the Hon. Richard C. Casey of that court on October 21, 2003. On January 23, 2004, Judge Casey sentenced Mr. Sash to 27 months' imprisonment and eight years' supervised release on these charges. A. 108-110. Id.

Mr. Sash was released from imprisonment by the Bureau of Prisons on November 22, 2004, having served 17 days' more in prison than he contends the law allows. He has not, however, completed his entire sentence, since he still must complete his eight-year term of supervised release. He seeks on this appeal a remand to the district court, which would have the power, based on the 17 days' illegal confinement he has suffered, to reduce his eight-year term of supervised release by a month or more due to the excess imprisonment he has suffered. 28 U.S.C. § 2243 (court shall "dispose of habeas application as law and justice require"); Jago v. Van Curen, 454 U.S. 14, 21 n.3, (1981); cf. United States v. Carpenter, 320 F.3d 334, 346 (2d Cir. 2003) (court may apply equivalence of one day's home detention to one-half day's imprisonment in reducing sentence for excess punishment.)

On June 14, 2004, while Mr. Sash was incarcerated on his federal charges at the Metropolitan Detention Center in Brooklyn, New York, he filed a pro se writ of habeas corpus, originally styled a writ of mandamus, challenging the manner in which the Federal Bureau of Prisons ("the Bureau") had calculated the time he was required to serve under his sentence. See Petition, A. 25-26. The Bureau had concluded that Mr. Sash would, absent bad behavior of some kind, be entitled to 105 days' "good conduct time" or "good time" credit against his sentence and accordingly projected that Mr. Sash would be released on November 22, 2004.

Id. Under the Bureau's computation, Mr. Sash had been credited with only about 46 2/3 days of good time for each year of the "term of imprisonment" imposed on him. Mr. Sash contended that pursuant to the plain language of 18 U.S.C. § 3624(a) & (b), he was entitled to "54 days" of credit for "each year of [his] term of imprisonment" and that he should have received at least 121 days' good-time credit ($2.25 \times 54 = 121.5$) deducted from his 27-month, or 2.25 year, term.

B. The Statute

In the Comprehensive Crime Control Act of 1984, P.L. 98-473, Congress effected a substantial reduction in the time taken off a sentence for "good conduct," from nearly a third of the sentence to only 15% of the sentence. This change was codified at 18 U.S.C. § 3624(a) and (b), which set out the extent and operation of the new good conduct time credit. These sections read in pertinent part:

(a) Date of release. - A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) Credit toward service of sentence for satisfactory behavior. -

(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of

the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to a determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. . . . Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.¹

C. The Two Competing Methods of Applying the Good Conduct Time Statute, 18 U.S.C. § 3624(b) (1).

The dispute in this case arises from the Bureau of Prisons' decision that under the statute the good time credit must be calculated on the basis of time "actually served," not on the basis of the "term of imprisonment" imposed by the sentencing court. Using the time "actually served" rather than the "term of imprisonment" imposed as the basis for the good conduct time computation has two significant consequences. First, because the "time served" is always less than the total sentence of imprisonment "imposed," the credit for it is always less than a credit for the total term. In this case, a computation based on time served allows a credit of only 105 days, while a credit based on

¹The portion omitted in ellipses as well as the succeeding subsections (3) and (4) of § 3624 deal with a requirement that the prisoner make progress toward earning a high school diploma, a subject not germane here.

the term imposed allows 121 days. In general, the Bureau's calculation accords a prisoner only about 47 days' credit for each year of his term of imprisonment imposed, instead of 54 days under Petitioner's calculation, approximately a 15% credit on the total term.² In addition, the calculation based on the "term of imprisonment" is simple and transparent, while the calculation based on "time served" is complex and completely unintuitive.

Under Petitioner's construction of the statute, the maximum available credit for a prisoner is determined on the basis of the number of years in the "term of imprisonment" imposed at sentencing by the court. To calculate the maximum available credit, the number of years, or fractions of a year, in that term is simply multiplied times 54 days.³ For a 2 1/4-year term of imprisonment like Petitioner's, the total credit available is calculated by multiplying 2 1/4 times 54, for a credit of 121 days.⁴ During the course of a prisoner's sentence, the credit granted is a deduction "at the end" of each year in the term, shortening that year by up to 54 days. The succeeding year then begins on the

²The credit under Petitioner's calculation is more precisely about 14.8% of the term of imprisonment.

³This amount may, of course be reduced at any time until the end of the prisoner's sentence by any amount that the prisoner has forfeited due to bad behavior. 18 U.S.C. § 3624(b)(2).

⁴The Bureau of Prisons simply drops any fractional day of credit in its calculation. A. 127; P.S. 5880.28 at 1-45. Petitioner has not contested this aspect of the method.

date determined by deducting the credit and runs for a year after that, subject again to a credit.⁵ A partial credit is granted for the last portion of a year at the end of a sentence.

The method of calculation the Bureau of Prisons has adopted, however, accords the 54-day credit not for each year of the term of imprisonment imposed on a prisoner, but only "for each year served" on the sentence, 28 C.F.R. § 523.20 (emphasis supplied). As Bureau of Prisons Program Statement 5880.28 (hereafter P.S. 5880.28)⁶ dealing with Good Conduct Time emphasizes: "It is essential to learn that [good conduct time credit] is not awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served." A. 130; P.S. 5880.28 at 1-48 (emphasis in original).⁷

The Bureau's method of calculating the good conduct time becomes complex because the actual time served, on which the credit is based, cannot, be known until the amount of credit

⁵For a more detailed example, see p. 27, below. In brief, whenever the Bureau grants the credit, it must simply deduct the credit from the date that would have been the end of a full year, moving the end of the year earlier to account for the credit. It then sets the end of the next year as the day one year later, from which another credit may be deducted.

⁶The full Program Statement can be found at www.bop.gov/progstat/5880_028.pdf.

⁷The regulation requires, in accordance with § 3624(b), that credit for the end of a sentence be prorated, but it bases the prorated credit on "the time served by the inmate" when it is "less than a full year." 28 C.F.R. § 523.20 (emphasis supplied)

itself is determined. This results in a repetitive computation by trial and error to determine the ultimate credit due. The Bureau's computation of Petitioner Sash's sentence exemplifies its method. The Bureau first establishes the "effective full term" date, the date to which the prisoner will serve assuming no credit to his term of imprisonment by determining the date the sentence began to run, the amount of jail credit due and the resulting end date of the sentence. A. 118. In Mr. Sash's case, the full term date was determined to be March 7, 2005. A. 118.

Then the Bureau accords 54 days' credit for each full year the prisoner will certainly serve; in Mr. Sash's case, the Bureau granted the 54-day credit for his first year of service. A. 118. This moved his projected release date back to January 12, 2005, from March 7, 2005. A. 118.⁸ At this point, the Bureau determined that at most 400 days would remain on Mr. Sash's sentence. A. 118-19. It did not, however, grant Mr. Sash an additional 54 days' credit. Instead, because the remaining time was "less than 426 days,"⁹ the Bureau adopted a different method of computation

⁸Note that the process of moving dates backward is similar to the process under Petitioner's construction of the statute. Under Petitioner's construction, however, the dates must be moved back at the end of each year to which the credit is applied. See p. 27, below.

⁹This is the point below which the Bureau believes it must prorate the credit, because, although the remaining term sentence is well more than a year, the "time served" will not be, or will be only a year and a few days, which will still permit a credit of 54 days. See A. 131.

"prorating the final portion of one year," although more than a year remained on the sentence. A. 118-19.

To compute the final portion of Mr. Sash's credit, the Bureau engaged in the trial and error calculation its policy requires. A. 119. The calculation is based on the Bureau's conclusion that a prisoner is entitled to .148 days' credit for each day "served" ($54/365 = .148$). A. 119. Given the conclusion that 400 days remain on his term after one year of service, the Bureau estimated that the most credit he could receive would be $400 \times .148$ days, or 59.2 days' credit, rounded to 59. This would produce a time remaining to be served of 341 days. But in that case, Mr. Sash would be entitled only to credit for service of 341 days' imprisonment, which would be less than 59 days. It would be $341 \times .148$ days, or 50.4, rounded to 50, days' credit. A. 119. But if Mr. Sash received 50 days' credit, he would serve a longer time, 350 days, and be entitled to more than 50 days' credit. The result would be $350 \times .148$ days = 51.8 days, for 51 days' credit. A. 119. This could not be correct, since the total of 350 and 51 would be 401, not 400 days, so the Bureau continues, calculating the credit on 349 days' (400-51) imprisonment. In this case, the result is also 51 days ($349 \times .148 = 51.6$) and the total sentence, 349 days' imprisonment plus 51 days' credit equals the required 400 days service. A. 119.

The sum of 54 plus 51 days' credit produced 105 total days,

and a projected release date of November 22, 2004. A. 119.

The Bureau's Program Statement 5880.28 at 1-44 to 1-47, 1-61, included at A. 126-29, 143, sets out other examples of its method, including the calculation of the credit available on a seven-year sentence and a year-and-a-day, or 366-day, sentence. In the course of the Bureau's explanation, it notes that some computations never do work out. For example, if the number of days remaining on a sentence is 294 days, the Bureau concedes that its formula would go on forever, oscillating endlessly between 37 and 38 days' credit. A. 129-30; P.S. 5880.28 at 1-47, 1-48 ("As you can see from above, the GCT formula does not produce a result that will allow the number of days actually served plus the GCT to equal 294 days."). At that point the Bureau throws up its hands and gives the prisoner the extra day, allowing 38 days' credit. Id.¹⁰

D. The Habeas Proceeding

Petitioner argued that the Bureau of Prisons had misread the clear intent of the statute in granting good conduct time credit of 54 days only for each year of time served, rather than for "each year of the term of imprisonment" imposed by the sentencing court based on the plain language of the statute and the rule of lenity. See A. 7-8 (summarizing contentions). The Bureau's

¹⁰ This kind of indeterminacy is not uncommon and occurs in roughly 1/7 of all calculations under the Bureau's method.

response was to rely on the doctrine of Chevron [U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)] deference, arguing that the construction of the statute adopted by the Bureau of Prisons must prevail because it was a "reasonable" interpretation, as well claiming that the statute's plain language favored its view. See A. 8-9 (summarizing contentions).

United States Magistrate Judge Lois Bloom held argument on the matter and issued a Report and Recommendation summarizing the arguments of the parties, concluding that the statute was ambiguous, and applying Chevron deference to uphold the Bureau's construction of the statute. A. 18.

The district court, the Hon. Nicholas G. Garaufis, also held argument and issued an opinion adopting the Report and Recommendation.¹¹ After summarizing the positions of the parties, the court noted that Petitioner's construction of the statute produced an "anomalous" result, since "a prisoner is awarded credit toward service of his sentence as a reward for good behavior during time that he will never be required to serve." A. 9. The court viewed the requirement that the credit be "at the end of each year of the prisoner's term of imprisonment" as reinforcing the view that the prisoner must serve a year before receiving

¹¹Because of the urgency of deciding the case before Mr. Sash had finished his term as calculated by the Bureau, Judge Garaufis issued his thoughtful opinion just four days after the case was fully submitted to him. A. 4.

credit. A. 9.

On the other hand, the court acknowledged that neither the Bureau nor any other court had been able to explain what the phrase "beyond the time served" meant, if it did not mean that the credit applied to the full sentence imposed, beyond the time actually served by the prisoner. A. 9-10. The court stated in a footnote, however, that it was "plausible" that the phrase meant simply that the "credit" would be "in addition to time served." A. 10, n. 2. The court also acknowledged that the words "term of imprisonment" could well mean the "sentence imposed," and not the "time served," as the Bureau contended.¹² A. 10.

Having determined that the statute was ambiguous, the court went on to decide that the rule of lenity did not apply to "statutes delegating responsibility for administering sentences handed down by the courts." A. 12. The court stated that applying the rule of lenity to this case would "tie the hands of prison administrators." A. 13. It noted further that the Supreme Court had declined to apply the rule of lenity to "facial challenges to administrative regulations" simply because criminal enforcement was authorized. Id., quoting Babbitt v. Sweet Home Chapter of Cmty., 515 U.S. 687, 704 n.18 (1995). The court concluded that Chevron deference "trumps lenity" where the agency

¹²The court considered briefly the legislative history of the provision, which it found unhelpful. A. 10-12.

in question was responsible for administering the statute and it had promulgated its interpretation pursuant to the notice and comment provisions of the Administrative Procedures Act. A. 13-14.

Applying deference, the court found that since the statute did not make clear whether the words "term of imprisonment" referred to the term imposed or the term served by the defendant, the Bureau's construction of the statute was "permissible," and the court was required to defer to it. A. 15-16.

SUMMARY OF ARGUMENT

The district court's reliance on the deference doctrine of Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) was erroneous, first, because the intent of Congress in § 3624 to base a sentencing credit on the "term of imprisonment" imposed is entirely clear. Id. at 842 (if Congress's intent is clear, "that is the end of the matter").

The plain language of § 3624(b)(1), giving its words their "ordinary" and "natural" meaning, Bailey v. United States, 516 U.S. 137, 145 (1995), grants prisoners a "credit" of "up to 54 days at the end of each year of the term of imprisonment" imposed. The credit must be based on the "term" imposed, rather than on "time served" as the Bureau contends, because the statute says the credit applies to the "sentence, beyond the time served." Moreover, since the meaning of a "credit" is a "deduc-

tion" from the time "otherwise due" to be served, a credit toward "each year of the term of imprisonment," means a deduction from "each year" that is imposed, since it would be nonsensical to speak of such a "deduction" from "time actually served." And the "end" of each year is the natural place for such a deduction to occur. Finally, by making the credit apply to "each year of the ... term of imprisonment," Congress clearly meant the term imposed, since that phrase "term of imprisonment" is used in that sense twice in the sentence creating the credit. There is, indeed, no sound basis for reading the phrase "term of imprisonment " in any other way. Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning;" internal quotation marks omitted).

The contrary interpretation of the statute by the Bureau of Prisons, arguing that "term of imprisonment" must mean "time served," offends the usual methods of construing statutes by not giving terms such as "credit" and "term of imprisonment" their ordinary and natural meaning, by not giving the words "sentence, beyond the time served" any independent meaning at all, Moskal v. United States, 498 U.S. 103, 104 (1990) ("a court should give effect, if possible, to every clause or word of a statute"), by failing to give any substantial reason why the words "term of imprisonment" should not be construed the third time Congress

used them in a sentence the same way they were used the first two times, and generally by failing to read the statute as a whole. United States v. Morton, 467 U.S. 822, 828 (1984) (“We do not ... construe statutory phrases in isolation; we read statutes as a whole.”).

The legislative history of the statute supports Petitioner’s interpretation by showing that there is no anomaly, nor any windfall conferred on prisoners, by basing a sentencing credit on the “term of imprisonment” imposed rather than on the “time served.” Indeed, the history shows that it was probably to prevent basing the credit on “time served” alone that Congress included the words basing it on the “sentence, beyond the time served.”

If Congress’s intent were not clear and the statute were “ambiguous,” however, Chevron deference would not apply, since it has long been the rule that ambiguity in the context of criminal punishment “should be resolved in favor of lenity.” United States v. Bass, 404 U.S. 336, 347 (1971). The rule of lenity is one of the traditional rules of statutory construction that courts must apply before granting Chevron deference. Chevron, 467 U.S. at 842 n. 9 (“traditional tools of statutory construction” apply before Chevron); Dolfi v. Pontesso, 156 F.3d 696, 701 (6th Cir. 1998) (applying rule of lenity rather than Chevron). The rule has deep roots in the common law and the

Constitution, and whenever the Supreme Court has found such a rule in conflict with Chevron, it has applied the traditional rule in lieu of the Chevron doctrine. See, e.g., INS v. St. Cyr, 533 U.S. 289, 320 n. 45 (2001) (common-law presumption against retroactivity applied in preference to Chevron). Such traditional rules have been developed specifically to resolve particular problems, they reflect deep interests derived from the common law and the constitution, and they must prevail over the more general rule of Chevron.

Even if Chevron deference applied, however, the Bureau's interpretation should be found unreasonable at Chevron's second step. The only ambiguity the Bureau finds in the statute is in the phrase "term of imprisonment" based on the requirement that the credit apply "at the end of each year" of the "term." But, since the credit is a deduction from the term, it may easily be deducted from the end of every year of the "term" imposed, and the ambiguity is little more than apparent. Given the slight nature of this ambiguity, given the significant support for Petitioner's interpretation in the text of the statute, and given application of the rule of lenity at the second step of Chevron, the Bureau's interpretation of § 3624 is entirely unreasonable.

ARGUMENT

The Correct Statutory Construction of 18 U.S.C. § 3624 Requires That a Good Conduct Time Credit of 54 Days Be Available for Each Year of the Sentence Imposed, Not for Each Year Actually Served; If the Statute Were Ambiguous, the Rule of Lenity Would Apply; And Even if Chevron Deference Applied, the Bureau of Prisons' Interpretation of the Statute Is Unreasonable.

A. The Plain Language of §§ 3624(b)(1), Construed Using the Traditional Tools of Statutory Construction, Requires That a Prisoner Be Eligible for 54 Days of Good Conduct Time for Each Year of the Sentence Imposed.

This Court has twice assumed that by granting a "credit ... at the end of each year of the ... term of imprisonment," Congress intended to give a credit for years imposed by the sentencing court, not only for years served. United States v. Tocco, 135 F.3d 116, 131-32 (2d Cir. 1998), aff'g United States v. Ferranti, 928 F. Supp. 206, 215-16 (E.D.N.Y. 1996) (Weinstein, J.) (defendant entitled to "54 days of good-time credit for each year of his prison sentence"); United States v. Rodriguez, 892 F.2d 233 (2d Cir. 1989) (assuming credit for each year of the sentence imposed, except for the first year).¹³ In this case,

¹³In Tocco, the credit was calculated for the purpose of imposing a sentence permitting the maximum time served consistent with 18 U.S.C. § 34, as then applicable, and correct calculation of the sentence was essential to this Court's holding. In Rodriguez, this Court stated, "Under the new law, 18 U.S.C. § 3624(b), a prisoner could earn no good time until after he had served a year, and could earn no more than 54 days of good time a year, for a total of 486 days over 10 years," 892 F.2d 233, thus

the Bureau of Prisons has adopted an interpretation of the statute contrary to the clear meaning this Court twice read into it. When the full text of the statute is considered, and its words read with one another in context, rather than in isolation, it is clear that the Court's prior interpretation was correct. See Williams v. Dewalt, -- F. Supp. 2d -- , 2004 WL 3022300 (D. Md. Dec. 29, 2004) (holding that credit is "based on the sentences imposed, rather than the time actually served by the inmate"). Since Congress's intent is clear from the plain language of the statute after application of the "traditional tools" of statutory construction, "that is the end of the matter." Chevron, 467 U.S. at 842 & n. 9.

Here the statute plainly establishes a "credit," that is a "deduction," of "up to 54 days at the end of each year of the ... term of imprisonment," reducing the time that need be served in each such year. Since in this provision Congress consistently used the words "term of imprisonment" to mean the sentence imposed, not the time served, and reinforced this meaning by making the credit apply to the period "beyond the time served," the 54-day credit is available for each year imposed by the

assuming credit for nine years of a ten-year sentence. It is clear, however, that Congress intended credit for the first year, as well as succeeding years, of the sentence. H.R. Rep. 99-797 at 21 (1986), reprinted in 1986 U.S.C.C.A.N. 6138 ("clarify[ing] that the good time credit can be earned for the first year of a term of imprisonment").

district court in its sentence. Williams v. Dewalt, 2004 WL 3022300.

1. The Phrase "Sentence, Beyond the Time Served" Must Be Given Independent Content, and Must Accordingly Mean That the Credit Is Based on the Entire Sentence, Not Merely the Time Served.

The first clause of § 3624(b)(1) says that a sentencing credit applies "toward service of the prisoner's sentence, beyond the time served." The plain meaning of this clause is that the sentence on the basis of which the credit is applied is not the "time served" alone as the Bureau contends, but also the sentence "beyond the time served." See Williams v. Dewalt, 2004 WL 3022300 at *4. There is, indeed, no other sensible construction of these words, and, as the district court noted, the Bureau of Prisons has never suggested any other construction. See A. 9-10. Thus, the first clause of the statute directly refutes the Bureau's statutory interpretation, for it makes the sentence toward which a credit applies the full "sentence, beyond the time served," not the "time served" alone.

While acknowledging that no one had suggested any other interpretation of the words "the prisoner's sentence, beyond the time served,"¹⁴ the district court ventured that it was "entirely

¹⁴None of the cases adopting the government's reading of the statute has even attempted to construe the phrase "sentence, beyond the time served" using the normal tools of construction. See, e.g., White v. Scibana, 390 F.3d 997, 998 (7th Cir. 2004); Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001); Pasciuti

plausible" that they meant merely that the prisoner would receive a "credit" that was "in addition to time served." A. 10 n.2. This reading is wrong for two reasons. First, it is not what the statute says. The statute does not describe the "credit" as being what is "beyond the time served;" rather it describes the "sentence" towards which the credit applies as being "beyond the time served." The district court's interpretation of the phrase thus runs afoul both of the standard English usage that a noun and its modifier go together and the canon of construction that "qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote." United States v. Ven-Fuel, Inc., 758 F.2d 741, 751 (1st Cir. 1985) (citing cases). It is the "sentence" toward which the credit applies that is "beyond the time served," not the credit itself.

Even more importantly, the court's suggested reading is wrong because, by using the phrase "beyond the time served" to modify the word "credit" rather than "sentence" it leaves the phrase without any independent meaning. Moskal v. United States,

v. Drew, 2004 WL 1247813 (N.D.N.Y., June 2, 2004). The leading case, Pacheco-Camacho, does not even quote the language. White v. Scibana quotes it, but does not consider its effect, and seems to assume without discussion that the words "beyond the time served" modify "credit." White, 390 F.3d at 998. Accordingly, none of these cases can be taken as an adequate guide to construction of the statute. For this and other reasons set forth below, they cannot be considered persuasive.

498 U.S. 103, 104 (1990) ("a court should give effect, if possible, to every clause or word of a statute;" construction making words redundant rejected). If all that the phrase means is that the "credit" constitutes a period "in addition to time served," it adds nothing, since every sentence "credit" is "in addition to" some time served. Since it makes the phrase superfluous or redundant, it is disfavored. Id.; Connecticut ex rel. Blumenthal v. United States Dep't of Interior, 228 F.3d 82, 88 (2d Cir. 2000) (interpretations rendering language superfluous disfavored). Congress obviously meant something by the words "sentence, beyond the time served," and it can only have meant that the credit did not apply to the "time served" alone. If the phrase is given the independent meaning it must have, then the Bureau's interpretation of the statute is manifestly wrong.

2. The Language Awarding a "Credit" at the "End of Each Year of the ... Term of Imprisonment" Can Reasonably Be Read Only as Allowing a Deduction from "Each Year" of the "Term" Imposed by the Court.

That the "credit" is to be based on the full term of imprisonment imposed is confirmed by the succeeding phrase granting a "credit ... of up to 54 days at the end of each year of the prisoner's term of imprisonment." To begin with, a "credit" in this sense has the ordinary meaning of a "deduction from an amount otherwise due." Webster's Third New International Dictionary 532-33 (1986); see Black's Law Dictionary 374 (7th ed.

1999) ("deduction from an amount due"). The amount "otherwise due" to be served, to which the credit applies, is "each year" of the term of imprisonment; by definition this cannot be the time already served, time which is not "due" but is instead "served." The reading of "credit" in this way is strongly reinforced by the fact that, in context, the words "term of imprisonment," to which the credit applies, are consistently used to mean the term imposed by the court, not the time served. The requirement that credit be "at the end of each year" does not conflict with this reading; it says nothing other than that the "deduction" allowed by the credit may be "up to 54 days at the end" of each year imposed, and thus be a reduction of up to 54 days in the time to be served in the year. The section's plain language accordingly grants the 54-day credit for each year of the term of imprisonment imposed. Williams v. Dewalt, 2004 WL 3022300.

Congress's intent in § 3624 was by its plain terms to create a "credit" of "up to 54 days at the end of each year of the ... term of imprisonment," and the Court must read the phrase "term of imprisonment" in the context of the granting of a "credit," not in isolation. United States v. Morton, 467 U.S. at 828 (phrase read in isolation might be ambiguous, but must be read together with other words of statute). The word "credit" means a "deduction" from the full amount, or full term, "otherwise due." Under the statute, the credit or "deduction" is thus made from

"each year" of the "term of imprisonment" which would "otherwise" be served, that is, each year of the term imposed. The Bureau's construction of the word "credit" violates this plain meaning. It does not permit a "deduction" of 54 days for each year of the time "otherwise due" to be served, but only a deduction for each year that actually is served, a distorted use of the word "credit."¹⁵ This is not what Congress specified when it created a 54 day "credit" per year.

This point is strongly confirmed by the fact that the statute says the deduction to be made is from each year of the "term of imprisonment," a phrase that Congress consistently used to mean the full term imposed by the court, not a period actually served. See Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (noting "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning;" citing cases). The words "term of

¹⁵ An example shows that the Bureau's construction of the word "credit" distorts its ordinary, natural meaning. Should one go to a store offering a 10% credit on a \$100 item, one would expect to spend \$90 for it. And if the shopkeeper said, "Oh no, you've only spent \$90, so you only get a \$9 credit, and you owe me \$91," one would be taken aback. In the spirit of the Bureau's system, however, one might respond, "But now I've spent \$91, so I get a credit of \$9.10, and only owe \$90.90." The shopkeeper could then respond, "Wait, now you only spent \$90.90 and only get a credit of \$9.09, and you owe \$90.91." And so on. No one would understand the natural meaning of "credit" to entail this sort of calculation.

imprisonment" appear three consecutive times in the single sentence of § 3624 creating the 54-day credit. On the first two occasions the phrase is unequivocally used to mean the full sentence imposed, not the "time served." The statute initially states that a credit is available to a "prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for life," and both these uses refer to the "term" imposed by the sentencing court, a position that the Bureau has not contested. Given this context, the third use of the words in the sentence, granting a credit of "up to 54 days at the end of each year of the prisoner's term of imprisonment," must, absent some very strong reason, also be read to refer to each year of the term of imprisonment imposed by the judge. Brown v. Gardner, 513 U.S. 115, 118 (1994) (the "presumption that a given term is used to mean the same thing throughout a statute ... is surely at its most vigorous when a term is repeated within a given sentence").

The Bureau has argued that this rule of construction is not without exception, and that is true. But the Bureau has given little reason to deviate from the rule, and in this case the rule has more power than in many instances. First of all, reading the phrase "term of imprisonment" consistently to mean "sentence imposed" is also the only way to avoid conflict with Congress's use of the words "credit" and "sentence, beyond the time served"

in the same sentence. Second, if Congress had really meant "at the end of each year of the term of imprisonment" to mean "at the end of each year served," it would most naturally have said exactly that, and it is most odd that it did not. Williams v. Dewalt, 2004 WL 3022300 at *4 ("Congress used the phrase 'time served' when it meant time served"). Third, since basing the credit on "time served" would have worked a significant change from prior practice, see pp. 33-35, below, had Congress intended the change, it would surely have said so in plain English, rather than by using a term that seems to mean just the opposite. And fourth, while the phrase "term of imprisonment" might sometimes be used to mean "time served," Congress rarely uses it in this way, and the phrase appears countless times in Title 18 of the United States Code.¹⁶ Here, the phrase "term of imprison-

¹⁶ See, e.g., 18 U.S.C. § 3584(c) ("Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated as a single, aggregate term"); 18 U.S.C. § 3621(a) ("A person who has been sentenced to a term of imprisonment ... shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior"); 28 U.S.C. § 994(e) ("The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering [certain factors]"); 28 U.S.C. § 994(u) (if the "Commission reduces the term of imprisonment recommended" by the guidelines it shall specify the effect on the sentences "of prisoners serving terms of imprisonment" for the offense); and see 18 U.S.C. §§ 3142(e)(3), 3142(f)(1)(C), 3143(b), 3147, 3150, 3156(a), 3551(b)(3), 3553(c), 3561(a)3, 3581(a), 3581(b), 3582(a), 3582(c), 3582(d), 3583(a), 3584(a), 3585(a), 3585(b), 3614(b), 3742(a)(3), 3742(b)(3), and 28 U.S.C. §§ 994(a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), (b)(2), (h), (j), (k), and (u).

ment" must be construed consistently in light of its most natural usage and its context to mean the "sentence imposed."¹⁷

The only textual argument the Bureau has invoked to avoid this common-sense result is to claim that by including the word "end" in the phrase "at the end of each year of the prisoner's term of imprisonment," Congress must have intended that the 54-day credit not apply until after a year had been "served." But this is not so. The Bureau may apply the credit to the end of the year of the term, deducting 54 days, and reducing the time to be served in the year by that amount. The word thus does not alter the otherwise clear meaning of "term of imprisonment" as the time the prisoner must serve, absent the credit. When a

In one instance, Congress used the words "expiration of the prisoner's term of imprisonment" as a shorthand for "expiration of the prisoner's term of imprisonment, less any time credited," where it was clear the longer phrase was intended. Compare 18 U.S.C. § 3624(a) ("[a] prisoner shall be released on the date of the expiration of the prisoner's term of imprisonment, less any time credited"), with 18 U.S.C. § 3624(d) ("Upon the release of a prisoner at the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with" various items). The meaning of the shorter phrase was clear because of the context of "release" and the earlier definition of release in the statute.

¹⁷ In addition, it is noteworthy that when Congress obviously meant to indicate the "time actually served" in § 3624(b)(1), it did not use the phrase "term of imprisonment" but instead used the word "sentence" alone. In the last sentence of the section, Congress specified that "credit for the last year or portion of a year of the term of imprisonment shall be ... credited within the last six weeks of the sentence." Id. (emphasis supplied). Here the word "sentence" denotes the actual time served, since, to have any meaning, the credit must be "credited" before the prisoner is released.

prisoner is given a 54-day "credit" at the "end" of a year of his "term," it simply means that 54 days are deducted from the end of the year that would otherwise be served and, accordingly, that he need serve only 311 days of the year.

An example of a prisoner serving a two-year, or 24-month, term of imprisonment shows how the credit must be applied at the "end of each year" of a "term of imprisonment" to comply with the statute. If a prisoner is sentenced to a two-year term beginning on 1/1/05 and ending on 12/31/06, the first "year" of the "term" of imprisonment "otherwise due" to be served would end on 12/31/05, absent any "credit." The deduction of the 54-day credit at the "end" of the year as a credit would move the period to be served back 54 days to November 7, 2005, ending the first year of the term. In that case, the second and last year of the term would be due to end a year later, on November 7, 2006. Again, however, there could be a 54-day deduction from this year, which would move the end of the year to be served back to September 14, 2006. This process grants the correct amount of credit, and it shows that applying the credit "at the end of each year" is not inconsistent with giving the words "term of imprisonment" their ordinary meaning.

The Bureau's objection to this construction of the statute arises from its incorrect reading of the statute as requiring that the credit be "awarded" at the "end of each year" served.

See White v. Scibana, 390 F.3d at 1001-02. The statute is in fact silent about when the credit is "awarded," or when the Bureau must do its bookkeeping, except at the very end of the time served, when a prisoner is due to be released, and the credit must be granted before the end of the sentence.¹⁸ The words of the statute do not tell the Bureau when it must calculate the credit, but simply define the credit as a period of "up to 54 days at the end of each year" that may be deducted from service of that year. The Bureau may calculate the credit at its convenience, even waiting until the prisoner has served a year to make its calculation if it wishes, unless the prisoner is due to be released that year. 18 U.S.C. § 3624(b)(1).

Petitioner's construction also answers the objection in White that a prisoner cannot receive a credit "at the end of" a year he never "serves." Id. Since the statute requires that a credit be deducted from each year of the "term," a prisoner may satisfy each such "year" by imprisonment for as little as 311 days, plus the credit. As petitioner's explanation of the computation involved shows, a credit can be applied to every "year" of the term of imprisonment imposed by the sentencing court, without necessarily requiring that the prisoner serve in

¹⁸The statute requires that "credit for the last year or portion of a year of the term of imprisonment shall be ... credited within the last six weeks of the sentence." 18 U.S.C. § 3624(b)(1).

full any such year. See p. 27, above. Thus, a prisoner serves, at least in part, every single year of imprisonment imposed, although his service of each such year may be shortened by a "credit," and he will not, as the Seventh Circuit imagined, get credit for a year he does not serve.

Nothing in the use of the word "end" in the statute conflicts with the construction of the phrase "term of imprisonment" in its most natural and ordinary sense, since the word "end" merely requires that the applicable credit be deducted from the "end" of each year otherwise due to be served. Since the credit must be based on "each year" of the "term of imprisonment" imposed, the Bureau's construction of the statute conflicts with its plain language.

3. The Bureau's Remaining Arguments Are Based on the Unproven Assumption That a "Year of the Term" Constitutes a Year Served, or Are Otherwise Without Substance.

Many of the Bureau's arguments are inspired by the notion that there is something improper or "anomalous" in a system which grants prisoners credit based on "time that [they] will never be required to serve," A. 9, and that Petitioner's interpretation grants them a "windfall." That argument is treated more fully at pp. 33-35, below, by showing that such an "anomalous" system was in fact the traditional one in this country for 85 years, and one Congress specifically endorsed. What is noteworthy about the argument here is that it shares the characteristic of many of the

Bureau's claims, a reliance on the unproven assumption that the 54-day credit must be based on the year "served." This assumption is what the Bureau must prove, however, and it cannot simply rely on it to support its interpretation of the statute or to claim that contrary interpretations give prisoners a "windfall."

One further example of the Bureau's method is its argument below that the word "year" in the statutory requirement that "during that year" the prisoner have displayed exemplary behavior to gain the credit, requires that a full year be served. See A. 9. But this is so only if the words "that year" refer to a year "served." In fact, however, they refer to a "year of the ... term of imprisonment," to which a "credit" or "deduction" applies, shortening it, and making it less than a year served. If Petitioner is correct that the words "term of imprisonment" mean the term imposed, not the term served, and that period may be reduced by a credit, the Bureau's argument must be simply wrong.

Moreover, the Bureau's own practice refutes the claim that a prisoner must serve a full year before receiving credit. The Bureau in fact reads the statute to permit giving credit to, and releasing, many prisoners who have not served a full year. Under the Bureau's own procedures, any prisoner who is serving a term of one year and one day is evaluated and released after only 319 days' service of his sentence. See A. 125-29; P.S. 5880.28 at 1-44 to 1-47. Thus, the Bureau's suggestion that a prisoner cannot

possibly receive credit unless he has served a full year rings hollow.

The Bureau's additional argument that the fact that the statute makes the credit available to those "serving a term of imprisonment" of more than one year "suggests that it is the time that is actually served, rather than the length of the sentence, that is the key," Gov't Mem. in Opposition at 13, misreads the statute. The use of the word "serv

ing" in that context says nothing about the basis for the credit, but describes those who are eligible for it, by signifying those who are imprisoned pursuant to a particular kind of sentence. The word "serv

ing" merely refers to confinement under a "term of imprisonment" imposed by a judge, and in no way suggests that the credit is available based only on the quantity of such confinement that is actually served.

4. The Fundamental Failure of the Bureau's Position Is That It Reads the Statute Selectively, in a Piecemeal Way, and Does Not Fullfill Its Obligation to Read the Statute As a Whole.

Instead of proceeding from the premise that the plain language of the statute controls, the Bureau instead proceeds from the preconception that it would be granting some kind of anomalous "bonus" or "windfall" to prisoners if it based its construction on the obvious meaning of the statutory language, and it must stretch the language to fit into its preconceived

notion. But the fundamental principles of statutory construction do not allow such a procedure. Those principles require reading the statute "as a whole," with each portion related to, and not in conflict with, the others. United States v. Morton, 467 U.S. at 828. In order to support its construction, the Bureau must either ignore or render meaningless the phrase "sentence, beyond the time served" in the statute, pull the phrase "term of imprisonment" out of its immediate context, and ignore the very nature of a sentencing "credit" as a "deduction" from time that would "otherwise" be served. When measured by the "traditional tools of statutory construction," Chevron, 467 U.S. at 842 n. 9, the Bureau's interpretation fails.

Petitioner's construction, in contrast, simply follows the plain command of Congress that the "credit" be based on the "sentence, beyond the time served," and be a deduction from the end of each year of the "term of imprisonment," which in its context can only mean the term imposed. Read this way, the statute poses no difficulty and carries out what Congress intended. Chevron, 467 U.S. at 842 (when the statute speaks directly to the issue, "that is the end of the matter").

B. The Legislative History of § 3624 Further Supports Petitioner's Interpretation of the Statute.

The legislative history of § 3624 supports Petitioner's reading of the statute in numerous respects. First, the background of the statute makes clear that Petitioner's interpreta-

tion does not have an "anomalous" or unwarranted result in granting credit for time that is not ultimately served. Second, the legislative history shows why Congress included the words "beyond the time served," when it made the credit apply "at the end of each year of the prisoner's term of imprisonment." Third, nothing in the legislative history suggests any intent to change the mode of calculating the credit to base it on "time served." Finally, it is clear that members of Congress who participated in passing § 3624 believed that it allowed a credit based on the sentence imposed, not the sentence actually served.

1. The Traditional Method of Calculating the Good Time Credit Was on the Basis of the Sentence Imposed, a Method That Grants Credit for Time the Prisoner Is "Never Required to Serve" and That Is Not "Anomalous."

The Bureau seems to have convinced many courts unaware of the legislative history that prisoners are asking for some kind of "windfall" or some "anomalous" reward, by seeking to have their credit based on the entire sentence. See, e.g., Pacheco-Camacho, 272 F.3d at 1268-69 (prisoner's "interpretation would confer a bonus during his last year of imprisonment;" "nothing suggests that Congress intended to give the prisoner such a windfall in his last year"). But the history of Congress's provision for good conduct time credit shows instead that it is the Bureau's method of computation, based on "actual time served," that is anomalous; the traditional method has been to

base the credit on the sentence imposed. A. 9. The Bureau cannot complain that the traditional method is in any way suspect, for it is simply another method of computation, one that was well-entrenched before 1987, and one to which Congress has never objected.

The method of good time computation required under Petitioner's interpretation, basing good time on the sentence imposed, was the method approved by Congress from 1902 to 1987. The old version of the good time statute, 18 U.S.C. § 710, recodified in 1948 as 18 U.S.C. § 4161,¹⁹ permitted a "deduction from the term of [the prisoner's] sentence" of a certain number of "days for each month" in the sentence. Id. Under that statute, and until 1987, the settled method of calculating the credit was "by multiplying the number of months of a sentence as imposed by the court by the appropriate number of days [per month] as prescribed in the statute." H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19. This is, of course, the same method that Petitioner argues should apply to § 3624.

This traditional method had the characteristic that prisoners would get credit for many months of imprisonment to which they were sentenced, but which they never served. There is, however, nothing "anomalous," see A. 9, or suspect about such a

¹⁹See 18 U.S.C. § 4161, as repealed by Section 235(a)(1) of Pub. L. 98-473, effective November 1, 1987, set out in Federal Criminal Code and Rules, 1137-38 (West, 2004 ed.).

system. It is simply the method that was always used to measure the amount of credit due a prisoner, and the system that the proper construction of § 3624 still requires.

2. The History of Good Time Credits Shows Why the Phrase "Beyond the Time Served" Was Included in the Statute.

The history of the former good time statute strongly suggests that Congress included the words "beyond the time served" in § 3624 to preclude any interpretation of it that would base the credit on the "actual time served," H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19, as a result of the newly-imposed requirement that the credit be applied to "each year of the prisoner's term of imprisonment."

On one prior occasion, Congress had also sought to require periodic consideration of credits, and the Tenth Circuit had responded by reading the change to require basing the credit on "actual time served." Congress had amended former § 4161 in 1948 to require that good time was to be "credited as earned and computed monthly." H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19. Shortly thereafter, the Tenth Circuit held that this language required "good time to be computed on the basis of actual time served rather than on the basis of the sentence as imposed by the court." Id. (emphasis supplied); see Hunter v. Fasching, 195 F.2d 1007 (10th Cir. 1952). In response, Congress explicitly rejected the use of "time served" as the

basis for computing good time. H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19. It deleted from the statute the words on which the Tenth Circuit had relied, in order to "return to the [previous] method of computing good conduct time," basing the credit on the "sentence as imposed by the court." Id. The statute then remained substantially unchanged until its repeal, effective November 1, 1987.

When it passed § 3624, Congress once again, as in 1948, included words requiring periodic application of good time credits. But this time, Congress explicitly included the requirement that the credit be applied toward the "sentence, beyond the time served," evidently in order to prevent any interpretation of this provision to require that the sentence be based on "time served" alone.

3. There Is No Evidence in the Legislative History of § 3624 That Congress Wished to Change the Method of Calculating the Credit Based on the Sentence Imposed.

The legislative history of § 3624 shows no intent to change the prior mode of calculating the sentence credit, based on the "sentence as imposed by the court." H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19. Congress enacted § 3624 in response to three quite different complaints about the good conduct time credit that existed before 1987. First, the credit could be awarded, rescinded, and then restored, which made the length of sentences to be served unpredictable. S. Rep. 98-225

at 46, 48-49, 56-59, 146-47, reprinted in 1984 U.S.C.C.A.N. 3182, 3229, 3231-32, 3239-41, 3329-30. Second, the existing statute was too complex, providing different rates of credit for different sentences, and Congress sought simplicity and uniformity in the good time credit. Id. at 146-47, reprinted in 1984 U.S.C.C.A.N. at 3329-3330. In this regard, Congress believed that the new § 3624 created a credit that would be "earned at a steady and easily determined rate that will have an obvious impact on the prisoner's release date." Id. at 147, reprinted in 1984 U.S.C.C.A.N. at 3330 (emphasis supplied). Finally, Congress sought to reduce the size of the credit to 54 days, enough to provide an incentive for good behavior, yet not so much "that it will carry forward the uncertainties as to release dates that occur under current law." Id.

Thus, Congress said nothing to indicate any desire to change the long-standing method of calculating the credit based on the "sentence as imposed by the court," H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19, and its aim to award the credit at an "easily determined rate" is at odds with the complex and opaque system of calculating the credit the Bureau has adopted. Id.

4. Numerous Statements of the Congressional Intent Behind the Statute, Both Contemporaneous with and Subsequent to its Enactment, Make Clear That Congress Intended a Credit Roughly Equivalent to 15%, or 54 Days, of the Sentence Imposed by the Court.

Although the original bill to enact § 3624 had proposed that the good time credit amount only to 36 days per year, in conference between the House and Senate, this was changed to a 54-day credit. The Report of the Committee of Conference stated that its amendment made the change from 36 to 54 days, which "increases 'good time' that accrues from 10 percent to 15 percent." H.R. Conf. Rep. 98-1159 at 415 (1984), reprinted in 1984 U.S.C.C.A.N. 3710, 3711. A long line of contemporaneous and subsequent history of this provision clearly indicates that the credit was intended to be 15%, or 54 days, of the "sentence imposed," not the "time served."

Shortly after the passage of the bill, members of Congress characterized it as granting a 15% reduction from the defendant's "sentence," not the time he had served. On October 31, 1984, for example, Representative Lee Hamilton stated, "Now sentences will be reduced only 15% for good behavior." 131 Cong. Rec. E37-02 (emphasis supplied). On January 25, 1985, Representative Romano Maxilla quoted with approval an article stating that under the new law, "a sentence could be shortened 15 percent for good behavior." 131 Cong. Rec. E201-04 (emphasis supplied). The next year, Senator Kennedy stated that, under the Act, the "sentence

announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for 'good time'." 131 Cong. Rec. S4083-03 (emphasis supplied).

Over the years, this continued to be the understanding. In 1993, for example, Representative Schoff observed: "We already offer in the Federal system good-time credit of up to 15 percent off a sentence. Why not make that a requirement of earning that 15 percent instead of giving more time off the sentence?" 139 Cong. Rec. H8723-01 (emphasis supplied). And it was Senator Biden who made the most explicit statement of this long understanding:

In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85% of that time - 8.5 years, which is what the law mandates. You can get up to 1.5 years in good time credits, but that is all. And we abolished parole. So you know you'll be in prison for at least 8.5 years.

141 Cong. Rec. S2348-01 (Feb. 9, 1995).

At the time § 3624 was enacted and ever since, Congress intended that the 54-day, or 15%, reduction for good conduct be applied against the prisoner's full "sentence," not the time served.

C. At the First Step of Chevron Analysis, Before Deferring to an Agency's Interpretation, a Court Is Required to Apply the "Traditional Tools of Statutory Construction" Including Substantive Canons of Construction Such As the Rule of Lenity.

Even if the district court was correct in finding § 3624, which fixed the minimum time Petitioner could serve in prison, ambiguous, it erred in failing to apply the rule of lenity, requiring that ambiguity in the statute be resolved in Petitioner's favor. Ladner v. United States, 358 U.S. 169, 178 (1958) (Court will not construe a statute to "increase the penalty" on an individual, when it is ambiguous); see Bifulco v. United States, 447 U.S. 381, 387 (1980) (rule of lenity applies to "penalties"). The Supreme Court has made it clear that the "traditional tools of statutory construction" are to be employed before a court resorts to Chevron deference to construe an ambiguous statute, Chevron, 467 U.S. at 842 n.9, and the rule of lenity is among such traditional tools. See Lurie v. Wittner, 228 F.3d 113, 126 (2d Cir. 2000) (rule of lenity a "canon of statutory construction"); United States v. Torres-Echavarria, 129 F.3d 692, 698 & n.2 (2d Cir. 1997) (discussing "canons of construction, such as, for example, the rule of lenity"). It is clear, moreover, that the Supreme Court has consistently applied substantive canons of construction instead of Chevron deference, when those canons were firmly based in common-law or constitutional interests. See, e.g., INS v. St. Cyr, 533 U.S. 289, 320

n. 45 (2001) (common-law presumption against retroactivity applied in preference to Chevron). Because of the importance of the policies that underlie the rule of lenity, it, like these other substantive canons of construction, must be applied at the first step of Chevron analysis, before deference is accorded the agency's construction. Dolfi v. Pontesso, 156 F.3d 696, 701 (6th Cir. 1998) (applying rule of lenity rather than Chevron deference to statute specifying punishment). Otherwise, the law would, for the first time, permit imprisoning a citizen when that imprisonment is "based on no more than a guess as to what Congress intended." Ladner v. United States, 358 U.S. at 178.

The rule of lenity, unlike the Chevron rule, arose in the context in which this case arises, the interpretation of laws providing for imprisonment. And, unlike Chevron, lenity can trace its origins to the founding of this country and to underpinnings in the Constitution itself. In United States v. Wiltberger, 18 U.S. (5 Wheat) 76 (1820), Chief Justice Marshall noted that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." Id. at 95. The rule was, he went on, "founded on the tenderness of the law for the rights of individuals; and on the principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define the crime, and ordain its punishment." Id.

(emphasis supplied); see 1 William Blackstone, Commentaries *92 (“A man cannot suffer more punishment than the law assigns, but he may suffer less.”).

The rule thus has two aspects, one requiring a clear definition of criminal offenses²⁰ and the second, which is applicable in this case, requiring courts to adopt the construction of an ambiguous penalty statute “yielding the shorter sentence.”

United States v. R.L.C., 503 U.S. 291, 305 (1992). This second aspect of the rule is “rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.” United States v. R.L.C., 503 U.S. 291, 305 (1992), quoting United States v. Bass, 404 U.S. 336, 348 (1971), quoting H. Friendly, Benchmarks 209 (1967). The rule’s purpose in this context is “assuring that society, through its representatives, has genuinely called for the punishment to be meted out.” R.L.C., 503 U.S. at 309 (Scalia, J., concurring). Since the punishment must be based on the “moral condemnation of the community” expressed in legislation, “[w]here it is doubtful

²⁰The first prong of the rule is a counterpart to the requirement that citizens receive “fair warning” of what conduct may be criminal. United States v. Lanier, 520 U.S. 259, 266 (1997). The district court seemed to think this prong, which is not involved in this case, and which might have different interactions with Chevron, was the “core purpose” of the rule. See A. 13. But this aspect of lenity is no more important than the rule’s protections against punishments that have not been authorized by the legislature. See R.L.C., 503 U.S. at 309 (Scalia, J., concurring).

whether the text includes the penalty, the penalty ought not be imposed.” Id.

The imprisonment of a person, when it is not clear that Congress itself intended that result, implicates due process as well as separation of powers interests, and the rule of lenity acts as both a protection of the “rights of individuals” against unauthorized punishments and a means of assuring the constitutional distribution of power. See Burge v. Butler, 867 F.2d 247, 250 (5th Cir. 1989) (punishment not authorized by legislature violated due process); Wasko v. Vasquez, 820 F.2d 1090, 1091 n.2 (9th Cir. 1987) (punishment beyond “extent authorized by state statute” violated due process); cf. Mistretta v. United States, 488 U.S. 361, 391 n. 17 (1989) (placing power to make sentencing guidelines in Executive would raise constitutional question by “unit[ing] the power to prosecute and the power to sentence within one Branch”).

That the rule of lenity must precede the application of Chevron deference is clear from the Supreme Court’s treatment of similar substantive canons of construction. When the Court has in the past been faced with a conflict between established substantive canons and the Chevron doctrine, it has consistently applied the canons. In I.N.S. v. St. Cyr, 533 U.S. 289 (2001), for example, the Court found a statute repealing relief from deportation to be ambiguous with respect to whether it could be

applied retroactively. Id. at 320. Despite this ambiguity, the Court specifically rejected the I.N.S.'s argument that its own construction of the statute was entitled to deference under Chevron. Instead, the Court applied the common-law presumption against retroactive application of statutes, id. at 320 n. 45, a principle it had held was "deeply rooted in our jurisprudence." Id. at 316, 320 n. 45.

Similarly, the Supreme Court and the Courts of Appeals have applied other such "deeply rooted" rules of construction in preference to Chevron. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988) (although agency's interpretation would "normally be entitled to deference," Court applied rule avoiding constructions that would "raise serious constitutional problems;" rule had "so long been applied" as to be "beyond debate"); EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 256-58 (1991) (Court applies "longstanding" presumption against extra-territorial effect, rather than deferring to the views of the EEOC);²¹ Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997) ("canon of construction favoring Native Americans controls over"

²¹In applying the presumption against extraterritoriality, the Court found a lower level of deference applicable to the E.E.O.C.'s position than would have been granted under Chevron. 499 U.S. at 256-57. Justice Scalia, concurring, thought Chevron deference warranted, but would, nonetheless, have found that deference overcome by the presumption against extraterritoriality. Id. at 259-60.

Chevron rule). And the Sixth Circuit has, of course, explicitly held that the rule of lenity supplants Chevron deference in construing penalty provisions of the law. Dolfi v. Pontesso, 156 F.3d at 701; see Crandon v. United States, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring) (applying Chevron in lieu of lenity would “turn the normal construction of criminal statutes upside-down”).

These rules of construction take priority over the rule of Chevron deference, both because of the importance of the policies they further and because they are the rules designed over the years to apply to specific legal situations, and thus constitute specific rules that must govern over the general rule of Chevron. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) (“it is a commonplace of statutory construction that the specific governs the general”). Chevron, after all, is an enormously broad principle that assumes in countless instances an implicit Congressional delegation of power to agencies to construe every ambiguity or silence in the statutes which they administer. But established rules such as the rule of lenity were devised by courts to deal with specific recurring legal problems, and there is no reason the broad rule of Chevron, whatever its merits in general, should displace these specific rules when they are being applied within their proper spheres. Id.; see St. Cyr, 533 U.S. at 320 n. 45.

Moreover, consideration of the rationale for the Chevron doctrine shows that specific substantive canons of construction such as the rule of lenity should displace Chevron when they conflict, for they perform the very function that Chevron performs in way superior to Chevron and they protect substantive values Chevron does not address. The Chevron doctrine is justifiable in general on the basis of Congressional intent, recognizing that the intent is in most cases a "fictional presumed intent," that the rule "operates principally as a background rule of law against which Congress legislates," and that its function is to inform Congress that the "ambiguities [Congress] creates ... will be resolved ... not by the courts but by a particular agency, whose policy biases will ordinarily be known." Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (hereafter "Scalia").

Given the basis for Chevron, then, there are three reasons its doctrine should not displace specific existing canons of statutory construction. First, the mere "fictional presumed intent" of Congress involved in Chevron can hardly be said to have gone so far as to extinguish the effectiveness of rules the courts have followed for decades or centuries. There is nothing in Chevron or any of its progeny to suggest that it allows the courts to presume an even broader intent to repeal the rule of lenity, or other such rules, in circumstances to which Chevron

applies. Indeed, Chevron says just the opposite. 467 U.S. at 842 n. 9 (preseerving "traditional tools of statutory construction"). Any repeal of the effect of existing substantive rules through a Congressional delegation would require a clear statement of intent, and could not simply be "presumed." See United States v. Vonn, 535 U.S. 55, 65 (2002) (partial repeals by implication not favored).

Second, when the broad Chevron rule, based on this "fictional ... intent," conflicts with a specific canon of construction like the rule of lenity, the specific rule performs the function of the general Chevron rule, by informing Congress who will resolve the "ambiguities it creates" in that context. Scalia, supra, at 517. Indeed, the specific rule performs this function better than Chevron does, for it also tells Congress what the result will be if Congress leaves any ambiguity, which Chevron cannot do.

Third, and finally, the specific rule fosters time-honored common-law or constitutional interests, such as the protection of personal liberty, which are beyond Chevron's scope. Thus, it is not surprising that, when these rules have come in conflict, the Supreme Court has abandoned Chevron in favor of rules that are well-established, specifically suited to the circumstances, and that further important interests.

Finally, the district court's justifications for declining

to apply the rule of lenity are inadequate. The court's concern that extension of lenity to these circumstances would "tie the hands" of prison administrators is wholly without basis. Indeed, the Supreme Court has considered the application of the rule in two cases involving the Bureau of Prisons' interpretations of statutes it administers, without suggesting that the rule of lenity had no application to them. See, Reno v. Koray, 515 U.S. 50, 56-60 (1995); Lopez v. Davis, 531 U.S. 230, 244 n. 7 (2001). In both cases, the court rejected the prisoner's reliance on the rule solely because there was no ambiguity in the statute. Koray, 515 U.S. at 65 (lenity reserved for cases in which Court could make "no more than a guess about what Congress intended"); Lopez v. Davis, 531 U.S. at 244 n. 7 ("rule of lenity is not invoked by a grammatical possibility"). In neither case did the Court suggest that the rule had no application, and the Court clearly assumed the rule would have applied even given the nature of the statute, had there been any ambiguity.

The district court's second ground for rejecting the rule was that the Supreme Court said in Babbitt v. Sweet Home Chapter of Cmty., 515 U.S. 687, 704 n. 18 (1995), that the rule of lenity did not "provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." Id. (emphasis supplied). But a rule applicable to "facial challenges" does not

apply here. In a case like Babbitt, involving a “facial” challenge to regulations decided on summary judgment, the Court’s decision would apply to the application of the statute in “every circumstance,” including applications as to which the statute was not ambiguous. Id. at 699–700. The Court accordingly made clear that the rule of lenity would not apply to such broad facial challenges, but would continue to apply “to a specific factual dispute” arising even in the civil context. Id. at 704 n. 18. This case is not a broad “facial” challenge like that in Babbitt, which might produce unintended results if lenity applied. Rather, it is a “specific factual dispute” arising from the unlawful imprisonment of Mr. Sash for 17 days. The Babbitt holding has no application here.

If the statute here is ambiguous, the rule of lenity must apply. To do otherwise would, for the first time, permit the imprisonment of citizens without the “assur[ance] that society, through its representatives, has genuinely called for the punishment to be meted out.” R.L.C., 503 U.S. at 309 (Scalia, J., concurring). There is no justification for declining to apply the rule of lenity here.

D. The Chevron Doctrine Does Not Apply to a Statute Providing the Maximum Amount of Sentence Credit Due, Since Such a Determination Is Not One That Congress Intended to Delegate to the Federal Bureau of Prisons and Is One That Presents a Pure Issue of Statutory Construction for the Courts.

The statute at issue here, § 3624(b)(1), sets the lower

boundary of the period of imprisonment that prisoners must actually serve on a sentence, and thus acts like a statute setting a maximum or mandatory minimum sentence. But agency interpretations of this kind of provision are simply not governed by Chevron.

It seems clear that Chevron is not applicable to an agency's interpretations of statutes in Title 18 of the United States Code that create crimes. See, e.g., Crandon, 494 U.S. at 177-78 (Scalia, J., concurring) ("we have never thought that the interpretation of those charged with the prosecution of criminal statutes is entitled to deference"); United States v. Gayle, 342 F.3d 89, 94 n. 4 (2d Cir. 2003) (government concedes that formal regulation of the Bureau of Alcohol, Tobacco, Firearms and Explosives interpreting 18 U.S.C. § 922(g) is not entitled to Chevron deference); United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (in interpreting "law of crimes" court is "far outside of Chevron territory here"). Similarly, there is no reason to believe that Congress has delegated the power to interpret statutes setting maximum or minimum sentences to any agency. Evans v. United States Parole Com'n, 78 F.3d 262, 265 (7th Cir. 1996) ("we have substantial doubt that the Judicial Branch owes any deference to the Executive Branch when the question concerns the maximum term of imprisonment; certainly judges do not defer to the Attorney General's interpretation of

Title 18"). The Bureau's interpretation of § 3624(b)(1), which establishes the minimum sentence a defendant must serve for his crime, is not entitled to any deference by the courts.²²

Indeed, the extent of the credit under § 3624, and accordingly the minimum sentence a prisoner must serve, presents a pure question of statutory construction to which Chevron does not apply. INS v. Cardoza-Fonseca, 480 U.S. 421, 446-47 (1987) ("pure question of statutory construction" not subject to deference); Iavorski v. INS, 232 F.3d 124, 132-33 (2d Cir. 2000) ("question purely of statutory construction" not subject to deference); cf. Bamidele v. INS, 99 F.3d 557, 561 (3d Cir. 1996) (statute of limitations question "not within the particular expertise of the INS;" no deference). Congress certainly did not intend to leave it to the Bureau of Prisons to decide what the extent of the good time credit was, any more than it has delegated the power to construe the terms of mandatory minimum sentences.

If Congress has not spoken clearly in setting the boundaries of punishment, it is for the courts, not the jailer, to interpret

²²This case does not involve an actual delegation of discretion such as the one in Lopez v. Davis, 531 U.S. 230, 244 n. 7 (2001). In areas where there is such a delegation, considerations might be different. Thus, since the Bureau is given the discretion to determine whether a prisoner has exhibited exemplary behavior, its interpretation of matters within this sphere might be entitled to deference.

Congress's direction.²³

E. Even If the Chevron Doctrine Applies to This Case, The Bureau's Interpretation of § 3624(b) (1) Is Unreasonable and Cannot Be Adopted.

Even if § 3624(b) (1) can be said to be "ambiguous," at the second step of Chevron analysis, this Court must "determine whether the agency's interpretation is a reasonable resolution of whatever ambiguity" is in the statute. Massachusetts v. United States Dep't of Transportation, 93 F.3d 890, 893 (D.C. Cir. 1996); see Chevron, 467 U.S. at 844 (in case of "implicit" delegation, agency construction must be "reasonable"). Here, three factors show that the Bureau's resolution of the supposed ambiguity is unreasonable. First, the ambiguity the Bureau relies on is barely perceptible, if it exists at all, and the Bureau's resolution of the ambiguity is contradicted by much of the statutory text as read according to the time-honored canons of statutory construction. Second, the policy argument that the Bureau has advanced for its interpretation, that Petitioner's

²³The Supreme Court's decision Reno v. Koray, 515 U.S. at 56-60 is not controlling here. First, its statements on deference to the Bureau are dicta, since it independently found the Bureau's interpretation of the statute correct. United States v. Mead, 533 U.S. 218, 254 (2001) (Scalia, J., dissenting) (in Koray "we had no occasion to consider what level of deference was owed the Bureau of Prison's interpretation ... because ... our opinion made clear that we would have independently arrived at the same interpretation on our own"). And second, a different kind of statute, raising a question within the expertise of the Bureau of the meaning of "official detention," was at issue in Koray. 515 U.S. at 56-60.

reading of the statute would be "anomalous," has no support in the text of the statute or elsewhere. And third, even if the rule of lenity does not preclude Chevron deference at the first step, it must be taken into account in determining the reasonableness of the Bureau's interpretation at the second step. Considering these factors, the Bureau's interpretation of the statute is plainly unreasonable.

Whether the Bureau should prevail at the second step of Chevron analysis depends primarily on the "nature and extent of the ambiguity already identified in Chevron's first step." Massachusetts v. United States Dep't of Transportation, 93 F.3d at 893. "[A]n agency cannot exploit some minor unclarity to put forth a reading that diverges from any realistic meaning of the statute," and such an interpretation would be unreasonable. Id. Here, virtually the entire basis of the Bureau's textual argument is that the phrase "term of imprisonment" could mean two different things, either "sentence imposed" or "time served," even though the context of the phrase strongly indicates that it must mean the former. The only significant support cited for this argument is that the phrase "term of imprisonment" is preceded by the words "at the end of each year," which the Bureau assumes means that the words "term of imprisonment" must mean "time served." But where Congress was creating a "credit," that is, a "deduction," from the each year of the term, the words "end of

each year" make no ambiguity, and the possible ambiguity is lessened, if not extinguished, by language basing the credit on the "sentence, beyond the time served" and the "term of imprisonment." There is, accordingly, only slight textual indication in the statute that the phrase "term of imprisonment" is ambiguous.

Moreover, the Bureau can claim ambiguity only by ignoring virtually every applicable canon of construction, including those requiring reading the statute as a whole, giving its words a natural and consistent meaning, not ignoring or making redundant any phrases or words, and others. See pp. 19-32, above. These "time-honored" canons, if they do not eliminate all ambiguity in the statute, clearly "constrain the possible number of reasonable ways to read [that] ambiguity." Massachusetts v. United States Dep't of Transportation, 93 F.3d at 893. In light of the statutory language read together with these principles, the Bureau's interpretation is, if not entirely unfounded, clearly unreasonable.

Second, the Bureau's construction is based on an unfounded policy argument, the claim that Petitioner's construction necessarily creates a "windfall" for prisoners or is somehow "anomalous." A. 9. As shown above, this argument is entirely without basis in either the text or history of the statute. To the extent the Bureau relies on this kind of reasoning, its

interpretation cannot be found reasonable.

Finally, even if the rule of lenity did not apply at the first step of Chevron, it must apply here, and it confirms that the Bureau's construction is unreasonable. The rule requires that Congress speak clearly if imprisonment is to be imposed and that courts presume a construction of the statute favorable to liberty if it does not. Such "traditional presumptions" in the law "may limit the breadth of ambiguity," even if they do not operate at the first step of Chevron analysis, and where the agency's interpretation is questionable, they constitute grounds to find the agency's interpretation unreasonable. Massachusetts v. United States Dep't of Transportation, 93 F.3d at 893, 895 (declining to defer at step two because of "the powerful and well-established presumption against extending a preemption statute" to matters not clearly addressed); see EEOC v. Arabian American Oil Co., 499 U.S. at 260 (Scalia, J., concurring) (Chevron deference required, but agency's interpretation, based on "mere implications from the statutory language" not reasonable in light of the "presumption against extraterritoriality"). The rule of lenity's requirement of a clear Congressional intent before imprisonment may be imposed mandates, even if Chevron deference applies, that any interpretation of a statute imposing imprisonment have a substantial basis in the Congressional text if it is to cause a loss of liberty. Here, where there is

slight, if any, justification for the Bureau's interpretation in the statute's text, the rule of lenity makes the Bureau's interpretation unreasonable.

CONCLUSION

For the foregoing reasons, the writ should be granted and the case remanded to the district court to consider the appropriate remedy, including a reduction in the term of Petitioner's supervised release. Jago v. Van Curen, 454 U.S. 14, 21 n. 3 (1981).

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>	
TABLE OF AUTHORITIES	iv	
JURISDICTIONAL STATEMENT	1	
QUESTION PRESENTED	2	
STATEMENT OF FACTS	2	
A. The Dispute Over Petitioner’s Sentence	2	
B. The Statute	4	
C. The Two Competing Methods of Applying the Good Conduct Time Statute, 18 U.S.C. § 3624(b) (1)	5	
D. The Habeas Proceeding	10	
SUMMARY OF ARGUMENT	13	
 ARGUMENT		
The Correct Statutory Construction of 18 U.S.C. § 3624 Requires That a Good Conduct Time Credit of 54 Days Be Available for Each Year of the Sentence Imposed, Not for Each Year Actually Served; If the Statute Were Ambiguous, the Rule of Lenity Would Apply; And Even if <u>Chevron</u> Deference Applied, the Bureau of Prisons’ Interpretation of the Statute Is Unreasonable		17
A. The Plain Language of §§ 3624(b) (1), Construed Using the Traditional Tools of Statutory Construction, Requires That a Prisoner Be Eligible for 54 Days of Good Conduct Time for Each Year of the Sentence Imposed.	17	
1. The Phrase “Sentence, Beyond the Time Served” Must Be Given Independent Content, and Must Accordingly Mean That the Credit Is Based on the Entire Sentence, Not Merely the Time Served	19	

2.	The Language Awarding a "Credit" at the "End of Each Year of the ... Term of Imprisonment" Can Reasonably Be Read Only as Allowing a Deduction from "Each Year" of the "Term" Imposed by the Court	21
3.	The Bureau's Remaining Arguments Are Based on the Unproven Assumption That a "Year of the Term" Constitutes a Year Served, or Are Otherwise Without Substance	29
4.	The Fundamental Failure of the Bureau's Position Is That It Reads the Statute Selectively, in a Piecemeal Way, and Does Not Fullfill Its Obligation to Read the Statute As a Whole	31
B.	The Legislative History of § 3624 Further Supports Petitioner's Interpretation of the Statute	32
1.	The Traditional Method of Calculating the Good Time Credit Was on the Basis of the Sentence Imposed, a Method That Grants Credit for Time the Prisoner Is "Never Required to Serve" and That Is Not "Anomalous."	33
2.	The History of Good Time Credits Shows Why the Phrase "Beyond the Time Served" Was Included in the Statute	35
3.	There Is No Evidence in the Legislative History of § 3624 That Congress Wished to Change the Method of Calculating the Credit Based on the Sentence Imposed	36
4.	Numerous Statements of the Congressional Intent Behind the Statute, Both Contemporaneous with and Subsequent to its Enactment, Make Clear That Congress Intended a Credit Roughly Equivalent to 15%, or 54 Days, of the Sentence Imposed by the Court	38
C.	At the First Step of <u>Chevron</u> Analysis, Before Deferring to an Agency's Interpretation, a Court Is Required to Apply the "Traditional Tools of Statutory Construction" Including Substantive Canons of Construction Such As the Rule of Lenity	40

D.	The <u>Chevron</u> Doctrine Does Not Apply to a Statute Providing the Maximum Amount of Sentence Credit Due, Since Such a Determination Is Not One That Congress Intended to Delegate to the Federal Bureau of Prisons and Is One That Presents a Pure Issue of Statutory Construction for the Courts. . .	49
E.	Even If the <u>Chevron</u> Doctrine Applies to This Case, The Bureau's Interpretation of § 3624(b) (1) Is Unreasonable and Cannot Be Adopted	52
CONCLUSION	56

TABLE OF AUTHORITIES

CASES

Babbitt v. Sweet Home Chapter of Cmty., 515 U.S. 687
(1995) 12, 48, 49

Bailey v. United States, 516 U.S. 137 (1995) 13

Bamidele v. INS, 99 F.3d 557 (3d Cir. 1996) 51

Bifulco v. United States, 447 U.S. 381 (1980) 40

Brown v. Gardner, 513 U.S. 115 (1994) 24

Burge v. Butler, 867 F.2d 247 (5th Cir. 1989) 43

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 41

Chevron, U.S.A., Inc. v. Natural Resources Defense
Council, Inc., 467 U.S. 837 (1984) passim

Connecticut ex rel. Blumenthal v. United States
Department of Interior, 228 F.3d 82 (2d Cir. 2000) 21

Crandon v. United States, 494 U.S. 152 (1990) 45, 50

Dolfi v. Pontesso, 156 F.3d 696 (6th Cir. 1998) 15, 41, 45

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 44, 55

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building
and Construction Trades Council, 485 U.S. 568 (1988) 44

Evans v. United States Parole Com'n, 78 F.3d 262
(7th Cir. 1996) 50

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 23

Hunter v. Fasching, 195 F.2d 1007 (10th Cir. 1952) 35

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 51

INS v. St. Cyr, 533 U.S. 289 (2001) passim

Iavorski v. INS, 232 F.3d 124 (2d Cir. 2000) 51

<u>Jago v. Van Curen</u> , 454 U.S. 14 (1981)	3, 56
<u>Ladner v. United States</u> , 358 U.S. 169 (1958)	40, 41
<u>Lopez v. Davis</u> , 531 U.S. 230 (2001)	48, 51
<u>Lurie v. Wittner</u> , 228 F.3d 113 (2d Cir. 2000)	40
<u>Massachusetts v. United States Department of Transportation</u> , 93 F.3d 890 (D.C. Cir. 1996)	<u>passim</u>
<u>Mistretta v. United States</u> , 488 U.S. 361 (1989)	43
<u>Moskal v. United States</u> , 498 U.S. 103 (1990)	15, 20
<u>Pacheco-Camacho v. Hood</u> , 272 F.3d 1266 (9th Cir. 2001)	19, 20, 33
<u>Pasciuti v. Drew</u> , 2004 WL 1247813	19
<u>Ramah Navajo Chapter v. Lujan</u> , 112 F.3d 1455 (10th Cir. 1997)	44
<u>Reno v. Koray</u> , 515 U.S. 50 (1995)	48, 52
<u>Sorenson v. Secretary of Treasury</u> , 475 U.S. 851 (1986)	14
<u>United States v. Bass</u> , 404 U.S. 336 (1971)	15, 42
<u>United States v. Carpenter</u> , 320 F.3d 334 (2d Cir. 2003)	3
<u>United States v. Gayle</u> , 342 F.3d 89 (2d Cir. 2003)	50
<u>United States v. Lanier</u> , 520 U.S. 259 (1997)	42
<u>United States v. McGoff</u> , 831 F.2d 1071 (D.C. Cir. 1987)	50
<u>United States v. Mead</u> , 533 U.S. 218 (2001)	52
<u>United States v. Morton</u> , 467 U.S. 822 (1984)	15, 22, 32
<u>United States v. R.L.C.</u> , 503 U.S. 291 (1992)	42, 49
<u>United States v. Rodriguez</u> , 892 F.2d 233 (2d Cir. 1989)	17
<u>United States v. Tocco</u> , 135 F.3d 116 (2d Cir. 1998), <u>aff'g United States v. Ferranti</u> , 928 F. Supp. 206, 215-16 (E.D.N.Y. 1996)	17

<u>United States v. Torres-Echavarria</u> , 129 F.3d 692 (2d Cir. 1997)	40
<u>United States v. Ven-Fuel, Inc.</u> , 758 F.2d 741 (1st Cir. 1985)	20
<u>United States v. Vonn</u> , 535 U.S. 55 (2002)	47
<u>United States v. Wiltberger</u> , 18 U.S. (5 Wheat) 76 (1820) . .	41
<u>Wasko v. Vasquez</u> , 820 F.2d 1090 (9th Cir. 1987)	43
<u>White v. Scibana</u> , 390 F.3d 997 (7th Cir. 2004)	18, 19, 28
<u>Williams v. Dewalt</u> , 2004 WL 3022300	18, 19, 25

STATUTES AND REGULATIONS

18 U.S.C. § 710	34
18 U.S.C. § 922(g)	50
18 U.S.C. § 1028(a) (7)	2
18 U.S.C. § 1029(a) (3)	2
18 U.S.C. § 3142(e) (3)	24
18 U.S.C. § 3142(f) (1) (C)	24
18 U.S.C. § 3143(b)	24
18 U.S.C. § 3147	24
18 U.S.C. § 3150	24
18 U.S.C. § 3156(a)	24
18 U.S.C. § 3551(b) (3)	24
18 U.S.C. § 3553(c)	24
18 U.S.C. § 3561(a) 3	24
18 U.S.C. § 3584(c)	24
18 U.S.C. § 3621(a)	24

18 U.S.C. § 3624(b) (1)	passim
18 U.S.C. § 4161	30
28 C.F.R. § 523.20	7
28 U.S.C. § 1291	1
28 U.S.C. § 2241	1
28 U.S.C. § 2243	3
28 U.S.C. § 994(e)	25

LEGISLATIVE HISTORY

131 Cong. Rec. E37-02	38
131 Cong. Rec. E201-04	38
131 Cong. Rec. S4083-03	39
139 Cong. Rec. H8723-01	39
141 Cong. Rec. S2348-01	39
H.R. Conf. Rep. 98-1159 at 415 (1984), <u>reprinted in</u> 1984 U.S.C.C.A.N. 3710, 3711	34
H.R. Rep. 86-935, <u>reprinted in</u> 1959 U.S.C.C.A.N. at 2518-19	passim
H.R. Rep. 99-797 at 21 (1986), <u>reprinted in</u> 1986 U.S.C.C.A.N. 6138	18
S. Rep. 98-225 at 46, 48-49, 56-59, 146-47, <u>reprinted in</u> 1984 U.S.C.C.A.N. 3182, 3229, 3231-32, 3239-41, 3329-30	37
Pub. L. 98-473	34

MISCELLANEOUS

<u>Antonin Scalia, Judicial Deference to Administrative Interpretations of Law</u> , 1989 Duke L.J. 511	46
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