IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MICHAEL TRISTANO,

OPINION AND ORDER

Plaintiff,

07-C-189-C

v.

FEDERAL BUREAU OF PRISONS,
UNITED STATES OF AMERICA,
RICARDO MARTINEZ,
MICHAEL NALLEY,
HARLEY LAPPIN,

Defendants.

- -

Plaintiff Michael Tristano is serving a sentence of one year and one day for mail fraud at the Federal Prison Camp in Oxford, Wisconsin. He brought this lawsuit under the Administrative Procedures Act, contending that he is entitled under 18 U.S.C. § 3621(b) to be considered for transfer to a halfway house *now*. Defendants' position is that 18 U.S.C. § 3624(c) restricts such a transfer until plaintiff reaches the last 10% of his term of imprisonment, a date that respondents have calculated as June 14, 2007. In the alternative, defendants argue that even if there is authority under § 3621(b) to transfer prisoners to halfway houses before the last 10% of their term of imprisonment, the Federal Bureau of

Prisons has properly and categorically exercised its discretion to deny such transfers in all instances by enacting 28 C.F.R. §§ 570.20 and 570.21.

I dismissed a previous suit brought by plaintiff because he failed to exhaust his administrative remedies before filing. The parties agree now that plaintiff has filed all the necessary grievances and appeals, which were denied at every level. Plaintiff's motion for a preliminary injunction is ripe for review.

I agree with plaintiff that 18 U.S.C. § 3621(b) is unambiguous and that it permits the bureau to transfer prisoners to halfway houses before the final 10% of their term of imprisonment. Further, because the statute requires the bureau to take specific criteria into account when making a placement decision, the bureau exceeded its authority when it enacted regulations that bar consideration of those criteria when considering a prisoner's request to be transferred to a halfway house. Accordingly, plaintiff's motion for a preliminary injunction will be granted. However, because it is the bureau alone that is responsible for denying plaintiff's request, all other parties will be dismissed.

From the parties' proposed findings of fact, I find that the following facts are undisputed.

FACTS

In July 2006, the United States District Court for the Northern District of Illinois

sentenced plaintiff Michael Tristano to imprisonment for one year and one day after he pleaded guilty to one count of mail fraud. On August 31, 2006, plaintiff began serving his sentence at the Federal Prison Camp in Oxford, Wisconsin.

After arriving at the camp, plaintiff sought transfer to a community corrections center, more commonly known as a halfway house. Defendant Federal Bureau of Prisons informed plaintiff that he would not be eligible for such a transfer until June 14, 2007, which is one month before plaintiff's scheduled release date. The bureau did not consider an earlier transfer because its current position is that it is prohibited from placing prisoners in a halfway house before the last six months or 10% of a prisoner's sentence, whichever is shorter. (Plaintiff proposes numerous facts regarding the reasons he believes he meets the criteria for transfer to a halfway house. However, the question is not whether plaintiff is entitled to a transfer in accordance with the statutory criteria but whether he is entitled to be considered for a transfer at all. Therefore, facts reflecting plaintiff's character and circumstances are not relevant to this case.)

Plaintiff has exhausted his available administrative remedies.

OPINION

In determining whether a plaintiff is entitled to a preliminary injunction, the first question is whether he has a shown some likelihood of success on the merits. Planned

Parenthood v. Doyle, 162 F.3d 463, 473 (7th Cir. 1998); Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11-12 (7th Cir. 1992). In this case, the merits relate to the correct interpretation of 18 U.S.C. §§ 3621(b) and 3624(c), which both involve the appropriate placement of federal prisoners. Section 3621(b) provides:

> The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering--
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> (1) the resources of the facility contemplated;
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> (2) the nature and circumstances of the offense;
>
> (3) the history and characteristics of the prisoner;
>
> (4) any statement by the court that imposed the sentence--
>
> > (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
> >
> > (B) recommending a type of penal or correctional facility as appropriate; and
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> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.
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> In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

Section 3624(c) provides:

> The Bureau of Prisons shall, to the extent practicable, 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. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

The bureau says that § 3624(c) limits a prisoner's placement in a halfway house to the shorter of six months or the last 10% of the prisoner's term of imprisonment. Plaintiff says § 3621(b) allows the bureau to place prisoners in a halfway house at any point in their sentence, using the factors enumerated in that provision to determine the most appropriate placement, and that § 3624(c) does nothing to limit that discretion.

The issue is by no means a new one. It began in December 2002, when the Office of Legal Counsel issued a directive adopting the interpretation of § 3624(c) that the bureau advances now. Department of Justice Office of Legal Counsel, Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who Have Received Sentences of Imprisonment (Dec. 13, 2002); Federal Bureau of Prisons, Memorandum for Chief Executive Officers (Dec. 20, 2002). This interpretation represented an abrupt about-face to the view the bureau had held since the enactment of § 3624(c) in 1984. Under the previous interpretation, the bureau believed that § 3624(c) did not act as a limitation on the

its authority to transfer a prisoner to a halfway house at any point in his sentence. E.g., Department of Justice, Federal Bureau of Prisons, Program Statement 7310.04. Community Corrections Center (CCC) Utilization and Transfer Procedure (Dec. 16, 1998) ("the Bureau is not restricted by § 3624(c) in designating a [community corrections center] for an inmate and may place an inmate in a [community corrections center] for more than the 'last ten per centum of the term,' or more than six months, if appropriate").

Not surprisingly, challenges to the new interpretation proliferated in the courts, most of them brought pursuant to 28 U.S.C. § 2241, the habeas corpus statute. The overwhelming majority of courts granted the petitions, concluding that the bureau's new policy conflicted with the unambiguous language of both §§ 3621(b) and 3624(c). E.g., Elwood v. Jeter, 386 F.3d 842 (8th Cir. 2004); Goldings v. Winn, 383 F.3d 17 (1st Cir. 2004); Zucker v. Menifee, No. 03CIV10077(RJH), 2004 WL 102779 (S.D.N.Y. Jan. 21, 2004); Grimaldi v. Menifee, No. 04CIV1340DABGWG, 2004 WL 912099 (S.D.N.Y. April 29, 2004); Colton v. Ashcroft, 299 F. Supp. 2d 681, 687 (E.D. Ky. 2004); Estes v. Federal Bureau of Prisons, 273 F. Supp. 2d 1301 (S.D. Ala. 2003); Tipton v. Federal Bureau of Prisons, 262 F. Supp. 2d 633 (D. Md. 2003); Byrd v. Moore, 252 F. Supp. 2d 293 (W.D.N.C. 2003); Howard v. Ashcroft, 248 F. Supp. 2d 518 (M.D. La. 2003).

In Hendershot v. Scibana, No. 04-C-291-C (W.D. Wis. Oct. 15, 2004), a copy of which is attached to this opinion, I followed these decisions and granted a petition for a writ

of habeas corpus brought by prisoners who sought to be considered for transfer to a halfway house before the last 10% of their term of imprisonment. First, with respect to § 3621(b), I concluded that a halfway house was "a correctional facility" to which the bureau could designate a prisoner as a general matter. (The bureau does not appear to challenge that interpretation in this case.) Second, I concluded that § 3624(c) did not limit the bureau's authority under § 3621(b) to place prisoners in a halfway house. Rather, § 3624(c) imposed an obligation on the bureau ("the bureau of prisons *shall* . . .") to place prisoners in pre-release conditions at the end of the their term of imprisonment. The temporal boundary ("not to exceed six months, of the last 10 per centum of the term. . .") simply established when this obligation began. In other words, § 3624(c) *is* a limitation on the bureau's discretion, but the limitation is on the bureau's authority to refuse a prisoner's placement in a halfway house, not on the authority to transfer him there. Accordingly, I ordered the bureau to consider the petitioners for earlier transfer to a halfway house.

Shortly after I decided Hendershot, the Court of Appeals for the Seventh Circuit considered a similar challenge to the bureau's interpretation of §§ 3621(b) and 3624(c) in Richmond v. Scibana, 387 F.3d 602 (7th Cir. 2004). However, the court never reached the merits in that case because it concluded that the case had been brought improperly under § 2241. Under the court's reasoning, a case may be brought under the habeas statutes only in instances in which "victory in [the] litigation would not entitle [the petitioner] to [a]

change in the duration or . . . the location of his confinement." Id. at 605. Because success for the prisoner would not entitle him to a transfer but only to consideration for transfer, the prisoner could not proceed under § 2241. Instead, any challenge to the bureau's interpretation would have to be brought under the Administrative Procedures Act. (Although I did consider the jurisdictional question in Hendershot, I concluded that § 2241 was the appropriate vehicle because both the Supreme Court and the court of appeals had previously considered the merits of habeas petitions that were not seeking guaranteed release. E.g., Lopez v. Davis, 531 U.S. 230 (2001) (considering on merits claim brought under § 2241 that federal statutes require bureau to consider certain prisoners for early release); California Dept. of Corrections v. Morales, 514 U.S. 499 (1995) (considering merits of habeas claim that respondents violated ex post facto clause when they relied on new statute to lengthen time between hearings for parole suitability); Parsons v. Pitzer, 149 F.3d 734 (7th Cir. 1998) (considering on merits § 2241 claim challenging bureau's determination that petitioner was not eligible to be considered for early release).) As a result of Richmond, I vacated the judgment in Hendershot and dismissed the case as having been brought improperly as a petition for a writ of habeas corpus.

In this case, plaintiff has followed the instruction of Richmond to bring his challenge under the Administrative Procedures Act. Further, since Richmond, the court of appeals has not considered a challenge to the bureau's "10% rule" and the parties do not point to any

district court decisions within this circuit that have done so. Thus, the only question is whether the bureau has presented a reason why the holding in Hendershot should not apply in this case.

There are only two relevant differences between this case and Hendershot: (1) as noted above, I decided Hendershot under § 2241 rather than the Administrative Procedures Act; (2) after I decided Hendershot, the bureau memorialized its "10% rule" in two regulations, 28 C.F.R §§ 570.20 and 570.21. Do either of these differences suggest a different result?

With respect to the first difference, the answer is clearly no. Under the Administrative Procedures Act, courts are empowered to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. In this case, plaintiff contends that the bureau unlawfully withheld consideration of a halfway house transfer by failing to act in accordance with 18 U.S.C. § 3621(b). When a party challenges an agency's interpretation of a statute, the standard of review is governed by Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984), under which the court first asks whether Congress has unambiguously expressed its intent in the statute. If it has, that is the interpretation that both the court and the agency must follow. But if the statute is

ambiguous or has left open a "gap" on a particular issue, the agency's interpretation is entitled to deference, the level of which varies depending on its context. Id. at 843.

This is the same standard of review I applied in Hendershot. In doing so, I concluded that I did not need to consider how much deference I owed the agency because the statutes were unambiguous: the bureau had authority to place prisoners in a halfway house before the final 10% of their sentences. The bureau has not shown that this conclusion was erroneous.

The second difference is more substantial: since I decided Hendershot, the bureau has put its 10% rule into two regulations, 28 C.F.R. §§ 570.20 and 570.21. These regulations provide:

> 570.20 What is the purpose of this subpart?
>
> (a) This subpart provides the Bureau of Prisons' (Bureau) categorical exercise of discretion for designating inmates to community confinement. The Bureau designates inmates to community confinement only as part of pre-release custody and programming which will afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community
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> .
>
> (b) As discussed in this subpart, the term "community confinement" includes Community Corrections Centers (CCC) (also known as "halfway houses") and home confinement.
>
> § 570.21 When will the Bureau designate inmates to community confinement?
>
> (a) The Bureau will designate inmates to community confinement only as part of pre-release custody and programming, during the last ten percent of the prison

> sentence being served, not to exceed six months.
>
> (b) We may exceed these time-frames only when specific Bureau programs allow greater periods of community confinement, as provided by separate statutory authority (for example, residential substance abuse treatment program (18 U.S.C. 3621(e)(2)(A)), or shock incarceration program (18 U.S.C. 4046(c)).

The crux of the bureau's argument relating to these new regulations is that even if Congress gave the bureau discretion to place prisoners in halfway houses at any point in their sentence, the bureau has the authority to exercise its discretion "categorically" through regulations that deny halfway house placement to anyone who has not yet reached the final 10% of his term of imprisonment.

The bureau has advanced this argument before each of the courts of appeal that has considered the validity of 28 C.F.R. §§ 570.20 and 570.21. Each court has rejected it. Wedelstedt v. Wiley, 477 F.3d 1160, 1168, – F.3d – , 2007 WL 512517, *7 (10th Cir. 2007); Levine v. Apker, 455 F.3d 71, 81 (2d Cir. 2006); Fults v. Sanders, 442 F.3d 1088, 1090-91 (8th Cir. 2006); Woodall v. Federal Bureau of Prisons, 432 F.3d 235, 244 (3d Cir. 2005). See also Perez v. Winn, 465 F. Supp. 2d 87 (D. Mass. 2006); Ku v. Willingham, 431 F. Supp. 2d 265 (D. Conn. 2006). As explained by these courts, the bureau is not authorized to exercise its discretion categorically because § 3621(b) instructs the bureau to make determinations *individually*, by considering each of the five factors enumerated in that statute. I agree with those courts that § 3621(b) is unambiguous on this point, making it

unnecessary to consider the level of deference to which the bureau's interpretation is entitled.

The bureau says that the decisions cited above are inconsistent with Lopez v. Davis, 531 U.S. 230 (2001), but it is difficult to see how that is so. In Lopez, the Supreme Court reviewed the validity of 28 C.F.R § 550.58(a)(1)(vi), under which the bureau had barred prisoners convicted of certain crimes from obtaining early release under 18 U.S.C. § 3621(e)(2)(B). The Court held that it was permissible for the bureau to impose this categorical limitation.

The obvious difference between Lopez and this case is that § 3621(e)(2)(B) does not require the bureau to consider *any* criteria in determining whether to grant sentence reductions. The statute says only that the bureau may reduce the period of incarceration for prisoners who were convicted of a nonviolent crime and complete a drug treatment program. Although the statute prohibits the bureau from granting sentence reductions to violent prisoners, it does not otherwise limit the discretion of the bureau. Because Congress had not provided criteria, or, in the language of Chevron, had not answered "the precise question at issue," the bureau was free to adopt its own criteria, so long as it was "reasonable in light of the legislature's revealed design." Lopez, 531 U.S. at 242. In contrast, because § 3621(b) *does* include the criteria for making placement decisions, Congress has answered the precise question at issue, meaning that Lopez is not instructive.

The bureau cites language from American Hospital Association v. NLRB, 499 U.S. 606, 612 (1991), in which the Court stated, "even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." But in that case, Congress had not provided the criteria the agency was required to use in making a decision. The statute simply required the agency to make a determination "in each case." In § 3621(b), Congress lists the five factors the bureau must consider in making a placement decision, meaning that Congress *has* expressed its intent to withhold from the bureau the authority to disregard those factors, some of which are not susceptible to general application. 18 U.S.C. § 3621(b) (requiring bureau to consider "the nature and circumstances of the offense" and "the history and characteristics of the prisoner").

The bureau points out correctly that in Richmond, the court of appeals cited both Lopez and American Hospital in commenting on the new regulations, which at that time had been proposed but not promulgated. Of course, any discussion of the new rules by the court in Richmond was dicta and therefore not binding, because the court did not reach the validity of the December 2002 policy, much less the validity of regulations that had not even taken effect. Klingman v. Levinson, 114 F.3d 620, 628 (7th Cir. 1997) (statements not essential to court's holding are dicta).

More important, the court's entire discussion of the issue consisted of one sentence: "Given the holding of Lopez that discretion may be exercised by rule as well as by person-specific decision, see also American Hospital Ass'n v. NLRB, 499 U.S. 606 (1991), Richmond is unlikely to obtain a judicial order directing the Bureau to place him in community confinement any time before February 3, 2005 [when he will reach the last 10% of his term of imprisonment]." Richmond, 387 F.3d at 605. It is far from clear whether the court in Richmond was expressing its view on the validity of what are now 28 C.F.R §§ 570.20 and 570.21. Even if I were to construe the statement as expressing an opinion, I would not follow it because it does not address the differences between the statutes at issue in each case. Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 916 F.2d 1174, 1176 (7th Cir. 1990) (choosing not to follow dicta because it was not "considered" or "well-reasoned"); see also Wilder v. Apfel, 153 F.3d 799, 803 (7th Cir. 1998) (dicta is not binding because it "may not express the judges' most careful, focused thinking").

Finally, the bureau repeats the arguments made in the dissenting opinions in Wedelstedt, Levi, Fults and Woodall. Some of these arguments rely on Lopez or other issues I have considered above that I need not address again. The two remaining arguments are: (1) although § 3621(b) requires consideration of the five factors listed, the statute does not require the bureau to make a facility designation at a particular time, meaning that it does not have to consider those factors until the last 10% of the prisoner's term, when § 3624(c)

becomes applicable; and (2) the new regulations do not eliminate any of the factors listed in § 3621(b), but instead simply remove a particular type of facility from consideration.

The first argument is a red herring because § 3621(b) *does* require the bureau to make placements at a particular time, namely, when the prisoner is first incarcerated. Further, every later rejection of a request for a transfer to a halfway house requires a determination that the prisoner's current placement is "appropriate and suitable" under § 3621(b) and thus triggers an obligation to consider the five factors listed in the statute. Under § 570.21, the bureau may consider only one factor, which is the amount of time left in the prisoner's term.

The second argument is stronger but ultimately unpersuasive. The bureau is correct that §§ 570.20 and 570.21 do not expressly bar consideration of any of the five factors in making a placement decision; rather, the regulations remove from consideration a particular type of facility. The problem with this argument is that it could make any exercise of discretion meaningless. Under the bureau's view, it could enact regulations prohibiting prisoners from being placed anywhere except maximum security facilities. Although such a rule would not expressly eliminate consideration of any of the five factors in choosing among different facilities, there would be little point to the exercise. Thus, categorically eliminating any particular "available penal or correctional facility" *does* prohibit consideration of the five factors *with respect to that type of facility*. However, § 3621(b) is clear that all available facilities should be considered.

I addressed the bureau's remaining arguments in Hendershot so it is unnecessary to consider them again this case. I conclude that plaintiff has shown a likelihood of success on the merits.

The remaining factors in considering a motion for a preliminary injunction favor plaintiff as well. Money damages would not be an adequate remedy in this case and they are not allowed under the APA in any event. With respect to irreparable harm, the bureau argues disingenuously that the court should refrain from "hastily" granting plaintiff's motion "and allow the parties to fully develop their positions with regard to the issues raised in the complaint." Dfts. Br., dkt. #6, at 16. Of course, the bureau knows full well that if plaintiff does not obtain a preliminary injunction, this case will become moot before he is able to obtain any relief, handing the bureau a victory by default. This is sufficient to satisfy the standard for irreparable harm. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 286 (7th Cir. 1984) ("irreparable harm" is "harm that cannot be prevented or fully rectified by the final judgment after trial"). In any event, the bureau offers no reason to believe that the issues have not been "fully develop[ed]." The question in this case is a legal one, which has been fully briefed by both sides. Further delay would accomplish nothing but a denial of relief for plaintiff.

With respect to the balance of harms, it is difficult to see how the bureau is harmed at all by considering plaintiff for a transfer to a halfway house, particularly when it is already

required to do so in four other circuits. Finally, defendants point to no reason why the public interest would not be served by granting the injunction.

I conclude that plaintiff has shown that he is entitled to a preliminary injunction. Accordingly, the bureau will be directed to consider in good faith whether plaintiff should be transferred to a halfway house.

ORDER

IT IS ORDERED that

1. Plaintiff Michael Tristano's complaint is DISMISSED as to defendants United States of America, Ricardo Martinez, Michael Nalley and Harley Lappin.

2. Plaintiff's motion for a preliminary injunction is GRANTED as to defendant Federal Bureau of Prisons. The bureau is directed to consider plaintiff for immediate transfer to a halfway house, using the criteria listed in 18 U.S.C. § 3621(b).

Entered this 17th day of April, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

RICHARD HENDERSHOT,
JOSEPH JACKSON and
ERIBERTO GALINDO,

OPINION AND ORDER

Petitioners,

04-C-0291-C

v.

JOSEPH SCIBANA,
Warden of Oxford Prison Camp,

Respondent.

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The questions raised in this petition for a writ of habeas corpus under 28 U.S.C. § 2241have become increasingly common across the country in recent months, but have not yet been resolved in this circuit. Petitioners Richard Hendershot, Joseph Jackson and Eriberto Galindo are inmates at the Federal Prison Camp in Oxford, Wisconsin. They contend that the Federal Bureau of Prisons is violating the ex post facto clause, 18 U.S.C. §§ 3621(b) and 3624(c) and the Administrative Procedure Act by refusing to consider them for placement in a community corrections center, or halfway house, until they have reached the last 10% of their sentence.

After having considered the arguments raised by both sides, I conclude that the petition must be granted. First, § 3624(c) does not limit the discretion of the bureau under § 3621(b) to place a prisoner in a halfway house prior to the prisoner's six month or 10% date. Second, the bureau has discretion to place prisoners in halfway houses under § 3621(b) because a halfway house constitutes a "penal or correctional facility" for the purpose of that provision. The bureau's current policy is a misreading of the plain language of §§ 3621(b) and 3624(c) and does not warrant any deference. In particular, I am persuaded by the arguments set forth by the Court of Appeals for the First Circuit in Goldings v. Winn, No. 03-2633, 2004 WL 2005625 (1st Cir. Sept. 3, 2004), as well as the decisions in Zucker v. Menifee, No. 03CIV10077(RJH), 2004 WL 102779 (S.D.N.Y. Jan. 21, 2004), Monahan v. Winn, 276 F. Supp. 2d 196, 199 (D. Mass. 2003), Iacaboni v. United States, 251 F. Supp. 2d 1015 (D. Mass. 2003) and Howard v. Ashcroft, 248 F. Supp. 2d 518 (M.D. La. 2003). Accordingly, I will grant the petition for a writ of habeas corpus and order respondent to consider petitioners for transfer to a halfway house as early as six months before their projected release date. Because I conclude that petitioners are entitled to relief under § 3621(b), it is unnecessary to consider petitioners' claims that the bureau's new policy violates the Administrative Procedure Act and the ex post facto clause.

A number of courts in other jurisdictions have granted habeas petitions or preliminary injunctions on one or more of the grounds raised by petitioners. See e.g., Goldings v. Winn,

No. 03-2633, 2004 WL 2005625 (1st Cir. Sept. 3, 2004); Zucker v. Menifee, No. 03CIV10077(RJH), 2004 WL 102779 (S.D.N.Y. Jan. 21, 2004); Grimaldi v. Menifee, No. 04CIV1340DABGWG, 2004 WL 912099 (S.D.N.Y. April 29, 2004); Panchernikov v. Federal Bureau of Prisons, No. 04 Civ. 2531(RMB), 2004 WL 875633 (S.D.N.Y. Apr. 23, 2004); Crowley v. Federal Bureau of Prisons, 312 F. Supp. 2d 453 (S.D.N.Y. 2004); Colton v. Ashcroft, 299 F. Supp. 2d 681, 687 (E.D. Ky. 2004); Monahan v. Winn, 276 F. Supp. 2d 196, 199 (D. Mass. 2003); Estes v. Federal Bureau of Prisons, 273 F. Supp. 2d 1301 (S.D. Ala. 2003); Tipton v. Federal Bureau of Prisons, 262 F. Supp. 2d 633 (D. Md. 2003); Byrd v. Moore, 252 F. Supp. 2d 293 (W.D.N.C. 2003); Iacaboni v. United States, 251 F. Supp. 2d 1015 (D. Mass. 2003); Howard v. Ashcroft,, 248 F. Supp. 2d 518 (M.D. La. 2003). However, other courts have upheld the Bureau of Prisons' interpretation of §§ 3621(b) and 3624(c) and denied habeas or injunctive relief. See, e.g., Skelskey v. Deboo, No. 304CV986CFD, 2004 WL 1897023 (D. Conn. Aug. 16, 2004); Loeffler v. Menifee, No. 04CIV3610(PKC), 2004 WL 1252925 (S.D.N.Y. June 7, 2004); Cohn v. Federal Bureau of Prisons, 302 F. Supp. 2d 267 (S.D.N.Y. 2004); Adler v. Menifee, 293 F. Supp. 2d 363 (S.D.N.Y. 2003); Benton v. Ashcroft, 273 F. Supp. 2d 1139 (S.D. Cal. 2003).

All of these cases have been filed since December 2002, when the Bureau of Prisons changed its policy on the placement of prisoners in halfway houses. Before that time, the bureau had construed its authority under the statutes as encompassing discretion to place

prisoners in halfway houses at any point in their sentence. Bureau of Prisons Program Statement No. 7310.04, at 4 (Dec. 16, 1998). In practice, the bureau exercised this discretion by transferring many inmates to halfway houses for the last six months of their sentence, regardless of the length of the inmate's sentence. Zucker, 2004 WL 102779, at *2 n.1; Monahan, 276 F. Supp. 2d at 199. The bureau changed this policy after the United States Department of Justice issued an opinion concluding that, under § 3624(c), the bureau could not place inmates in halfway houses for more than the last 10% of their sentence. Under the current policy, the bureau maintains that it cannot place a prisoner in a halfway house as an exercise of its discretion under §3621(b). See Department of Justice Office of Legal Counsel to the United States Deputy Attorney General, Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who Have Received Sentences of Imprisonment (Dec. 13, 2002); Federal Bureau of Prisons, Memorandum for Chief Executive Officers (Dec. 20, 2002). Thus, inmates like petitioners who were sentenced to a term of less than five years will spend less than six months in a halfway house. Petitioners seek an order directing respondent to consider them for transfer to a halfway house under the pre-December 2002 policy.

In an opinion and order entered on June 10, 2004, I concluded that petitioners' claims were cognizable under § 2241 because a transfer from a prison camp to a halfway house represents a "quantum change in the level of custody." See Bunn v. Conley, 309 F.3d

1002, 1007 (7th Cir. 2002); Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991). Further, although I noted that a ruling in petitioners' favor would not *require* respondent to transfer them to a halfway house on a particular date, I concluded that it was sufficient for purposes of § 2241 that petitioners were seeking to remove a *barrier* to immediate or speedier release. See Lopez v. Davis, 531 U.S. 230 (2001) (considering on merits claim brought under § 2241 arguing that federal statutes require bureau to *consider* certain prisoners for early release); California Dept. of Corrections v. Morales, 514 U.S. 499 (1995) (considering merits of habeas claim that respondents violated ex post facto clause when they relied on new statute to lengthen time between hearings for parole suitability); Parsons v. Pitzer, 149 F.3d 734 (7th Cir. 1998) (considering on merits § 2241 claim challenging bureau's determination that petitioner was not *eligible* for early release); but see Bush v. Parsons, 133 F.3d 455, 456-57 (7th Cir. 1997) (questioning whether § 2241 was appropriate vehicle to challenge bureau's determination that petitioner was not eligible for early release). Respondent does not challenge this determination from the June 10 order, so I do not reconsider it here.

Also in the June 10 order, I concluded that it was not necessary for petitioners to exhaust their administrative remedies because the Bureau of Prisons had predetermined the issue. Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004) (because § 2241 does not contain exhaustion requirement, unlike §§ 2254 or 2255, "'sound judicial discretion

governs'" decision to require or excuse exhaustion in action brought under statute) (quoting McCarthy v. Madigan, 503 U.S. 140, 144 (1992)). Finally, I concluded that appointment of counsel would help insure a fair and full presentation of the potentially complex issues raised in the petition. In an order dated June 30, 2004, I appointed Thomas Wilmouth as counsel for petitioners and established a briefing schedule.

I find the following facts from the record.

FACTS

On September 5, 2001, the United States District Court for the Northern District of Illinois sentenced petitioner Richard Hendershot to a 48-month term of imprisonment for mail fraud. Petitioner has been confined at the Federal Prison Camp in Oxford, Wisconsin since October 10, 2001. The Federal Bureau of Prisons has calculated Hendershot's projected release date as April 3, 2005, taking good conduct time into account. His projected date for eligibility for transfer to a halfway house is November 28, 2004.[1]

[1] After the factual record in this case had been developed, I entered an order dated September 15, 2004 in another of petitioner's cases, Hendershot v. Scibana, 04-C-415-C, granting Hendershot's petition for a writ of habeas corpus and directing the Bureau of Prisons to recalculate his good conduct time on the basis of each year of his sentence rather than on time actually served. Assuming the Bureau of Prisons has complied with the order, petitioner's projected release date should now be approximately 28 days earlier, in March 2005, and his eligibility for transfer to a community corrections center may have been similarly advanced.

On February 1, 2002, the United States District Court for the Northern District of Illinois sentenced petitioner Joseph Jackson to a 41-month term of imprisonment for conspiracy to commit money laundering. He has been confined at the Federal Prison Camp in Oxford, Wisconsin since February 20, 2003. The bureau has calculated Jackson's projected release date as May 25, 2005, taking good time into account. His projected date for eligibility for transfer to a halfway house is February 7, 2005.

On January 10, 2002, the United States District Court for the Northern District of Indiana sentenced petitioner Eriberto Galindo to a 48-month term of imprisonment for using a communication facility to facilitate the distribution of cocaine. He has been confined at the Federal Prison Camp in Oxford, Wisconsin since February 5, 2002. The bureau has calculated Galindo's projected release date as June 17, 2005, taking good time into account. His projected date for eligibility for transfer to a halfway house is February 11, 2005.

Respondent Joseph Scibana is the warden of the Federal Prison Camp in Oxford, Wisconsin.

OPINION

A. Exhaustion of Administrative Remedies

As noted above, I concluded in the June 10 order that petitioners were not required

to exhaust their administrative remedies before filing their petition for a writ of habeas corpus. Respondent asks the court to reconsider this conclusion. He advances two arguments. First, he contends that the Prison Litigation Reform Act applies to petitioners' claim, which does not permit courts to waive the exhaustion requirement. Booth v. Churner, 532 U.S. 731, 739 (2001) (Prison Litigation Reform Act "eliminated [a court's] discretion to dispense with administrative exhaustion"). In the alternative, he argues that none of the grounds for waiving the exhaustion requirement are present in this case.

With respect to respondent's first argument, he acknowledges that the Prison Litigation Reform Act applies only to actions challenging "prison conditions." 42 U.S.C. § 1997e(a); Porter v. Nussle, 534 U.S. 516 (2002). A § 2241 habeas corpus action is not an action challenging prison conditions, but a challenge to the execution of the inmate's sentence. Skinner v. Wiley, 355 F.3d 1293 (11th Cir. 2004); Carmona v. United States Bureau of Prisons, 243 F.3d 629 (2d Cir. 2001); McIntosh v. United States Parole Commission, 115 F.3d 809 (10th Cir. 1997); see Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) (holding that requirements of Prison Litigation Reform Act do not apply to habeas corpus petitions). In Gonzalez, 355 F.3d at 1016, the court held expressly that exhaustion of administrative remedies is not statutorily required in a § 2241 case.

Distilled, respondent's first argument is that petitioner's claims are not cognizable in habeas corpus because they represent a challenge to his prison conditions rather than a

challenge to his custody. I considered and rejected this position in the June 10 order. Hendershot v. Scibana, No. 04-C-291-C, 2004 WL 1354371, at *2-4 (W.D. Wis. June 10, 2004). Respondent has not shown that it was error to conclude that petitioner's claim was directed at the execution of his sentence. As I said in the June 10 order, a transfer from a prison camp to a halfway house represents a quantum change in the level of custody. Accordingly, I conclude that the exhaustion requirements of the Prison Litigation Reform Act do not apply to this case.

I have considered respondent's alternative argument, that even if it were proper to bring this action as a habeas action, the case involves none of the situations identified in Gonzalez, 355 F.3d at 1016, for waiving the exhaustion requirement. In the June 10 order, I concluded that requiring petitioners to exhaust their administrative remedies would be futile because respondent and the bureau had predetermined the issue. Id. (waiving exhaustion requirement in case brought under § 2241 is appropriate when "appealing through the administrative process would be futile because the agency is biased or has predetermined the issue"). See also Loeffler v. Menifee, 326 F. Supp. 2d 454, 457 (S.D.N.Y. June 7, 2004) (concluding that respondent had conceded that exhaustion would be futile on claim that bureau was misinterpreting §§ 3621(b) and 3624(c)); Colton, 299 F. Supp. 2d at 690 (concluding that exhaustion of administrative remedies would be futile); Zucker, 2004 WL 102779, at *4 (same); Iacaboni, 251 F. Supp. at 1017 n.1 (same); Ferguson, 248

F. Supp. 2d at 563 (same); United States v. West, No. Civ. 03-CV-70239-DT, 2003 WL 111990 (E.D. Mich. Feb. 20, 2003)(same).

Respondent does not deny that the bureau has no intention of changing its current policy, which it adopted in direct response to an opinion issued by the Department of Justice's Office of Legal Counsel. As I noted in the June 10 order, this conclusion is strongly supported by the bureau's refusal to reconsider its policy despite the legion of federal courts that have found it to be unlawful. If the judiciary cannot get the bureau to reconsider, there is "no reasonable prospect," Gonzalez, 355 F.3d at 1016, that petitioners will have greater success.

Nevertheless, respondent contends that exhaustion is not futile unless it is impossible for the petitioners to obtain *any* relief. As an initial matter, I note that respondent's argument appears to be confusing the futility exception to the exhaustion requirement under § 2241 with the requirement in 42 U.S.C. § 1997e(a) that prisoners exhaust any "available" administrative remedy. See Booth, 532 U.S. 731 (inmate challenging prison conditions must exhaust administrative remedies if there is some remedy he may obtain administratively; unavailability of money damages does not entitle prisoner to go straight to federal court). Unlike civil actions, habeas actions do not offer petitioners a wide array of possible remedies; a petition is either granted or denied. In any event, the only possible remedy identified by respondent that petitioners could have received administratively is an

"explanation," which is no remedy at all. The reason the bureau refused to even consider petitioners for earlier transfer is not in doubt: it is the December 2002 policy. It is unclear how confirming this through the administrative exhaustion process would have provided petitioners with any relief or aided this court in reviewing the bureau's position.

Respondent cites two cases in support of his position that the futility exception should not apply in this case, but neither is controlling. In Greene v. Meese, 875 F.2d 639, 641 (7th Cir. 1989), the court declined to apply the futility exception to a federal prisoner's habeas corpus action, even though it agreed with the prisoner that the "likeliest outcome" at the administrative level would be a denial of his claim. I note first that Greene predates Gonzalez by 15 years; to the extent there is any tension between the two cases, it is the more recent case that I must follow. Further, the claim in Greene was not a strictly legal question that had been rejected previously by the same agency time and time again. Rather, in Greene, the prisoner claimed a violation of the due process clause when he lost good time credits and decreased his chances for parole simply because he resisted a sexual assault. Thus, if denial would have been the likely outcome of Greene's prison grievance, it is only because that is the likely result for nearly any prison grievance. Unlike this case, it could not be said with certainty in Greene that an investigation of the prisoner's claim would be resolved against him.

United States v. Roque-Espinoza, 338 F.3d 724, 729 (7th Cir. 2003), provides even

less support for respondent. In that case, the court noted that "there is some support . . . in our cases" for the application of the futility exception. Id. at 28. The court did note that "the law would never change if litigants did not request the responsible tribunals to reconsider earlier rulings," id. at 729, but again, Roque-Espinoza did not involve an issue that had been rejected repeatedly by the agency. In any event, in Roque-Espinoza, the court did not decide whether the futility exception should apply because it decided the case on other grounds, so Roque-Espinoza is not controlling. Id. ("Even though Roque-Espinoza may have had good reason for thinking that he was not eligible for discretionary relief from removal, because the Immigration Judge had so informed him, he should have realized that other avenues of judicial review were available to him.") In sum, I adhere to the conclusion in the June 10 order that petitioner was not required to exhaust his administrative remedies because doing so would have been futile.

I note that there are strong arguments in favor of waiving the exhaustion requirement for other reasons as well. For example, waiver is appropriate when "(1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action"; and "(2) the agency lacks the ability or competence to resolve the issue or grant the relief requested." Gonzalez, 355 F.3d at 1016. With respect to the first exception, if petitioners are correct that they are entitled to be considered for halfway house placement for the last six months of their term, the dates on which each of

the petitioners would be eligible for halfway house transfer are imminent. Petitioner Hendershot would be eligible in early October, petitioner Jackson in late November and petitioner Galindo in mid-December. In federal prisons, administrative exhaustion requires completion of three levels of review. The warden has 20 days to respond to an administrative remedy request, the regional director has 30 days to decide an appeal of the warden's decision and the general counsel has 40 days to decide an appeal of the regional director's decision. 28 C.F.R. § 542.18. It could be too late for petitioners to obtain relief by the time this process was completed.

With respect to the second exception, it is questionable whether the bureau has the authority to change its policy until the Department of Justice changes its interpretation of the statutes. Department of Justice memorandum at 1 ("We conclude . . . that BOP has no . . . general authority" to transfer prisoners from prisons to halfway houses.) However, because I have concluded that waiving the exhaustion requirement is appropriate under the futility exception, it is unnecessary to decide whether these additional reasons would justify a waiver.

B. Interpretation of 18 U.S.C. §§ 3621(b) and 3624(c)

Petitioners' first argument on the merits is that the December 2002 Department of Justice memorandum erroneously interpreted 18 U.S.C. §§ 3621(b) and 3624(c), and that

the Bureau of Prisons' refusal to consider petitioners for halfway house placement until their 10% dates stems directly from this erroneous interpretation. When reviewing an agency's construction of a statute, a court conducts a two-step analysis. First, the court looks to the text of the relevant statutes to determine whether "Congress has directly spoken to the issue." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. If the statute is ambiguous or silent, the court must decide the amount of deference to be given to the agency's interpretation and "evaluate the interpretation in that light." Howard v. Ashcroft, 248 F. Supp. 2d 518, 537 (M.D. La. 2003) (citing Chevron, 467 U.S. at 843). Respondent concedes that the bureau's interpretation is not entitled to "full" deference under Chevron but argues that it warrants "some" deference as a "permissible" construction of §§ 3621(b) and 3624(c). Chevron, 467 U.S. at 843.

Section 3621(b) provides in part: "The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau." Section 3624(c) states that

> The Bureau of Prisons shall, to the extent practicable, 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.

An initial reading of the statutes makes the purpose of each clear. Section 3621(b) obligates the bureau to assign each prisoner a place of imprisonment. It also gives the bureau wide discretion to select each prisoner's place of imprisonment, allowing the bureau to choose "any available penal or correctional facility" that meets health and habitability standards. In contrast, Section 3624(c) imposes an obligation on the bureau, requiring it to "take steps to facilitate a smooth re-entry for prisoners into the outside world." Goldings, 2004 WL 2005625, at *5.

1. Section 3624(c)

Petitioners argue that § 3624(c) does not curb the bureau's discretion to place a prisoner in a halfway house before he reaches either the last 10% or six months of his sentence. Respondent concedes that § 3624(c) contemplates the possibility of halfway house placement but argues that the provision sets an absolute limit on the amount of time a prisoner can spend in a halfway house, namely the lesser of six months or the final 10% of the prisoner's sentence. Respondent's interpretation of § 3624(c) reaches far beyond the provision's language. Section 3624(c) addresses the bureau's obligations with respect to a specific portion of a prisoner's sentence. On its face, § 3624(c) has no effect on the bureau's

actions prior to that final six month or 10% period. See Cato v. Menifee, No. 03CIV5795(DC), 2003 WL 22725524, at *7 (S.D.N.Y. Nov. 20, 2003) ("it is apparent that section 3624(c) does not limit BOP's authority to choose to utilize community confinement in appropriate cases sooner than when it would be required to do so."); see also Howard, 248 F. Supp. 2d at 544. Not surprisingly, prior to the December 2002 Department of Justice opinion, the bureau agreed with this reading of § 3624(c). See Department of Justice, Federal Bureau of Prisons, Program Statement 7310.04, Community Corrections Center (CCC) Utilization and Transfer Procedure (Dec. 16, 1998) ("the Bureau is not restricted by § 3624(c) in designating a [community corrections center] for an inmate and may place an inmate in a [community corrections center] for more than the 'last ten per centum of the term,' or more than six months, if appropriate").

Respondent tries to save his interpretation of § 3624(c) by arguing that if the bureau has the discretion to place a prisoner in a halfway house before the time at which § 3624(c) becomes applicable, the temporal limit in § 3624(c) is rendered meaningless. This argument rests on an incorrect understanding of the purpose of the six month/10% cap, which is not intended to limit the amount of time a prisoner may spend in a halfway house. Rather, the cap defines the temporal boundary of the *bureau's obligation* with respect to placing prisoners in pre-release conditions; it marks the beginning point of the bureau's obligation to consider placing a prisoner in a transitional environment. Cato, 2004 WL 22725524, at *6 ("The

six month limitation was obviously intended to place a cap on the period of time for which BOP was *obliged* to take steps to facilitate re-entry.") (emphasis in original). The fact that the bureau has an obligation to assure that the prisoner spends a reasonable part of the last months of his sentence in pre-release conditions has absolutely no impact on the fact that, prior to that prisoner's six month/10% date, the bureau may have the authority to place a prisoner in a halfway house. See Goldings, 2004 WL 2005625, at *7; Monahan v. Wynn, 276 F. Supp. 2d at 211 ("It is illogical and inappropriate to infer that where the mandate that § 3624(c) places upon the BOP at the end of a prisoner's sentence stops, a limitation on its discretion for the period before that begins.").

Finally, respondent points to the legislative history surrounding the Crime Control Act of 1990 as support for its argument that § 3624(c) is the only source of authority under which the bureau may place prisoners in halfway houses. Respondent highlights a report by the House Judiciary Committee regarding a proposed amendment to 18 U.S.C. § 3621(b), in which the Committee stated

> Currently, the Bureau of Prisons can only place an inmate in a Community Corrections Center for up to six months or for the last 10 percent of his or her sentence, whichever is shorter. Section 1403 would authorize the Bureau of Prisons to place certain non-violent offenders in community facilities for longer time periods at the end of their sentences so that they can better readjust to society. Section 1404 restores the Bureau of Prisons' previously existing authority to designate an appropriate place for offenders to serve their sentences, including Community Correction Centers or home confinement.

H.R. Rep. No. 101-681(I) at 140, *reprinted in* 1990 U.S.C.C.A.N. 6742, 6546. First, because I conclude that § 3624(c)'s language is clear, resort to legislative history is unnecessary. See Monahan, 276 F. Supp. 2d at 210. Second, even were I to consider legislative history, the passage quoted above appeared in a report completed after § 3624(c) was passed. Thus, it sheds no light on the intent of the section's drafters. Id. at 212.

In sum, it is clear that § 3624(c) merely obligates the bureau to take affirmative steps to insure that, where practicable, prisoners nearing the end of their sentences spend time in conditions that will facilitate their re-entry into society. By its terms, § 3624(c) has no effect on any authority the bureau might have to place a prisoner in a halfway house prior to the prisoner's six month/10% date. The bureau's contrary interpretation is simply erroneous.

2. Section 3621(b)

Having found that § 3624(c) does not curb the bureau's discretion to place a prisoner in a halfway house prior to the lesser of either the last 10% or six months of the prisoner's sentence, I must determine next whether § 3621(b) gives the bureau authority to place prisoners in halfway houses. Section 3621(b) provides: "The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability." Relying on the December 2002 Department of Justice opinion, respondent focuses on the

first sentence in §3621(b) and contends that a halfway house is not a place of "imprisonment." Indeed, the Department of Justice states in its opinion that "[n]othing in section 3621(b) provides BOP clear authority to place in community confinement an offender who has been sentenced to a term of imprisonment." This conclusion springs from the Department's premise that a halfway house is not a "place of . . . imprisonment" under § 3621(b). Respondent extends this argument by claiming that "imprisonment" exists only "where inmates generally live in cells behind bars and — unlike community confinement — are not free to leave for various purposes." Resp's. Br., dkt. #6, at 22. Petitioners frame the inquiry differently. Petitioners focus on the phrase "any available penal or correctional facility," arguing that a halfway house is a "correctional facility" within the meaning of the statute and, therefore, the bureau has discretion under § 3621(b) to place prisoners in halfway houses at any point during their sentences.

As a matter of statutory construction, petitioners have framed the issue correctly. The first sentence of § 3621(b) directs the bureau to place each prisoner somewhere. The second sentence "gives content to the first" by giving the bureau discretion to select "any available penal or correctional facility" as "the place of the prisoner's imprisonment." Goldings, 2004 WL 2005625, at *7; Howard, 248 F. Supp. 2d at 540. The question is whether a halfway house qualifies as a "penal or correctional facility."

(Even if I agreed with respondent's framing of the issue, it is clear that a halfway

house qualifies as a place of "imprisonment." Respondent concedes as much by arguing that a prisoner may serve only the final 10% of his "term of imprisonment" in a halfway house under § 3624(c). Given this concession, "it would be incongruous to conclude that the same [halfway house] may not be a place of imprisonment during any portion of the first ninety percent of that term." Goldings, 2004 WL 5005625, at *7. In addition, 18 U.S.C. § 3621(a) may provide the closest approximation to a definition of "imprisonment." Monahan, 276 F. Supp. 2d at 206. This section provides that "a person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons." It suggests that the condition of being "imprisoned" hinges not on the name or physical features of the place in which a prisoner lives, but rather on the prisoner's being subject to the bureau's control. See Iacaboni, 251 F. Supp. 2d at 1027-28 (discussing Reno v. Koray, 515 U.S. 50 (1995)). Respondent does not, and cannot, argue that a prisoner in a halfway house is not subject to the bureau's control. See Byrd v. Moore, 252 F. Supp. 2d 293, 301 (W.D.N.C. 2003); Howard, 248 F. Supp. 2d at 541.)

Initially, it seems obvious that halfway houses, or community corrections centers, qualify as "correctional" facilities under § 3621(b). Nothing in the language of § 3621(b) excludes community corrections centers from consideration. Instead, the statute allows placement at "*any* available penal or correctional facility." Use of the word "any" suggests that a broad reading of "penal or correctional facility" is warranted. Cf. City of Edmonds

v. Oxford House, 514 U.S. 725, 739 n.1 (1995) (Thomas, J., dissenting) ("The word *any* excludes selection or distinction. It declares the exemption without limitation.") (quoting Citizens' Bank v. Parker, 192 U.S. 73, 81 (1904)). In addition, the text of § 3621(b)'s predecessor, 18 U.S.C. § 4082(b), supports the idea that a community corrections center qualifies as a "penal or correctional facility." Respondent notes that § 4082(b) "expressly included a 'residential community treatment center' as a kind of 'facility' in which BOP could place prisoners." Resp's. Br., dkt. #6, at 27. Although this language was not included in § 3621(b), the Senate Judiciary Committee Report accompanying § 3621(b) stated that the section

> follows existing law [18 U.S.C. § 4082(b)] in providing that the authority to designate the place of confinement for federal prisoners rests in the Bureau of Prisons . . . Existing law provides that the Bureau may designate a place of confinement that is available, appropriate, and suitable. Section 3621(b) continues that discretionary authority . . .

Zucker, 2004 WL 102779, at *9 (quoting S. Rep. No. 98-225, at 141-42 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3324-25). Respondent argues that this excerpt does not give the bureau specific powers to place prisoners in community corrections centers. Although this argument is technically correct, it misses the larger point. Under § 4082(b), the bureau had clear authority to place prisoners in residential treatment centers (later to be renamed community corrections centers). Section 3621(b) was designed to maintain the bureau's discretion to make these placements; it was not intended to constrict or eliminate

that discretion.

Not to belabor the point, but both the bureau and the Department of Justice recognized that the bureau had the authority to place prisoners in halfway houses under § 3621(b) prior to the December 2002 Department of Justice opinion. In 1992, the Department's Office of Legal Counsel wrote that there was

> no statutory basis in section 3621(b) for distinguishing between residential community facilities and secure facilities. Because the plain language of section 3621(b) allows BOP to designate 'any available penal or correctional facility,' we are unwilling to find a limitation on that designation authority based on legislative history.

Department of Justice Office of Legal Counsel, Memorandum Opinion for the Director, Federal Bureau of Prisons (Mar. 25, 1992), *available at* http://www.usdoj.gov/olc/quinlan.15.htm. A year later, the bureau stated that it had the authority "to place sentenced prisoners in [CCCs], since such centers met 18 U.S.C. § 3621(b)'s definition of a 'penal or correctional facility.'" Cato, 2003 WL 22725524, at *5 (quoting Department of Justice, Program Statement 7310.02 (Oct. 19, 1993)). These two examples reinforce this court's understanding of the plain meaning of § 3621(b): a halfway house constitutes a "penal or correctional facility." Eliminating halfway house placement as an option under § 3621(b) is erroneous.

3. The Sentencing Guidelines and the Sentencing Reform Act of 1984

Petitioners also challenge the bureau's current policy because it relies on a series of cases holding that halfway house placement does not constitute "imprisonment" under § 5C1.1 of the Sentencing Guidelines. Respondent urges the court to interpret the statutes at issue in this case consistently with the guidelines. Whatever merit a consistent interpretation may have, it does not override the primary obligation of this court, which is to give full effect to the statutes passed by Congress. If a statute conflicts with a section of the guidelines, the court must follow the statute. United States v. LaBonte, 520 U.S. 751, 757 (1997). Also, as noted by the court in Goldings, the Sentencing Guidelines bind only 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, 2004 WL 2005625, at *9.

Respondent also urges the court to interpret §§ 3621(b) and 3624(c) consistently with other statutory provisions of the Sentencing Reform Act of 1984. Specifically, respondent points to 18 U.S.C. § 3551(b), which allows an individual convicted of an offense to be sentenced to a term of imprisonment, probation or a fine. Respondent argues that, because the Sentencing Reform Act authorized halfway house placement as a condition of both probation (18 U.S.C. § 3563(b)(11)) and supervised release (18 U.S.C. § 3583(d)), halfway house placement is not a form of imprisonment. Respondent's argument is unpersuasive for two reasons. First, respondent fails to explain how its argument fits with

§ 3624(c), which by respondent's own admission contemplates halfway house placement during the final 10% of a prisoner's "term of imprisonment." Respondent contends that § 3624(c) is merely a "narrow and specific exception to the general congressional objective evidenced in the Sentencing Reform Act as a whole," but provides no authority to support this bald legal conclusion. Second, the Sentencing Reform Act concerns the types of sentences that a court may impose. As noted by the court in Goldings, the Act

> does not limit the scope of the BOP's authority to designate the place where an offender sentenced to a term of imprisonment must serve that sentence. The fact that residence at or participation in a program of a CCC may serve as a condition of probation or supervised release for some offenders does not mean that a CCC cannot be a place of imprisonment for other offenders, based on the nature of their sentences and whether they are subject to the control of the BOP.

Goldings, 2004 WL 2005625, at *9.

I conclude that the petition must be granted. The arguments presented by the parties in this case have been raised in district courts and one court of appeals around the country. To date, the clear majority of authority favors the invalidation of the current Bureau of Prisons policy. I agree with the decisions reached by those courts and see no reason not to adopt their position in this case.

Finally, it is important to explain the limited nature of this ruling. It requires respondent only to *consider* petitioners for transfer to a halfway house for the last six months of their sentences. Section 3624(c) does not *require* halfway house transfers for the last six

months of a sentence; it merely encourages such transfers to the extent they are practicable. The only requirement in the section is that prisoners be prepared for release for "a reasonable part" of the last 10% of their sentence. In this case, petitioners are scheduled to be transferred to a halfway house for all or nearly all of the last 10% of their sentence, so there is no question that the bureau has complied with this requirement. However, respondent must exercise his discretion in good faith in determining whether the only factor preventing earlier transfer for any or all of the petitioners is the bureau's erroneous interpretation of §§ 3621(b) and 3624(c).

ORDER

IT IS ORDERED that the petition for a writ of habeas corpus filed by petitioners Richard Hendershot, Joseph Jackson and Eriberto Galindo is GRANTED. Respondent Joseph Scibana is directed to consider petitioners for transfer to a halfway house or other transitional program to begin as early as six months before their projected release date.

Entered this 15th day of October, 2004.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge