

New Time Limits on Federal Halfway Houses:

*Why and how
lawyers challenge
the Bureau of Prisons shift
in correctional policy—
and the courts' response*

**By Todd Bussert, Peter
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In an abrupt about-face, the federal Bureau of Prisons (BOP) in December 2002 abandoned long-standing policies governing the use of Community Corrections Centers (CCC). BOP announced that it would no longer send prisoners directly to CCCs to serve their sentences and would limit prerelease halfway house placements to the final 10 percent of a prisoner's time to serve. Prisoners, lawyers, and judges reacted quickly to the news that BOP would not honor judicial recommendations for halfway house placements. BOP found itself defending a raft of lawsuits and attending resentencings. Meanwhile, other prisoners, who would have been eligible to spend six months in a CCC prior to release from federal custody regardless of sentence length, cried foul and petitioned for relief. Courts around the country invalidated the 2002 rule changes, finding that they unilaterally, and contrary to legislative intent, redefined "place of imprisonment." Courts also ruled that BOP had failed to comply with Administrative Procedures Act (APA) requirements when it substantively amended its regulations without either notice or an opportunity for public comment. For a time, the bureau avoided precedential repudiation of its rule change by declining to appeal adverse court decisions, resulting in individual relief but not systemic change and frustrating efforts by opponents who wanted an opportunity to address the underlying issues. Ultimately, the circuit courts that considered the issue invalidated the rule change.

More recent BOP efforts to codify the change consistent with APA requirements have also met with judicial skepticism and opposition. Critics charge, and courts agree, that the bureau is trying to shed its statutory obligation to exercise individualized discretion when deciding where to incarcerate a prisoner and when to release a prisoner to a halfway house to prepare for reentry at the end of a sentence. This article provides a guide to the rule changes and the efforts to reverse them.

The Bureau of Prisons traces its origins to the Three Prisons Act of 1891 and the Federal Bureau of Prisons Act of 1930. Today it operates the nation's largest prison system, housing more than 188,000 prisoners in more than 100 institutions. The agency traditionally used community-based facilities as places of imprisonment for qualified inmates based on individualized placement and programming needs. In the mid-1960s, following enactment of the Prisoner Rehabilitation Act, BOP expanded halfway house use for those needing substance abuse treatment and, later, for any prisoner who might benefit from and be safely managed in structured community-based confinement. Then-BOP Director Myrl E. Alexander emphasized that reentry support was central to the agency's mission of preparing "our clientele for community adjustment rather than adjustment to probation or to the correctional institution."

Community corrections grew through the 1970s and 1980s, becoming a standard component of the agency's overall range of placement options. Congress expressly provided for BOP's use of residential treatment centers as places of imprisonment in 18 U.S.C. §§ 4082(a) and (c) and reaffirmed the agency's designation responsibilities in promulgating the Sentencing Reform Act of 1984 (SRA). Through 18 U.S.C. § 3621(b), Congress authorized BOP to "designate the place of the prisoner's imprisonment" at "any available penal or correctional facility that meets minimum standards of health and habitability." Significantly, as part of section 3621(b), Congress directed that the bureau consider certain factors when making any placement decision. They include offender-specific variables such as "the history and characteristics of the prisoner," "the nature and circumstances of the offense," and sentencing courts' statements concerning a sentence's purpose or facility recommendations. In 1985, BOP's general counsel issued a legal opinion interpreting the phrase "penal or correctional facility" in section 3621(b) as coincident with "institution or facility" in the former 18 U.S.C. § 4082(a).

In 1990, the statutory definition of "imprisonment" expanded to include home confinement when employed at the end of a prisoner's sentence. (18 U.S.C. § 3624(c).) In so broadening BOP's placement options, Congress did not amend section 3621(b) or otherwise modify the agency's

designation authority. Indeed, the House Committee on the Judiciary had originally reported a bill that would have allowed initial designations of sentenced prisoners to “home detention.” But, confronted with objections to such a change, negotiators crafted a compromise that moved the language to section 3624(c) and limited home confinement to the final 10 percent of a prisoner’s time to serve. The bill’s cosponsor explained that the amendment left “the law as it is” with respect to initial designations.

Shortly after section 3624(c)’s enactment, BOP issued a written policy statement that announced its intention to “promote greater use of community corrections programs for low risk offenders.” The bureau acknowledged 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.” This 120- to 180-day prerelease objective section relies on section 3621(b) to exceed substantially, for shorter sentences, the bureau’s minimum statutory obligation under section 3624(c) to “assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner’s re-entry into the community.” Because BOP understood section 3621 to still permit the use of CCCs as facilities for service of any part of a sentence, in appropriate cases, it designated a halfway house for the duration of a prisoner’s sentence. Prerelease transfer decisions were based on a prisoner’s perceived “transitional need” (for example, employment prospects, available housing) and without regard to sentence length.

The Department of Justice’s Office of Legal Counsel (OLC) upheld the bureau’s analysis and flexible use of CCCs in a 1992 legal opinion:

There is . . . no basis in section 3621(b) for distin-

guishing 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.

(Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65 (1992).)

The bureau discussed its CCC practices in a 1994 report to Congress, explaining that, in keeping with the objective of housing prisoners “in the least restrictive environment consistent with correctional needs,” it had created a two-part community corrections model that differentiated between those designated to CCCs to serve their entire sentences and those placed there in preparation for reentry. The bureau described a “community corrections component” used for direct commitments that was “sufficiently punitive to be a legitimate sanction, meeting the needs of the court and society, yet allowing the offender to undertake other responsibilities, such as participation in work, substance abuse education, and community service.” The prerelease component, on the other hand, was for those nearing the ends of their sentences—ordinarily not to exceed six months—to “assist offenders in making the transition from an institutional setting to the community. . . .”

The bureau’s view of sanctioned CCC usage remained constant in all versions of its official written policy statements. For example, Program Statement 7310.04 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.”

So it was until December 2002, when BOP, as directed by the Justice Department, changed its CCC practices.

December 2002 rule changes

Punishment of white-collar offenders trumps sound correctional principles. On December 13, 2002, the Department of Justice’s Office of Legal Counsel (OLC) issued a memorandum opinion to then-Deputy Attorney General Larry Thompson concerning a question posed by his office: “whether BOP has general authority, either upon recommendation of the sentencing judge or otherwise, to place [a low-risk and nonviolent] offender [who

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receives a short sentence of imprisonment] directly in community confinement at the outset of his sentence or to transfer him from prison to community confinement during the course of his sentence.” The OLC concluded that the bureau’s long-standing practice was “unlawful” and that a federal offender sentenced to a term of imprisonment could not be placed at a CCC without regard to sentence length. The opinion relied both on the Federal Sentencing Guidelines, particularly section 5C1.1 and guidelines references to “community confinement” as contrasted with “imprisonment,” and on 18 U.S.C. § 3624(c), which it interpreted as restricting the bureau’s designation authority under section 3621(b).

In sum: When a federal offender receives a Zone C or Zone D sentence of imprisonment, section 3621 and section 3622 of title 18 do not give BOP general authority to place the offender in community confinement from the outset of his sentence. Nor do they give BOP general authority to transfer him from prison to community confinement at any time BOP chooses during the course of his sentence.

(Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who Have Received Sentences of Imprisonment, Mem. Op. for Ass’t Att’y Gen. (Dec. 13, 2002).)

The OLC opinion thus treated the U.S. Sentencing Guidelines, which are directed at cabining judges’ sentencing choices, as binding the bureau in its implementation of those sentences once chosen. Three days after the OLC memorandum issued, Thompson drafted a memorandum to BOP Director Kathleen Hawk Sawyer instructing the bureau to immediately modify its CCC practices: “The OLC opinion concludes that the BOP is obligated to adhere strictly not only to statutory directives, but also to all placement requirements and policies set forth in the Federal Sentencing Guidelines. . . . To ignore the Guidelines is to promote the very disparity in sentencing that the Guidelines seek to eliminate.” Although unmentioned in the OLC opinion, Thompson added that “[a]nother concern regarding BOP’s CCC placement policies is its potentially disproportionate, and inappropriately favorable, impact on so-called ‘white-collar’ criminals,” concluding:

The OLC treated the Guidelines as binding.

BOP’s current placement practices run the risk of eroding public confidence in the federal judicial system. White collar criminals are no less deserving of incarceration, if mandated by the Sentencing Guidelines, than conventional offenders. Indeed, such individuals are often better educated and more rational than other criminals and are thus more likely to weigh the risks of possible courses of action against the anticipated rewards of criminal behavior. As many studies have shown, the prospect of prison—more than any other sanction—is feared by white collar criminals and has a powerful deterrent effect. Moreover, white collar crimes often involve not only a high level of intent and calculation, but are committed over an extended period of time, making the punitive dimension of prison especially deserved in many cases. With this memorandum, and the accompanying OLC opinion issued last week, I am confident that the Department of Justice

is taking an important step toward ensuring the proper and fair enforcement of the law.

(Memorandum from Larry Thompson to Kathleen Hawks Sawyer (Dec. 16, 2002) (on file with the author).)

On December 20, 2002, Hawks Sawyer issued a memorandum to federal judges announcing that “effective

immediately,” BOP would no longer place sentenced defendants directly into CCCs, regardless of judicial recommendations under 18 U.S.C. § 3621(b)(4). Her memorandum did not mention the new restrictions on prerelease transfers to CCCs, limiting them to the lesser of the final 10 percent of a prisoner’s time served or six months. In other words, with few exceptions, individuals sentenced to less than 70 months’ imprisonment—the sentence that yields 60 months to serve, assuming good behavior—were from that point forward ineligible for transfer up to 180 days prior to release, thereby limiting reentry opportunities for thousands of prisoners without accounting for section 3621(b) considerations or their particular transitional needs.

Newsweek disclosed the policy shift, made with neither notice nor opportunity to comment, in a Web-exclusive article that quoted unnamed Justice Department officials:

The new policy move, officials said, is partly intended to strengthen the hands of federal prosecutors in high-priority cases like the Enron and WorldCom

scandals. Officials say they are trying to signal to reluctant targets in those cases that they should cooperate with the government—or else. ‘There’s a clear signal being sent here,’ says one department official. ‘We’re not going to tolerate preferential treatment for rich corporate executives who have broken the law.’

(Michael Isikoff, *Hard Time for Corporate Perps: John Ashcroft says white-collar felons will now have to serve their sentences in prisons*, NEWSWEEK (Dec. 20, 2002). The article declared that a letter from a West Virginia district court judge expressing dissatisfaction with BOP’s placement of a tax offender at a CCC motivated the Attorney General’s Office to initiate its review. However, subsequent media accounts suggest that, in reality, prosecutorial displeasure prompted the action. (Tom Schoenberg, *Halfway House Backlash*, LEGAL TIMES (Feb. 10, 2003) (“U.S. District Judge Joseph Goodwin tried to sanction a prosecutor for arguing that the defendant could not be sentenced to a halfway house.”).) Moreover, where officials reportedly told *Newsweek* that the Justice Department was unaware of BOP’s CCC practices until 2001, the Solicitor General’s brief in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) referred to it: “[T]he BOP employs [CCC] as an alternative to ‘institutional confinement for certain short-term offenders.’” Indeed, aside from the aforementioned 1992 OLC memorandum and formal BOP statements, defense counsel, with federal prosecutors’ knowledge and occasional consent, commonly requested nonbinding, written recommendations for direct CCC designations in defendants’ judgment orders. As explained in the 1995 and 2000 editions of the Justice Department-published *Judicial Guide to the Federal Bureau of Prisons*, BOP honored such requests when, in its judgment, direct placement in a CCC was consistent with policy and sound correctional principles. Finally, it is noteworthy that contrary to the Justice Department’s assertions to *Newsweek* and others, “[BOP] officials said that halfway houses have been used for non-violent 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*, N.Y. TIMES (Dec. 26, 2002).)

As U.S. District Judge Ellen Segal Huvelle learned through testimony given during a hearing concerning the rule change, more than a third of the prisoners designated to serve their entire sentences in CCCs at the time the policy changed were female, even though women comprise

less than 7 percent of the general federal prison population. (*Cutler v. United States*, 241 F. Supp. 2d 19, 23 n.3 (D.D.C. 2003).) Cutler did not meet the “rich corporate executive” profile supposedly targeted by the Justice Department’s action, nor did any significant number of the affected prisoners, male or female.

Legal challenges to rule changes

The rule changes applied immediately and retroactively to an estimated 132 prisoners then designated to CCCs and to an undetermined number of other sentenced offenders preparing to self-surrender to CCCs based on judicial recommendations and related designation orders. Consequently, this “front-end” group of direct designees initiated the first round of litigation. Petitioners moved to enjoin BOP from relocating them to prison camps or metropolitan detention center minimum-security work cadres. Overwhelmingly, district courts granted relief, citing the attorney general’s improper reliance on the Sentencing Guidelines over federal statutes, the OLC’s erroneous reinterpretation of “place of imprisonment” under section 3621(b), and BOP’s failure to adhere to the APA’s notice-and-comment requirements. Some courts also found a violation of the Ex Post Facto Clause. However, given both BOP’s refusal to honor judicial requests for direct CCC placements for those sentenced after the rule change and the government’s willingness to settle any appeals that did not become moot by allowing sentenced prisoners to serve their entire sentences at CCCs, the front-end litigation gradually subsided, and focus shifted to the “back-end,” that is, prisoners awaiting prerelease transfers affected by the new 10 percent limitation.

Back-end petitioners challenged the December 2002 rule on three principal grounds: (a) restrictions on CCC placement based on definitions found in the U.S. Sentencing Guidelines and on the “not more than 10 percent” language in 18 U.S.C. § 3624(c) misinterpreted that statute, invoked the guidelines in a context where they had no application, and misconstrued BOP’s broad designation authority under 18 U.S.C. § 3621(b); (b) BOP avoided its obligation to subject the rule change to notice and comment under the APA; and (c) retroactive application to those whose offenses were committed before December 2002 violated the Ex Post Facto Clause. Just as in the front-end cases, district courts generally disfavored the bureau’s attempts to restrict CCC use, ordering instead that the agency reconsider individual prisoner’s halfway house eligibility consistent with pre-December 2002 practices.

An interesting feature of the litigation was the government’s apparent reluctance to permit its losses from becoming potentially binding precedent. Instead of appealing any of the numerous adverse rulings, BOP accommodated courts’ rulings in individual cases.

Consequently, it minimized the impact of petitioner-favorable decisions and compelled prisoners—many of whom were indigent and without benefit of counsel—to file individual petitions under 28 U.S.C. § 2241 even where a consensus view from judges in a particular district existed. (See *United States v. Arthur*, 367 F.3d 119 (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.’ ”).) Thus, it was nearly two years before the first appellate court ruled on the merits of the statutory interpretation issue, rejecting each of BOP’s arguments and holding that:

- 18 U.S.C. § 3624(c) imposes an affirmative obligation on the BOP to ensure pre-release placement, when practical, for the final 10% of a prisoner’s time served, up to six months, but does not prohibit community confinement or other prerelease alternatives at any earlier time during a sentence of imprisonment;
 - a CCC is unambiguously a “place of imprisonment” (*i.e.*, a penal or correctional facility) under the plain language of 18 U.S.C. § 3621, observing: “If, as both parties agree, a CCC may be a place of imprisonment during the last ten percent of a prisoner’s term of imprisonment, it would be incongruous to conclude that the same CCC may not be a place of imprisonment during any portion of the first ninety percent of that term”; and
 - reliance on the Sentencing Guidelines’ supposed limitations for sentences of imprisonment is misplaced: “[T]he Guidelines are binding only on the courts. They do not address the BOP’s use of its discretion as the custodian of federal prisoners to designate the appropriate place of imprisonment.”
- (*Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004).)

In sum, the First Circuit held, as did the Eighth soon after in *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004), “that 18 U.S.C. § 3621(b) authorizes the BOP to transfer [a prisoner] to a CCC at any time during her prison term. The BOP’s discretionary authority under § 3621(b) is not subject to the temporal limitations of 18 U.S.C. § 3624(c).”

For prisoners housed in these circuits, *Goldings* and *Elwood* barred BOP’s continued enforcement of the December 2002 rule change. Likewise, nonviolent offenders facing short periods of incarceration were again eligible for direct halfway house commitments. However, the victories were short-lived. Two-and-a-half years after improvidently changing its established CCC practices, BOP invoked the APA process in an effort to insulate those changes from further challenge. In August 2004, the agency published proposed “new rules” in the *Federal Register* for notice-and-comment that mirrored precisely the December

2002 OLC opinion and its previous rule changes.

The February 2005 rule

Couched as a “categorical exercise of discretion for designating inmates to community confinement when serving terms of imprisonment,” the proposed rules declared BOP’s intention to limit community confinement to prerelease purposes “which will afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community.” The bureau further made clear that prerelease halfway house use would be restricted to: “the last ten percent of the prison sentence being served, not to exceed 6 months.” Having purportedly considered the nonexclusive list of factors that section 3621(b) sets out for each prisoner’s designation, BOP offered four chief considerations for the rule changes: (a) promotion of consistency, (b) facility resources, (c) sentencing commission policy statements, and (d) congressional sentencing policy. The bureau received 26 comments concerning the *Federal Register* notice — only one supported the proposed changes.

Promotion of consistency. BOP asserted that its pre-December 2002 CCC practices “created the possibility that it would unintentionally treat similar inmates differently.” In their comments on the proposal, Families Against Mandatory Minimums (FAMM) and the National Association of Criminal Defense Lawyers (NACDL) questioned the appropriateness of measures to eliminate a potential for unintentional disparity in the absence of any evidence of actual unfairness or error. The better course, the organizations submitted, was to add to the rules a caution against favoritism. The bureau responded, “[W]e made no assertion that the Bureau had, in fact, treated inmates differently or shown favoritism. Rather, we stated that the previous procedures created the possibility that we would unintentionally treat similar inmates differently or, at least, the perception that such a possibility existed. We do not believe that a statement analyzing the previous situation requires further empirical support.”

Consideration of facility resources. BOP’s declaration that experience showed CCCs are “particularly well suited as placement options for the final portion of offenders’ prison terms” prompted a host of comments. NACDL cited the 1994 congressional report as well as a lawsuit brought against the agency by one of its largest CCC providers alleging that the decrease in direct commitments jeopardized both its financial viability and prisoner rehabilitation efforts. Several groups, including The Center for Community Corrections and Project Rehab, stated that the time afforded by the 10 percent limitation was inadequate for many prisoners’ successful reentry. The International Community Corrections Association (ICCA) stressed that “an offender [who] arrives at the halfway house without prospects of housing, employment, or even identification, will need four to six months to prepare to return to an

unstructured environment.” The ICCA also asserted that “most transitional programming consumes the better part of a 120-day stay.” and observed that under the 10 percent rule “a six-month pre-release placement would not have been possible for the more than 75% of all federal offenders sentenced to prison in 2001 who received a term of less than 70 months.”

Without addressing any of these length-of-stay points directly, the bureau’s response reiterated the rationale offered in the notice. Neither the notice nor the response stated how limiting halfway house time to the final 10 percent of a prisoner’s time served furthered the “characteristics” and “advantages” the agency claimed make CCCs best suited for prerelease purposes. BOP also ignored comments about the suitability of CCCs for the full service of short sentences where a defendant may need its resources, as well as those emphasizing that some prisoners require a longer time for adjustment prior to release than the 10 percent rule allows.

Consideration of sentencing commission policy statements. Like the OLC, the bureau attempted to find support for its position in U.S. Sentencing Guidelines section 5C1.1. Despite acknowledging that guidelines promulgated under 28 U.S.C. § 994(a)(1) are legally distinct from the “policy statements” drafted pursuant to 28 U.S.C. § 994(a)(2), which section 3621(b) requires it to weigh, BOP argued that section 5C1.1 “reflects the Commission’s policy determination generally to restrict the availability of community confinement in lieu of imprisonment.” NACDL highlighted *Goldings*’s wholesale rejection of this line of argument, and FAMM submitted that 5C1.1 “does not express a ‘general restriction’ on the availability of community confinement.” As courts have recognized, the Sentencing Guidelines do not trump BOP’s statutory authority under 18 U.S.C. § 3621 to determine the appropriate place of imprisonment. Two days after BOP issued its response, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005) that the Sentencing Guidelines are not binding even on the courts, further weakening the suggestion that they control an executive agency’s actions.

Consideration of congressional sentencing policy. “Whether or not Section 3624(c) precludes the Bureau from designating a prisoner to community confinement for longer than the lesser of the last 10% of the sentence or six months, it is consistent with congressional policy reflected in that section for the Bureau to exercise its discretion to decline to designate a prisoner to communi-

ty confinement for longer than that time period. In addition to furthering the sentencing policy reflected in Section 3624(c), the proposed rules further Congress’ determination that one of the important purposes of sentencing is to deter criminal conduct. *See* 18 U.S.C. 3553(a)(2)(B).” As noted above, this assertion in BOP’s August 2004 notice is contrary to the 1990 legislative history. Moreover, FAMM pointed out that there is waning support for the proposition that Congress “clearly indicated” in section 3624(c) a preference for the 10 percent limitation for CCC placements: “[C]ourts have relied upon the plain meaning of the statute to find that § 3624(c) only sets forth the extent of a prisoner’s entitlement to consideration for a pre-release adjustment . . . whether in a CCC or some place else.” Although acknowledging this fact, the bureau’s response fell back again on the desire “to exercise discretion to minimize the potential for disparity of treatment,” concluding that it acted rationally and justifiably.

Litigation over the new rule, which went into effect on February 14, 2005, has divided the courts. Some have found that BOP impermissibly acted categorically in an

area where it is required, by statute, to make individualized determinations. Others defer to the bureau’s discretion, citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Lopez v. Davis*, 531 U.S. 230 (2001), which upheld the bureau’s implementation of a different categorical exclusion called for by statute. The first appellate court to address the February

2005 rule has, like its sister circuits that struck down the December 2002 changes, found them invalid.

In *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005), the court of appeals held that the February 2005 rule mistakenly ignores the enumerated factors the bureau must consider under 18 U.S.C. § 3621(b) when making placement and transfer determinations. Former Chief Judge Becker’s opinion for the divided panel distinguished *Lopez*’s categorical approach, because, unlike the statute in that case, section 3621(b) mandates individualized determinations without limitations. The panel also found that the 2005 rule is not entitled to *Chevron* deference because it is both contrary to clear congressional intent and based on impermissible statutory construction, and, thus, unreasonable. Though not addressed in *Woodall*, some litigants have also relied on *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983) for the proposition that BOP

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acted arbitrarily and capriciously by largely ignoring the comments received in response to the proposed rule and, therefore, did not satisfy the APA in that respect as well.

Conclusion

The president featured prisoner reentry in the 2004 State of the Union address and the following summer 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 H.W. Bush, remarks by the president to the 2004 National Urban League Conference (July 23, 2004).) The former attorney general, who oversaw a \$100 million grant initiative designed to encourage states to focus on reentry 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.’

(Att’y Gen. John Ashcroft, prepared remarks at the Department of Justice Offender Re-entry Conference (Cleveland, Ohio, Sept. 30, 2004).)

These statements parallel those submitted by the ABA concerning the formal rule change. In its 2004 comments,

the ABA noted that, in August 2002, the House of Delegates approved the *20-Point Blueprint for Cost-Effective Pretrial Detention, Sentencing and Corrections Systems*. The blueprint promotes the use of community corrections among other reasoned, cost-effective measures. The ABA also referred to four reports issued by the ABA’s Justice Kennedy Commission recommending, among other things, that government officials take steps necessary to ease the transition from prison to the community, including assistance in finding transitional housing, job placement, substance abuse treatment, and the like.

The Bureau of Prisons’ hasty rule change belies decades of sound agency practice. Leaving aside the propriety of upending established correctional management practices to promote maximized punishment for white-collar offenders, the ends that the Justice Department sought to achieve could have been brought about without affecting all federal prisoners serving less than six-year sentences. BOP could have, as it has in the past, limited programming opportunities to those they will directly benefit. For instance, prior to the termination of the boot camp program in June 2005, the bureau barred participation by inmates “demonstrating a stable employment/educational/military history, etc.” because they were seen as lacking requisite program needs. BOP could have reasonably amended its CCC practices to ensure that white-collar defendants did not receive some undue, preferential benefit. Refusing access to Community Corrections Centers increases the chance of recidivism and the associated costs of prosecution and incarceration. It is also detrimental to thousands of federal prisoners, their families, and the communities to which they will return, while needlessly exacerbating mounting prison costs without any corresponding social benefit in crime control. ■