Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements

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HALFWAY HOUSE PLACEMENTS

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*It's déjà-vu, all over again.*

- Yogi Berra

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I. INTRODUCTION

Over 700,000 prisoners were released into their communities in 2008, at least 50,000 of those from federal custody. Once an obscure cause, nearly everyone agrees that prisoner reentry – the process by which former prisoners return to their community as free citizens – is of national importance. Absent adequate attention to transitional services, ex-offenders are often homeless, unemployed, and suffer from untreated substance abuse addictions. Accordingly, President Obama and his two predecessors have devoted considerable attention to the issue. Building on

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3 See PRISONER REENTRY AND CRIME IN AMERICA 182 (Jeremy Travis and Christy Visher, eds. 2005).


5 Herckis, supra note 4, at 4 (“President Obama is also supportive of reentry programs and included $75 million for the Second Chance Act in his FY 2010 budget proposal. ; President Bush, State of the Union 2004, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_documents&docid=f:hd144.108.pdf (“This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work or a home or help, they are much more likely to commit crime and return to prison. So tonight I propose a 4-year, $300 million prisoner reentry initiative to expand job training and placement
this national awareness, Congress in 2007 amended federal statutes, sections 3624(c) and 3621(b), giving inmates a longer time in halfway houses\(^6\) to transition from incarceration to law-abiding citizens and requiring individualized inmate assessments prior to placement. Nevertheless, the Bureau of Prisons is ignoring both mandates, by categorically limiting the inmates’ time in halfway houses, trends that some courts have found violates the agency’s statutory authority.\(^7\)

The Second Chance Act of 2007\(^8\) amended federal law to require that federal officials ensure that prisoners spend as much of their last twelve months “under conditions that will afford [them] a reasonable opportunity to adjust to and prepare for the reentry” into the community, including placement in halfway houses.\(^9\) Relying on their own experience, however, the Bureau of Prisons has restricted halfway house placement to six months absent an extraordinary justification and prior written approval of the Regional Director where the inmate is housed.\(^10\) In fact, the Bureau of

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\(^7\) See infra Section II.B.


\(^10\) Memorandum for Chief Executive Officers from Joyce K. Conley, Assistant Director Correctional Programs Division and Kathleen M. Kenney, Assistant Director / General Counsel, “Pre-Release Residential Re-Entry Center Placements Following the Second Chance Act of 2007,” (4/14/08). (Section III(D)) [hereafter the “Conley & Kenney Memo of 4/14/08”] (“While the [Second Chance] Act makes inmates eligible for a maximum of 12 months pre-release RRC placements, Bureau experience reflects inmates’ pre-release RRC needs can usually be accommodated by a placement of six months or less. Should staff determine an inmates’ pre-release RRC placement may require greater than six months, the Warden must obtain the Regional Director’s written concurrence before submitting the placement to the Community Corrections Manager.”).
Prisons eventually codified this practice in an Interim Final Rule.\textsuperscript{11} The Interim Final Rule (hereafter referred to as the “presumptive six month rule”) provides for a six month placement in halfway house absent an extraordinary justification to increase the length of time. This practice of limiting the placement of inmates to six months based upon the agency’s experience is not new. In 2005, the Bureau of Prisons, claiming a “categorical exercise of discretion,” also limited the halfway house placement of inmates to six months. In the immortal words of Yogi Berra, “It’s déjà vu all over again.”\textsuperscript{12}

Prior to the 2007 amendments to sections 3621(b) and 3624(c), prisoners had challenged the Bureau of Prisons’ earlier policies with some success. Not all courts, however, found the policies to be arbitrary or in violation of the agency’s statutory mandate under Chevron. Indeed, those challenges and the court’s mixed results may have been part of the impetus for the amendment. The existing presumptive six-month rule should be even more subject to challenge under the arbitrary and capricious and Chevron principles. The Eighth Circuit, which had previously found the “categorical exercise of discretion” to be impermissible, reversed itself and held that the Bureau of Prisons’ recent statutory interpretation to be a permissible exercise of discretion.\textsuperscript{13} That decision, however, was wrong. The Eighth Circuit, by ruling that the Bureau of Prisons was entitled to promulgate a policy that ignores the required individualized assessment, disregards the congressional intent for the Bureau of Prisons to conduct such assessment considering the five factors enumerated in section 3621(b).

Under sections 3621(b)\textsuperscript{14} and 3624(c),\textsuperscript{15} it is clearly contemplated that

\textsuperscript{11} 73 FR 62440-01 (Pre-Release Community Confinement) (October 21, 2008); 28 CFR Part 570.20 – 570.22. The Bureau of Prisons amended Program Statement 7310.04, “Community Corrections Center (CCC) Utilization and Transfer Procedure,” (12/16/1998) to inform its personnel of how to comply with the changes required by the Second Chance Act.

\textsuperscript{12} Found at http://www.yogiberra.com/yogi-isms.html.

\textsuperscript{13} Miller v. Whitehead, 527 F.3d 752, 756 (8th Cir. 2008)(rejecting the inmates’ argument that the presumptive six month placement unless there is an extraordinary justification rule is akin to the categorical exercise of discretion which the court found was impermissible in Fults v. Sanders, 442 F.3d 1088 (8th Cir. 2006)).

\textsuperscript{14} 18 U.S.C. § 3621 (b) (“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 (1) the resources of the facility contemplated; (2) the nature and
the Bureau of Prisons will conduct an individualized assessment of each inmate and will not limit an inmate’s placement to twelve months. Specifically, section 3621(b) requires the Bureau of Prisons to designate an inmate’s place of imprisonment, as well as granting the agency the discretion to determine that placement. The Bureau of Prisons is not entitled to supplant Congress’ intent and express requirement with its own policy based simply on agency experience. Congress was explicit in section 3624(c)(6) that the Bureau of Prisons was to promulgate a rule that was consistent with section 3621(b) when considering an inmate’s placement.

Presently, the Bureau of Prisons’ interpretation ignores Congress’ intent regarding how to consider an inmate to be placed in order to maximize an inmate’s chances at successful reentry because it treats all inmates alike by presuming that six months is a satisfactory length of time to spend in a halfway house. By presuming that a standardized length of stay is sufficient, the Bureau of Prisons fails to comply with its statutory authority and thus violates Chevron. Moreover, the presumptive six month rule is also arbitrary and capricious under a hard look review because the Bureau of Prisons ignored the totality of information that indicated the policy was misdireced and instead promulgated this blanket rule. Federal inmates that have sought to challenge the Bureau of Prisons’ policy have been thwarted by two judicial doctrines and thus unable to obtain judicial review to determine whether the agency acted appropriately, a problem that did not occur with previous challenges to the policy.

In denying access, courts have relied primarily on two related doctrines circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence: (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

15 18 U.S.C. § 3624(c) (“Prerelease custody: (1) In general.--The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility. (2) Home confinement authority.--The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months. (3) Assistance.--The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during prerelease custody under this subsection.”).

16 Chevron v. NRDC, 467 U.S. 837 (1984). See infra Section III.

17 See infra Section III.B.
– the failure to exhaust an administrative remedy and mootness. Courts refusing to hear inmates’ challenges to the Bureau of Prisons’ policy often dismiss the challenges because the inmates have failed to exhaust their remedies under the Bureau’s three-tiered process prior to seeking judicial relief. Inmates have asserted that because the Bureau of Prisons has predetermined their placement and because they seek a full twelve months, the requirement that they pursue an administrative remedy reduces the amount of time that they could be placed if they were to prevail. Inmates have thus invoked the futility exception, which allows a petitioner to bypass the administrative remedy when submitting to the remedy may be unduly prejudicial to future judicial action. Courts have overwhelmingly, and incorrectly, rejected this exception. The Director of the Bureau of Prisons, and other officials, have repeatedly stated that a six month placement is sufficient. Given these official statements, legal action is inevitable. Because legal action is a certainty, the time lost awaiting an administrative decision diminishes the amount of time that an inmate would be able to spend in a halfway house.

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18 The exhaustion of administrative remedies doctrine requires an individual to submit a grievance to the agency’s administrative remedy process before seeking relief from the courts. McCarthy v. Madigan, 503 U.S. 140, 145 (1992). There are a number of recognized exceptions to the doctrine: “(a) statutory exceptions; (b) irreparable harm; (c) reconsideration or administrative appeals; (d) express or implied waiver; (e) futility; (g) manifest violation of constitutional rights; (h) purely legal issue; (i) procedural challenge; (j) challenge of bias or prejudgment; (k) exercise of judicial discretion; and (i) unreasonable delay.” 33 Fed. Prac. & Proc. Judicial Review § 8398. See infra Section IV.A.

19 The mootness doctrine prevents courts from deciding cases where a real controversy no longer exists and the court is unable to provide the effective relief being sought. Arizonans for Official English v. Arizona, 520 U.S. 43, 45 (1997) (“Because Yniguez no longer satisfies the case-or-controversy requirement, this case is moot. To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.”). See also, Preiser v. Newkirk, 422 U.S. 395, 401 (1975); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937); Roe v. Wade, 410 U.S. 113, 125 (1973). See infra Section IV.B.


21 The court weighs the individual’s interest over the procedural exhaustion requirement. McCarthy, 503 U.S. 140.

22 Strong v. Schultz, 599 F.Supp.2d 556, 561 (“This Court notes that Strong is currently scheduled to be placed in a CCC for the final six months of his sentence . . . . Given that it took five months to exhaust administrative remedies the first time around, dismissal of the Petition as unexhausted would effectively moot Petitioner’s § 2241 claim through no fault of his own. [T]he purposes of
Two other exceptions also suggest that the exhaustion doctrine should not pose a bar to lawsuits - the claim that exhaustion is unnecessary because the agency is biased or has prejudged the outcome and the claim that exhaustion will cause unreasonable delay. Under the prejudgment exception, federal inmates have a strong argument that the Bureau of Prisons has made an *a priori* judgment that inmates require only six months in halfway house, thus making internal appeals worthless. They similarly have a strong claim that exhaustion will cause unreasonable delay. That exception is meant to protect the availability of the litigant’s ultimate remedy. For federal inmates, time is of the essence. The more time spent appealing adverse administrative decisions, the less time that is available to

exhaustion would not be served by requiring a second round of exhaustion, since Strong is challenging the validity of the BOP’s April 14, 2008, guidance, not its application. This Court will therefore excuse the failure to exhaust administrative remedies, and *563 n.4,* “[b]ecause Strong only has nine months left on his sentence, the BOP shall consider his designation to a CCC for the remainder of his term of incarceration.” (D. N.J. 2009); Padilla v. Wiley, 2009 WL 2447394 *3 (D.Colo.). *But see, Wolff v. Cruz,* 2009 WL 2143692 *3-4 (D.Minn.) (holding that petitioner failed to futility based upon not enough time. “[T]he prisoner’s calculation as to the amount of time required to complete the three-tier administrative remedy process is based upon his own use of the entire available time to submit successive appeals, along with unsupported assumptions that the warden, the BOP Regional Director, and the Central Office would each take the maximum amount of time to render their respective decisions, and that such decisions would be adverse to the prisoner . . . [T]he court concludes that the petitioner is not entitled to the benefit of the substantially arbitrary presumptions upon which he relies with regard to either the time for appeals or the likelihood of success, and the futility argument therefore fails.”).

23 McCarthy, 503 U.S. at 148-149.
25 Statement of Harley G. Lappin, Director, Federal Bureau of Prisons Before the United States Sentencing Commission, Regional Hearing on the State of Federal Sentencing, Western District of Texas, Austin, Texas (November 20, 2009) (“The Second Chance Act expands the Bureau’s authority to place inmates into RRCs by extending the time limit from the 10% (not to exceed six months) to 12 months and authorizing the agency to place inmates with short sentences (12 months or less) directly into RRCs for service of their entire term of imprisonment . . . the Bureau of Prisons rarely uses RRCs for direct court commitments and rarely transfers inmates to RRCs for prerelease services for more than 6 months . . . most releasing offenders receive the necessary transitional assistance in three to four months at an RRC.”).
be spent in a halfway house. Accordingly, internal appeals may render the inmates’ ultimate remedy unattainable by requiring them to exhaust administrative remedies. The courts’ rejection of prisoners’ exhaustion arguments fail to consider official Bureau of Prisons’ statements\(^{27}\) and existing placement data\(^{28}\) as evidence that the pursuit of an administrative remedy would be useless.

Under the mootness doctrine, federal courts are technically constrained from hearing cases in which they can no longer provide the remedy that is sought. In the absence of a case or controversy, the petitioner’s case is dismissed.\(^{29}\) There are several exceptions to this doctrine that permit a court to entertain a petition.\(^{30}\) The two most relevant are the capable of repetition yet evading review\(^{31}\) and the public importance exception. The

\(^{27}\) See Statement of Harley G. Lappin, Director Federal Bureau of Prisons, United States Department of Justice Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security “Federal Bureau of Prisons Oversight,” (July 21, 2009) (“The use of residential reentry centers is a topic of significant interest, especially with the enactment of the Second Chance Act. We understand the interest in placing inmates in halfway houses for periods of time longer than the current average of 4 months.”); Proceedings from the Symposium on Alternatives to Incarceration (July 14-15, 2008) found at http://www.USSC.GOV/SYMPO2008/NSATI_O.htm. at 272 (“BOP studies indicate that an inmate can receive the full benefit of a Residential Reentry Center after only six months.”) and at 283 (Statement by Jerry Vroegh, Administrator, Community Corrections and Detention Services Branch, Federal Bureau of Prisons.).

\(^{28}\) FOIA Request No. 2010-00330 from Wanda M. Hunt to S. David Mitchell (October 14, 2009) (In response to the author’s request for information regarding the length of time that inmates are placed in a Residential Reentry Center, the Bureau of Prisons provided a document which is on file with the author that indicates there were 2,275 inmates in a Residential Reentry Center. Of that number, 2,219 received placements of six months or less.) The data provided however was inconsistent with the public data available on the Bureau of Prisons website at the date of the request. The website indicated that there were 8,945 inmates in Residential Reentry Centers. The response to the request for information failed to account for 6,670.


\(^{30}\) One exception, the voluntary cessation of the challenged practice is inapplicable and will not be discussed. City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001); Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

\(^{31}\) See Citizens United v. Federal Election Com’n 130 S.Ct. 876, 895 (2010);
former allows a court to continue to hear a petition because the short duration of the action would continually prevent review. The latter exception – public importance – applies when an issue is significant and likely to recur. It has been recognized by state courts, but federal courts have refused to do so. The issue of halfway house placement as integral to successful reentry is clearly important as demonstrated by the passage of the Second Chance Act by a bipartisan Congress. Moreover, three successive administrations have not only referred to reentry but have also provided funding to improve such services. Furthermore, the issue is a recurring one because of the continued increase in the federal inmate population resulting from various criminal justice policies, such as mandatory minimum sentences, truth-in-sentencing, and the removal of federal parole. As the number of individuals exiting the federal system

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33 Cinkus v. Village of Stickney Municipal Officers Electoral Bd., 886 N.E.2d 1011, 1017 (2008), as modified, (Apr. 23, 2008) ("[O]ne exception to the mootness doctrine allows a court to resolve an otherwise moot issue if that issue involves a substantial public interest. The criteria for application of the public interest exception are: (1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable to guide public officers; and (3) the question is likely to recur."). See also, Lucas v. Lakin, 676 N.E.2d 637 (1997) and In re A Minor, 537 N.E.2d 292 (1989). A clear showing of each criterion is necessary to bring a case within the public interest exception. Bonaguro v. County Officers Electoral Board, 659, 634 N.E.2d 712 (1994).

34 John W. Roberts, The Federal Bureau of Prisons: It’s Mission, It’s History and It’s Partnership With Probation and Pretrial Services (sic), 61 Fed. Probation 53, 54 (DATE). ("For the first five decades of the Bureau of Prisons’ existence, the number of prisons and the number of inmates remained fairly stable. From the early 1940s through the early 1980s, for example, the inmate population in the Bureau of Prisons’ 25 to 30 facilities fluctuated within a narrow range of 17,000 to 25,000. By the mid-1980s, however, intensified prosecution of drug laws, the introduction of sentencing guidelines, and the discontinuation of federal parole created a period of unprecedented growth in the Bureau of Prisons."). U.S. Department of Justice, Federal Bureau of Prisons. “About the Federal Bureau of Prisons” at http://www.hawaii.edu/hivandaids/About_the_Federal_Bureau_of_Prisons.pdf (page 3) ("The 1980’s brought a significant increase in the number of Federal inmates – the result of Federal law enforcement efforts and new legislation that dramatically altered sentencing in the Federal criminal justice system. Most of the Bureau’s growth since the mid-1980’s has been the result of the Sentencing Reform Act of 1984 (which established determinate sentencing, abolished parole,
also increases the placement policy will continue to be challenged. The Bureau of Prisons needs to amend its policy and not categorically place inmates in halfway houses for six months. Ideally, the Bureau of Prisons would return to its pre-2002 policy.

Part II of this Article discusses the Bureau of Prisons’ placement policies over time and its current policy following the passage of the Second Chance Act. Part III analyzes how the judicial review of the Bureau of Prisons’ actions can occur under *Chevron* and a hard look review. Part IV then turns to the threshold matter of obtaining judicial access to challenge the Bureau of Prisons’ placement practices and why courts should relax their standards when faced with exceptions to the exhaustion requirement. In addition, Part IV argues that courts should adopt a public importance exception to the mootness doctrine. Finally, the Article concludes that these changes will further the Second Chance Act’s twin goals of reducing recidivism and increasing public safety.

**II. Halfway House Placement Policies and Challenges**

The Bureau of Prisons established what can be characterized as an open transfer policy, which means that inmates not only could be transferred to halfway houses at any point during their imprisonment and for any length of time but also could be placed directly in halfway houses upon judicial recommendation. In 2002, the Bureau of Prisons changed the policy abruptly, restricting when inmates could be transferred and for how long and prohibiting direct judicial placements. Subsequent challenges to the policy have been rebuffed by the Bureau of Prisons on the grounds that the new restrictions are a valid exercise of agency discretion. A detailed recounting of the Bureau of Prisons’ policies and numerous challenges are below.

and reduced good time) and mandatory minimum sentences enacted in 1986, 1988, and 1990.”

35 See Bureau of Justice Data cited earlier in “Prisoners in 2008”; Larry M. Fehr, “Statement before the United States Sentencing Commission ‘The Sentencing Reform Act of 1984: 25 Years Later.’” (May 28, 2009) at http://www.ussc.gov (page 5). (“Annually, the Bureau returns 45,000 federal inmates to our communities, a number that will continue to increase as the population grows.”).

36 The author of this Article has coined the phrase “open transfer policy” to reference the lack of temporal constraints only. The Bureau of Prisons does have other constraints that restrict its ability to place inmates that will be discussed at length, *infra*. 


A. The Bureau of Prisons’ Open Transfer Policy

The Bureau of Prisons’ open transfer policy for halfway houses consists of two practices: early transfer and direct judicial placement. An inmate considered for early transfer was placed in a halfway house at any point during his imprisonment, and for any length of time, after serving having spent a portion of his sentence in a federal prison. Direct judicial placement, on the other hand, means that an inmate was placed directly in a halfway house to serve his entire sentence, following a request by the sentencing court. Under either practice, the Bureau of Prisons had the

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38 Levine v. Apker, 455 F.3d 71, 75 (2nd Cir. 2006) (“Prior to the policy change in December 2002, the BOP interpreted its governing legislation such that the agency's general authority to designate places of imprisonment was “not restricted by § 3624(c) in designating a CCC for an inmate and [that it could] place an inmate in a CCC for more than the ‘last ten per centum of the term,’ or more than six months, if appropriate.”); Woodall v. Federal Bureau of Prisons, 432 F.3d 235, 240 (3d Cir.2005); Goldings v. Winn, 383 F.3d 17, 19-21 (1st Cir.2004); and Elwood v. Jeter, 386 F.3d 842, 844-45 (8th Cir.2004). See also, Amy L. Codagnone, Case Comments, Administrative Law - Bureau of Prisons Statutory Mandate Permits Creation of Categorical Rules to Guide Prison Placement Discretion - Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008), Cert. Denied, 129 S. Ct. 115 (2008), 42 Suffolk U. L. Rev. 285 (2009);

39 Jennifer Borges, The Bureau of Prisons’ New Policy: A misguided Attempt to Further Restrict a Federal Judge’s Sentencing Discretion and to Get Tough on White-Collar Crime, 31 NEW ENG. J. ON CRIME & CIVIL CONFINEMENT 141, 142 (2005) (“Since at least 1965, federal judges have been allowed to make recommendations to the Bureau of Prisons to have prisoners serve their term of imprisonment in community confinement facilities, a practice that was almost always honored by the Bureau of Prisons.”); Roberts, supra note 35, at 55 ([J]udges are able to provide the Bureau of Prisons with rationales for particular sentencing decisions and even to recommend that inmates be designated to specific institutions or to institutions with specific types of programming . . . . Judicial recommendations are taken very seriously by the Bureau of Prisons as it makes decisions on designations and programming . . . [T]he Bureau of Prisons complies with about 80 percent of the judicial recommendations it receives.”); and Adam J. Kolber, The Subjective Experience of Punishment, 109 COLUM. L. REV. 182, 195 (2009) (Although “[s]entencing decisions are usually made by judges while decisions about conditions of incarceration are usually made by prison bureaucrats (under conditions that are generally less open, accountable, and reviewable than
discretion to place an inmate in a halfway house regardless of how much
time an inmate had already served or if the inmate had not serve any time at
all in a traditional penal facility. The policy, which appears to give the
Bureau of Prisons unfettered discretion on placing an inmate, is guided by
two statutes, sections 3621(b) and 3624(c).

Under section 3621(b), the Bureau of Prisons is required to designate an
inmate’s place of imprisonment,\(^{40}\) but has the discretion to determine the
facility in which the inmate is placed.\(^{41}\) In making the determination where
to place an inmate, the Bureau of Prisons is required to consider the
following five factors: (1) facility resources; (2) the nature and
circumstances of the offense; (3) the prisoner’s history and characteristics;
(4) statements by the sentencing court about the purpose of the sentence or
recommending an appropriate facility; and (5) any pertinent policy
statement issued by the Sentencing Commission.\(^{42}\) The purpose behind
requiring the consideration of these five factors was to insure that each
inmate received an individualized assessment in order to be placed in the
proper facility to serve his sentence. The Bureau of Prisons interpreted its
discretion under this section to allow it to transfer or to place an inmate
directly in a halfway house.

To illustrate, assume that an inmate with a substance abuse problem and
a history of prior convictions had been convicted for assaulting a federal
officer. The Bureau of Prisons would assess whether there was a facility in
a higher security institution that had an opening, thus taking into
consideration factors one through three. Furthermore, the Bureau of Prisons
would review any statements made by the sentencing court or any policy
goals sought to be achieved by the Sentencing Commission, which would
take factors four and five into consideration. After reviewing all of the
information, the Bureau of Prisons would then identify an appropriate
facility for the inmate. The same process also occurs when the Bureau of

\(^{40}\) 18 U.S.C. § 3621(b) (2000) (“The Bureau of Prisons shall designate the
place of the prisoner’s imprisonment.”).

\(^{41}\) 18 U.S.C. § 3621(b) (2000) (“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 . . . .”).

\(^{42}\) 18 U.S.C. § 3621(b)(1) – (5).
Prisons honors a court’s request for a direct placement.\textsuperscript{43} In the end, the Bureau of Prisons has the final say on where and when an inmate is placed, and for how long. If the Bureau of Prisons therefore determined that an inmate would be better served in a halfway house, then according to its interpretation of section 3621(b), it is permitted to transfer or to place inmates directly in such facilities. In making its placement designation, the Bureau of Prisons is also guided by another statute, section 3624(c), which requires the Bureau of Prisons to provide the inmate with “reasonable opportunity to adjust to and prepare for his re-entry into the community.”\textsuperscript{44}

Under section 3624(c), the Bureau of Prisons was required to provide a set of conditions to insure that an inmate was prepared to reenter society,\textsuperscript{45} thus mandating that it be an active participant in the prisoner reentry process. The requirement, however, was “qualified,” meaning that placement in a halfway house was not an entitlement.\textsuperscript{46} While section 3624(c) obligated the Bureau of Prisons to assist an inmate’s reentry efforts, it did not dictate what those efforts were to be. This section was therefore interpreted as not placing limits on the Bureau of Prisons’ discretion to

\textsuperscript{43}See also Borges, \textit{supra} note 40, at 173. (“The Bureau of Prisons places great emphasis on the judicial recommendation . . . [accepting] judicial recommendations about eighty percent of the time . . . which might explain why judges were so outraged when the DOJ announced that the Bureau of Prisons is no longer allowed to honor judicial recommendations.”).

\textsuperscript{44}18 U.S.C. § 3624(c)(2007). The statute was originally passed in 1984. PL 98-473, October 12, 1984, 98 Stat 1837. It was amended in 1990 where the Bureau of Prisons was granted the authority to place inmates in home confinement. 104 Stat 4789 (PL 101-647, November 29, 1990, 104 Stat 4789).

\textsuperscript{45}18 U.S.C. § 3624(c)(2007); PL 98-473, October 12, 1984, 98 Stat 1837. In 1990, the statute was amended granting the Bureau of Prisons the authority to place inmates in home confinement. 104 Stat 4789 (PL 101-647, November 29, 1990, 104 Stat 4789). \textit{See also}, Goldings, 383 F.3d at 23 (“By its plain language, § 3624(c) provides that the BOP ‘shall take steps’ to ‘assure’ that prisoners serve a reasonable part of the last ten percent of their prison terms ‘under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner’s re-entry into the community.’ This language imposes an affirmative obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world.”),

\textsuperscript{46}Goldings, 383 F.3d at 23 (“This language imposes an affirmative obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world. It is true that this obligation is qualified. Section 3624(c) does not mandate placement in a CCC prior to release, and it requires the BOP to assure that a prisoner spends the last part of his sentence under pre-release conditions only if practicable.”).
designate an inmate to a particular program or facility;\textsuperscript{47} hence an inmate’s placement in a halfway house was not restricted.

To illustrate, assume that an inmate with an original sentence of forty months has only four months remaining. The Bureau of Prisons, however, has neither placed the inmate in a halfway house nor provided the inmate with a program designed to improve the inmate’s chances of being successful on reentry. If the Bureau of Prisons assessed the inmate according to the five factors contained in section 3621(b) and determined that the inmate was ineligible to be transferred because there was no facility available, for instance, then the Bureau of Prisons would not be forced to place the inmate in a particular facility. Section 3624(c) emphasizes that the Bureau of Prisons is to assure that an inmate receives such reentry programming assistance but only “to the extent practicable.”\textsuperscript{48} If it is not practicable, then no set of reentry conditions are required, including placement in a halfway house.

The Bureau of Prisons’ interpretations of sections 3621(b) and 3624(c) served as the basis for its open transfer policy, which enabled it to transfer or place an inmate directly in a halfway house. The policy, which had operated for a substantial period of time,\textsuperscript{49} was abruptly changed in 2002.

\textsuperscript{47} Prows v. Federal Bureau of Prisons, 981 F.2d 466, 469 (1992) (“While there is mandatory (albeit qualified) language employed in the statute [section 3624(c)(1984)], it relates only to the general direction to facilitate the prisoner's post-release adjustment through establishment of some unspecified pre-release conditions. Nothing in § 3624(c) indicates any intention to encroach upon the Bureau’s authority to decide where the prisoner may be confined during the pre-release period.”); Ferguson v. Ashcroft, 248 F.Supp.2d 547, 572 (2003) (“The statute [section 3624(c)] clearly emphasizes the Bureau's duty to ensure a reasonable opportunity for a period of adjustment. It aims to relieve the burdens of direct release on our communities, the inmates, and their families. This section does not shrink the discretion granted the Bureau in 18 U.S.C. § 3621(b).”).

\textsuperscript{48} 18 U.S.C. § 3624(c).

\textsuperscript{49} Macaroni v. United States, 251 F. Supp.2d 1015, 1017 (D. Mass. 2003) (“In making the recommendations for community confinement, the court relied upon the definition of the Bureau of Prisons’ scope of discretion as set forth in § 3621(b). It also relied upon explicit instructions, regularly provided to judges in various formats, to the effect that community confinement is a proper sentencing option for offenders serving relatively modest terms of imprisonment. Finally, the court had in mind the fact that recommendations to community confinement have been made in thousands of cases by hundreds of judges continuously since at least 1965, and in nearly all instances accepted by the Bureau of Prisons.”); Borges, supra note 40, at 142 (“Since at least 1965, federal judges have been allowed to make recommendations to the Bureau of Prisons to have prisoners serve their term of imprisonment in community confinement facilities, a practice that was almost
prompted by a reinterpretation of these two statutes. The new policy, which has been subject to numerous legal challenges and revised several times, places certain limitations on the ability of the Bureau of Prisons to designate an inmate to a halfway house.

B. A Seismic Shift in the Bureau of Prisons’ Placement Policy

The Bureau of Prisons adopted a new policy in 2002 that effectively closed the halfway house door. The new policy (hereafter referred to as the “2002 Policy”) ended early transfers and direct judicial placements. It was immediately challenged, resulting in the courts being split. The Bureau of Prisons, asserting a categorical exercise of discretion, promulgated a rule (hereafter referred to as the “2005 Rule”) that was identical to the 2002 Policy. It too was challenged, also resulting in a circuit split. Before the issue could be resolved, however, it was mooted by the passage of the Second Chance Act, which removed the restrictions on transferring an inmate to a halfway house. More importantly, it increased the maximum amount of time that an inmate was entitled to spend in a halfway house to twelve months. The Bureau of Prisons, attempting to give effect to the changes mandated by the Second Chance Act, promulgated the presumptive six month rule. This new rule restricts an inmate’s placement to a maximum of six months absent an extraordinary justification. Although the Bureau of Prisons has amended its placement policy three times in the last decade, its current form is still an impermissible exercise of discretion. The history of those changes and the legal challenges follows.

1. The 2002 Policy

The Bureau of Prisons’ 2002 Policy adopted the following three always honored by the Bureau of Prisons.”).

50 Goldings, 383 F.3d 17 (holding that the new ten percent, six month policy is “contrary to the plain meaning of 18 U.S.C. 3621(b)”; Elwood, 386 F.3d 842 (stating that the Bureau of Prisons policy limiting the transfer of federal offenders to the “lesser of 10% of the sentence or a six month period, was illegal.”); and Macaroni, 251 F.Supp.2d 1015. But cf. Cohn v. The Federal Bureau of Prisons, 302 F.Supp.2d 267 (SDNY 2004) (holding that Bureau of Prisons policy did not violate general grant of authority under 18 U.S.C. § 3621(b), was exempt from notice and comment requirements of the Administrative Procedures Act and did not violate the ex post facto clause by being applied retroactively); Benton v. Ashcroft, 273 F.Supp.2d 1139 (2003) (same).

51 The leading circuit cases where the courts disagreed with the Bureau of Prisons’ categorical exercise of discretion are: Wedelstedt v. Wiley, 477 F.3d (10th Cir. 2007); Levine, 455 F.3d 71; Woodall, 432 F.3d 235; Fults, 442 F.3d 1088. But see Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008).
changes to its placement policy. First, it would not transfer an inmate to a halfway house until the final ten percent of his term of imprisonment remained. Second, it limited the maximum amount of time spent that an inmate could spend in a halfway house to six months. And finally, it ended the honoring of judicial requests to place an inmate directly in a halfway house. The Bureau of Prisons’ policy change was prompted by a Department of Justice’s inquiry to the Office of Legal Counsel to determine whether the Bureau of Prisons had the statutory authority to engage in either the early transfer to or the direct judicial placement of an inmate in a halfway house. The Office of Legal Counsel responded in the negative.

According to the Office of Legal Counsel, the transfer of an inmate to a

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52 There was some debate as to whether the 2002 Policy was a legislative rule or an interpretive one. Courts have decided that the 2002 Policy was a legislative rule and not interpretive. Monahan v. Winn, 276 F.Supp.2d 196, 214 (1st Cir. 2003) (“This is no mere effort at interpretive guidance but rather a rulemaking exercise designed to reshape the scope of a statutory provision through an administrative statement of lawmaking.”); see also, Ashkenazi v. Attorney General of U.S. 246 F.Supp.2d 1, 7 n.1 (D.D.C. 2003) (“[I]rrespective of the BOP’s characterization of its policy, the new policy has the force of law and is not merely interpretive .... The new policy is [] not flexible and does not permit BOP to exercise any discretion.”), and n. 14 (“It is of no consequence that the BOP’s prior conclusion that it could place offenders directly into community confinement . . . was not a “legislative” rule adopted through notice and comment. The prior practice did not “bind” anybody and simply announced the manner in which the BOP intended to exercise discretion under its statutory duty of designating offenders to facilities . . . The new rule . . . purports to be legally binding and dramatically curtails the BOP’s discretion in a way that is not obvious in the law itself.”).


54 Id.

55 Id.

56 The Office of Legal Counsel also addressed the question of whether the Bureau of Prisons had the statutory authority to accept direct judicial placements as well. Todd Bussert, Peter Goldberger and Mary Price, “New Time Limits on Federal Halfway Houses: Why and How Lawyers Challenge the Bureau of Prisons’ Shift in Correctional Policy – And the Court’s Response,” 21 SPG Crim. Just. 20, 22 (2006) (“Whether [the] Bureau of Prisons has general authority, either upon recommendation of the sentencing judge or otherwise, to place [a low-risk and nonviolent] offender [who 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[?]”).
halfway house before the ten percent threshold or the placement of an inmate in a halfway for longer than six months was contrary to the Bureau of Prisons’ statutory authority, under sections 3621(b) and 3624(c),\textsuperscript{57} and the Federal Sentencing Guidelines.\textsuperscript{58} Specifically, the Office of Legal Counsel noted that the Bureau of Prisons’ interpretation of section 3621(b) authorized “unlimited placements”\textsuperscript{59} in halfway houses would render the temporal limitations in 3624(c) “meaningless.”\textsuperscript{60} To further bolster its

\textsuperscript{57} Memorandum Opinion for the Deputy Attorney General, “Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who have Received Sentences of Imprisonment” (December 13, 2002) can be found at http://biotech.law.lsu.edu/blaw/olc/bopimprisonment2.htm [hereafter the “OLC Memo of 12/13/02”] (“Your office [the Office of the Attorney general] has asked us to advise you whether the BOP has general authority, either upon judicial recommendation or otherwise, to place such an offender [low-risk, nonviolent] 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 . . . Community confinement does not constitute imprisonment for purpose of a sentencing order, and [the] BOP lacks clear general statutory authority to place in community confinement an offender who has been sentenced to a term of imprisonment. [The] BOP’s practice is therefore unlawful.”).

\textsuperscript{58} Id. The Office of Legal Counsel determined that the Bureau of Prisons was not permitted to place inmates into halfway houses because it would be a disharmonious interpretation of the Sentencing Reform Act of 1984. (“Both [the] BOP’s authority under title 18 to implement sentences of imprisonment and the federal courts’ sentencing authority under the Guidelines were conferred by the Sentencing Reform Act of 1984. It is therefore especially appropriate that they be construed to produce a harmonious interpretation.”).

In reaching this conclusion, the Office of Legal Counsel noted that “[F]ederal courts violate the Guidelines if they order . . . . that an offender sentenced to a . . . simple sentence of imprisonment serve his sentence in community confinement, or . . . that an offender sentenced to a . . . split sentence serve the imprisonment portion of his sentence in community confinement.” This conclusion was reached because under section 5C1.1 of the United State Sentencing Guidelines, community confinement does not constitute imprisonment. See United States v. Adler, 52 F.3d 20, 21 (2d Cir. 1995) (discussing the difference between imprisonment and community confinement); United States v. Swigert, 18 F.3d 443, 445 (7th Cir. 1994) (stating that the Sentencing guidelines distinguish between imprisonment and community confinement); United States v. Voda, 994 F.2d 149, 152 (5th Cir. 1993) (same) and United State v. Latimer, 991 F.2d 1509, 1513 (9th Cir. 1993) (remarking that the division between imprisonment and community confinement is made plain in section 5C1.1).

\textsuperscript{59} 69 FR 51213

\textsuperscript{60} Id. (“[The] OLC concluded that, if the Bureau designated an offender to serve a term of imprisonment in a [Community Correctional Center] . . . such
assessment, the Office of Legal emphasized that while halfway houses satisfy the “any penal or correctional facility” language contained in section 3621(b), its predecessor office did not assess whether halfway houses were a place of imprisonment.

Bureau of Prisons Program Statement No. 7310.02 (Oct. 19, 1993) (CANT FIND COPY OF DOC. MAY HAVE TO RELY ON CASE CITATIONS OF DOC.) Reno v. Koray, 515 U.S. 50, 62 (1995) (referring to the U.S. Dept. of Justice, Bureau of Prisons Program Statement No. 7310.02 (Oct. 19, 1993) “interpreting 18 U.S.C. § 3624(c) to allow BOP to place sentenced prisoners in community corrections centers, since such centers meet 18 U.S.C. § 3621(b)’s definition of a ‘penal or correctional facility’’); Memorandum Opinion for the Director of Federal Bureau of Prisons, “Statutory Authority to Contract With the Private Sector for Secure Facilities,” (March 25, 1992) (“[T]here is evidence in the legislative history of section 3621(b) that at least after a 1965 amendment Congress specifically anticipated that [the] BOP would designate privately operated facilities as places of incarceration. In 1965 Congress amended the designation provision to allow designation of a ‘facility’. . . . The word ‘facility’ was defined to ‘include a residential community center.’’); Ferguson, 248 F.Supp.2d at 566-567 (“It is . . . obvious, without going far, that a community corrections center is a penal or correctional institution . . . [A] penal facility is a facility to which people are committed as a form of punishment . . . [T]he court finds that CCCs are facilities for the purpose of punishment, rehabilitation, or correction.”); Joint Report to Congress, United States Sentencing Commission and Federal Bureau of Prisons, Maximum Utilization of Prisons Resources, at 9-10 (June 30, 1994).

Goldings, 383 F.3d at 32 (“Office of the Legal Counsel, United States Department of Justice, Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who Have Received Sentences of Imprisonment (Dec. 13, 2002) (noting that a prior Office of the Legal Counsel opinion had not addressed whether a CCC is a ‘place of imprisonment.’). But see, id. at 25 (“[T]he OLC’s interpretation of ‘place of imprisonment’ as exclusive of CCCs relied primarily on a line of cases in which courts have held that confinement in a CCC is not imprisonment as that term is used in 5C1.1 of the United States Sentencing Guidelines, which governs the kinds of sentences that may be imposed by courts for offenders within Zone C or D of the Guidelines. Although we recently joined this line of authority, we cautioned that ‘our interpretation of imprisonment does not necessarily apply to provisions [of the Sentencing Guidelines] other than § 5C1.1.’ [T]o the extent that § 3621(b) conflicts with a section of the Sentencing Guidelines, the Guidelines must yield . . . [The Guidelines] do not address the
Based on that reasoning, the Office of Legal Counsel concluded that the Bureau of Prisons’ actions were unlawful, thus recommending a new policy, which the Department of Justice accepted.\(^6^3\)

The Bureau of Prisons was informed that it needed to “take all steps necessary to ensure that its sentencing placement decisions are in full compliance with the governing law.”\(^6^4\) More importantly however, the Bureau of Prisons was also informed that its policy gave the perception that white collar offenders were receiving preferential treatment either by being transferred early during their imprisonment\(^6^5\) or by being placed directly in halfway houses. Both practices were considered to be in direct contradiction with the purpose of the Sentencing Guidelines, i.e., the removal of bias from federal sentencing practices.\(^6^6\) The Bureau of Prisons

\(^6^3\) 69 FR 51213 (“By memorandum dated December 16, 2002, the Deputy Attorney General adopted the OLC memorandum’s analysis and directed the Bureau to conform its designation policy accordingly.”).

\(^6^4\) Memorandum from Larry D. Thompson, Deputy Attorney General to Kathleen Hawk Sawyer, Director Federal Bureau of Prisons (12/16/2002) (http://www.usdoj.gov/dag/readingroom/imprisonment/htm) at 1. [hereafter “Thompson Memo of 12/16/02”] In addition to the prospective change in policy, the Department of Justice also required the Bureau of Prisons to retroactively apply the new policy and return all inmates that had been transferred to halfway houses back to a federal facility. (“In addition, [the] BOP should transfer to an actual prison facility all federal offenders currently residing in a [Community Corrections Center] who, as of today [December 16, 2002], have more than 150 days remaining on the imprisonment component of their sentence.”).

\(^6^5\) Id. at 2 (“Another concern regarding Bureau of Prisons’ CCC placement policies is its potentially disproportionate, and inappropriately favorable, impact on so-called ‘white collar’ criminals.”). See also Borges, supra note 40, at 142-143 (“The goal of the new policy was to help secure stricter penalties for white-collar offenders and to quash criticism that the administration had been soft on corporate criminals.”). But see, Criticism of Sentencing Plan For White-Collar Criminals, Eric Lichtblau, NYT (Dec. 26, 2002) C2 (“The officials said that halfway houses have been used for nonviolent offenders for at least 20 years. ‘The point is that it's not just white-collar offenders who have benefited from this longstanding practice,’ said Judy Garrett, 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’.”); Todd A. Bussert, NACDL Helps Members Fight Changes in Bureau of Prisons Policy, 27 Champion 8 (March 2003).

\(^6^6\) OLC Memo of 12/13/02, supra note 58 (“The Sentencing Guidelines were promulgated by the U.S. Sentencing Commission pursuant to the mandate of the Sentencing Reform Act of 1984, which sought to eliminate arbitrary discrepancies
complied, imposing the time limitations in section 3624(c) prospectively and retroactively. The response to the 2002 Policy was mixed.

Some were outraged by the policy because it was viewed as further encroachment on the sentencing practices of federal judges. Others were dissatisfied because it disrupted the longstanding practices of early transfers or direct judicial placements, thus causing a flurry of legal challenges. On the other hand, there were a number of courts that viewed the 2002 Policy as a proper exercise of agency discretion, reiterating that a halfway house is not a place imprisonment. Federal inmates challenged the 2002 Policy on the ground that the Bureau of Prisons erroneously interpreted sections 3621(b) and 3624(c) by placing time limits on transferring an inmate and by disallowing direct judicial placements.

in federal sentencing.”). Fehr, Statement before the United States Sentencing Commission, “The Sentencing Reform Act of 1984: 25 Years Later” Northwest Regional Hearing Community Impact Panel.” (A purpose of the Sentencing Reform Act embodied in the guidelines was to decrease the disparity in sentencing based upon the nature and type of the offense. The overriding perception is that offenders convicted of economic crimes or white collar offenders, were not being sentenced to imprisonment in traditional penal facilities but placed in halfway houses. From this basis, it was concluded that this class of offenders were given more lenient treatment than other offenders because of their socio-economic status.)

67 Thompson Memo of 12/16/02, supra note 65, at 2
68 69 FR 51213-01 (“The Bureau’s change was challenged in the Federal courts. District courts addressing the legality of the Bureau's changed policy have been sharply divided.”).
69 Dobkin, supra note 54, at 172.
71 Cohn, 2004 WL 240570 at *3 (S.D.N.Y., Feb. 10, 2004) (“[T]he Bureau of Prisons’ interpretation that a [Community Corrections Center] CCC is not a place of imprisonment, and therefore not subject to Congress’ general grant of discretion to the Bureau of Prisons under § 3621(b), is at a minimum a permissible interpretation of the statute.”); Benton, 273 F. Supp. 2d 1139.
72 See, e.g., Monahan, 276 F.Supp.2d 196; Moore, 252 F.Supp.2d 293 (W.D.N.C. 2003); Iacoboni, 251 F.Supp.2d, at 1015; Elwood, 386 F.3d at 847;
a. Challenging the New Transfer Policy

In *Goldings v. Winn*, the First Circuit ruled in favor of Goldings on his appeal from the district court. Goldings challenged the 2002 Policy on several grounds, such as an erroneous interpretation of sections 3621(b) and 3624(c); a violation of the Administrative Procedure Act’s because it was adopted without notice and comment; and violations of the Ex Post Facto and Due Process clauses of the United States Constitution. Goldings had been convicted of tax fraud and sentenced to thirty-six months. Approximately three months into his sentence, the 2002 Policy was adopted. The 2002 Policy changed the date of when he would have been eligible to be transferred to and reduced the length of time that he could have spent in a halfway house from six to three and a half months.

The defendants argued that a halfway house was not a place of imprisonment under section 3621(b), thus the Bureau of Prisons’ discretion under that section did not extend to placing an inmate in a halfway house “either at the outset or at the end of prisoner’s term.” The defendants claimed that section 3624(c) by itself governs the placement of an inmate in a halfway house. Furthermore, the Bureau of Prisons also contended that the 2002 Policy was an interpretive rule, thus beyond judicial review and entitled to an appropriate level of deference.

The District Court, relying on the reasoning offered by two other courts that the 2002 Policy “merely corrected an erroneous interpretation of 18 U.S.C. § 3624(c),” agreed and dismissed the complaint. The District

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73 Goldings, 383 F.3d at 20-21.
74 Id. at 19.
75 Id. at 20.
76 Id.
77 The defendants in this case were the warden of the prison where Goldings was housed and Attorney General John Ashcroft. Id. at 18.
78 Id. at 22.
79 Id.
80 Monahan, 276 F.Supp.2d at 214 (“Legislative rules are shaped through notice and comment but thereafter are entitled to deference in the courts under the principles of [Chevron]. Interpretative rules . . . are subject to multiple layers of review in agency adjudication and much more expansive review in the courts.”)(internal citations omitted). See United States v. Mead Corp., 533 U.S. 218 (2001) (confirming that Chevron deference does not apply to non-legislative rules).
81 Goldings, 383 F.3d at 21.
Court distinguished the instant case from others that had criticized the 2002 Policy, noting that those cases were focused on direct judicial placements and not the transfer of an inmate after the sentence in a federal prison had commenced.\footnote{Id.} Goldings appealed and the First Circuit ruled in his favor.

The First Circuit found that the lower court relied incorrectly on the defendants' interpretation that section 3621(b) was not applicable and thus only section 3624(c) was relevant.\footnote{Id. at 23.} The First Circuit stated that this interpretation amounted to a rewriting of the “unambiguous language of section 3621(b),”\footnote{Id. at 25.} which gave the Bureau of Prisons the discretion to designate an inmate to “any penal or correctional facility.”\footnote{Id. at 23.} In determining whether the 2002 Policy was proper, it was necessary to address both statutes.\footnote{Id. at 23.} The First Circuit proceeded to analyze each statute under \textit{Chevron}.

In reviewing the plain language of section 3624(c), the First Circuit determined that it mandated an “affirmative obligation” on the part of the Bureau of Prisons to provide an inmate with reentry assistance.\footnote{Goldings, 383 F.3d at 23.} That obligation, however, was qualified meaning that the Bureau of Prisons was “to assure that a prisoner spends the last part of his sentence under pre-release conditions only if practicable.”\footnote{18 U.S.C. § 3624(c) (2000).} The First Circuit concluded that Congress’ intent was to insure that the Bureau of Prisons was actively engaged in an inmate’s reentry process, but that it was not to be constrained in its decision-making of where to place an inmate.\footnote{Goldings, 383 F.3d at 23.} Moreover, the First Circuit remarked that section 3624(c) “operates as ‘a legislative directive focusing on the development of conditions to facilitate an inmate’s adjustment to free society, whatever the institution or pre-release confinement.’”\footnote{Id. (citing \textit{Prows v. Fed. Bureau of Prisons}, 981 F.2d 466, 470 (10th Cir. 1992)).} The directive prevented the Bureau of Prisons from
considering placement in a halfway house at the end of a sentence but did not prohibit the Bureau of Prisons from early placement. By determining that section 3624(c) did not prohibit early transfer, the First Circuit then proceeded to review section 3621(b) to determine whether the Bureau of Prisons had the discretion to carry out such transfers.

The First Circuit determined that in the first sentence of section 3621(b), the Bureau of Prisons has been required by Congress to designate the place of imprisonment for those who have been committed to its custody. The designation requirement did not define the “place of imprisonment,” which is defined later in the statute to be “any available penal or correctional facility.” Because a halfway house satisfies this open-ended definition of what constitutes a place of imprisonment, the First Circuit stated that the Bureau of Prisons could place an inmate in a halfway house “prior to the lesser of the last six months or ten percent of his term of imprisonment.” On these grounds, the First Circuit vacated the lower court and proceeded to hold that section 3621(b) authorized the transfer of an inmate at any time and that it is not prohibited by the “temporal limitations” in section 3624(c).

Other inmate challenges focused on the prohibition against honoring direct judicial placements.

b. Challenging the Denial of Direct Judicial Placements

In *Macaroni v. United States*, three petitioners received a short prison sentence accompanied by a judicial request that the term of imprisonment

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93 Id. at 24.
94 Id. at 25.
95 18 U.S.C. § 3621(a) (“A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons . . . and 3621(b) (“The Bureau of Prisons shall designate the place of the prisoner's imprisonment.”).
96 Goldings, 383 F.3d at 25.
97 Id. (citing United States v. King, 338 F.3d 794, 798 (7th Cir. 2003) (Under 18 U.S.C. § 3621(b), the BOP is authorized to house a prisoner . . . anywhere it deems appropriate.”); Prows, 981 F.2d at _____ (“Under 18 U.S.C. § 3621(b), the Bureau of Prisons . . . may direct confinement in any available facility and may transfer a prisoner from one facility to another at any time.”).
98 Goldings, 383 F.3d at 26. See also, Stephen R. Sady, Memorandum In Support of Amended Petition for Writ of Habeas Corpus in Pierce v. Thomas, (“Overwhelmingly, district courts granted relief, rejecting the OLC’s erroneous interpretation of §3621(b) . . . The courts held that, as a matter of statutory construction, the plain language of §3621(b) authorized placement and transfer of offenders to CCCs at any time during their terms of imprisonment.”).
99 Goldings, 383 F.3d at 29
be served in a halfway house. In accordance with existing policy at the time, the Bureau of Prisons honored the request. In the interim, the 2002 Policy was adopted. The petitioners brought a lawsuit claiming that the Bureau of Prisons’ new placement practice was unlawful. The court agreed, and also held that the Bureau of Prisons’ failure to allow for notice and comment of the change in policy as well as the retroactive application of the change, were also in error.

In reaching its conclusion that the policy was erroneous, the District Court reviewed the 2002 Policy under Chevron. Not only did the court look at the text of the statute, but it also looked beyond the statutory language, considering the importance of the halfway house for the offender, the offender’s family and society. The court reasoned that

100 Macaroni, 251 F. Supp.2d at 1017 (“In making the recommendations for community confinement, the court relied upon the definition of the Bureau of Prisons’ scope of discretion as set forth in § 3621(b). It also relied upon explicit instructions, regularly provided to judges in various formats, to the effect that community confinement is a proper sentencing option for offenders serving relatively modest terms of imprisonment. Finally, the court had in mind the fact that recommendations to community confinement have been made in thousands of cases by hundreds of judges continuously since at least 1965, and in nearly all instances accepted by the Bureau of Prisons.”); see also Ferguson, 248 F.Supp.2d at 566-567 (“[B]oth the [Office of Legal Counsel] . . . and [the] Government conclude that the section [3624(c)] demands that the Bureau never place anyone sentenced to a term of imprisonment of any kind to a [Community Corrections Center] . . . for more than ten percent of her term of imprisonment and, even then, never for more than six months . . . This portion of the Government’s rationale is almost worth preserving for the marvelous irony it foists upon the world . . . [T]he Government would have the court read this section as a stiff curb on the Bureau’s ability to make such placements at all. The court finds this reading to be implausible.”).
101 Id.
102 Id.
103 Id. at 1038-40.
104 Id. at 1040-43.
105 Id. at 1024-26.
106 Id. at 1022-23 (“[F]or the defendant . . . [i]mprisonment in a halfway house usually means the inmate will be residing closer to his or her home community, can continue employment outside the facility during the day, and can maintain ties with vulnerable family members, such as children or ailing parents . . . When one remembers that persons placed in community corrections are generally minor offenders, with minimal or no criminal records, and no history of violence, the decision to entirely eliminate community corrections as an optional imprisonment designation becomes even more astonishing.”). See, Travis, supra note 3, at ch. 7.
placement in a halfway house would provide the inmate with the opportunity to maintain contact with his family, \(^{107}\) which has been identified as a positive factor for successful reentry. \(^{108}\) Moreover, the court also noted that the benefits of placing a defendant in a halfway house also accrue to the children of the incarcerated parent. For instance, it provides the parent with an opportunity to remain in better contact with his children. \(^{109}\) Furthermore, the inmate can continue to provide financial support to his family, thereby reducing the potential for future economic burden on the state and forestalling the possibility of the children being placed in “foster care.” \(^{110}\) In addition, halfway house benefits also accrue to society as well as the inmate and his family. Because an inmate is required to work while in a halfway house, incarceration costs are reduced and taxpayers save money. \(^{111}\) The District Court concluded that the Bureau of Prisons’ 2002 Policy was therefore misguided.

In 2005, responding to legal challenges, the Bureau of Prisons adopted a new set of regulations. The regulations, which would eventually become the 2005 Rule, \(^{112}\) were substantively identical to the 2002 Policy. \(^{113}\) In

\(^{107}\) Id. ("[F]or the defendant . . . [i]mprisonment in a halfway house usually means the inmate will be residing closer to his or her home community, can continue employment outside the facility during the day, and can maintain ties with vulnerable family members, such as children or ailing parents . . . "). \(^{108}\) See, Travis, supra note 3, at ch. 6.

\(^{109}\) Id. ("For innocent third parties, particularly children, the economic and emotional devastation caused by a parent's distant incarceration can be, to some extent, palliated. With the inmate employed, families can stay off welfare; with a parent available, children can avoid placement in foster homes.").

\(^{110}\) Id. ("[T]he Number One beneficiary of community corrections is the American Taxpayer, since the cost of community confinement, when it serves the interests of justice, is far less than the price tag on more conventional forms of imprisonment.").

\(^{111}\) Fults, 442 F.3d at 1090 ("In February 2005, in response to Elwood and a similar decision from the First Circuit, Goldings v. Winn, . . . the BOP created new regulations governing the placement of inmates in CCCs. These regulations state that the BOP was engaging in a ‘categorical exercise of discretion’ and choosing to ‘designate inmates to [CCC] confinement only . . . during the last ten percent of the prison sentence being served, not to exceed six months.’") (internal citations omitted). \(^{112}\) See also, Levine, 455 F.3d 71 (noting that the Bureau of Prisons
promulgating the 2005 Rule, the Bureau of Prisons stated that it was doing so as a categorical exercise of discretion in an effort to prevent future legal challenges, but to no avail. The circuits split once again on the question of whether the Bureau of Prisons’ properly interpreted its placement statutes.

2. The 2005 Rule: A Categorical Exercise of Discretion

The regulations that the Bureau of Prisons adopted stated that federal inmates will only be placed in a halfway house for the final ten percent of their sentence, not to exceed a maximum of six months. A longer placement however would be granted for certain “statutorily created programs,” such as substance abuse treatment. The Bureau of Prisons promulgated an interim rule to reflect the regulations, submitting it for public notice and comment as required by the Administrative Procedure Act. None of the comments, which questioned procedural and substantive elements of the rule, favored the ten percent, six month temporal limitations on the Bureau of Prisons’ ability to transfer an inmate to a halfway house or the prohibition against direct judicial placements. More importantly, the comments asserted that the Bureau of Prisons’ categorical exercise of discretion ignored the statutory mandate of section 3621(b) to conduct an individualized assessment of each inmate.

Some comments remarked that the promulgation of the 2005 Rule was conducted improperly because the Bureau of Prisons failed to hold “public hearings.” Other comments noted that the 2005 Rule would have an “unreasonable economic impact” on both the private sector and the

113 69 FR 51213-01, 2004 WL 1835858 (F.R.) (“The proposed rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCCs) and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months . . . The Bureau announces these rules as a categorical exercise of discretion under 18 U.S.C. 3621(b).”).

114 69 FR 51213-01, 2004 WL 1835858 (F.R.) (“The only exceptions to this policy are for inmates in specific statutorily-created programs that authorize greater periods of community confinement (for example, the residential substance abuse treatment program (18 U.S.C. 3621(e)(2)(A)) or the shock incarceration program (18 U.S.C. 4046(c)).”).

115 Id.

116 5 U.S.C. § 553..


118 Id. ("The rule has an unreasonable economic impact. Several commenters
government. Still others suggested that the proscribed amount of time that federal inmates would be able to spend in a halfway house would be insufficient to provide the necessary tools and skills needed to successfully reenter society. The Bureau of Prisons acknowledged the concerns expressed, but did not make any changes to the proposed rule which it adopted as a Final Rule. After the 2005 Rule was finalized, it too was challenged on the grounds that it violated section 3621(b), resulting once more in a circuit split.

3. Challenging the 2005 Rule

In Woodall v. Federal Bureau of Prisons, the Third Circuit was the first court of appeals to address the question of whether the Bureau of Prisons’ 2005 Rule was a proper exercise of discretion. The case is instructive not only because it represents the type of challenges to the 2005 Rule but because it also highlights the importance of reentry programming in assisting inmates to be successful upon release and in preventing

complained, both generally and specifically with regard to their particular community corrections business (CCCs), that the rule had an unfair economic impact...”).

Id. (“The rule will increase Bureau costs by increasing the number of inmates housed in penal facilities.”).

Id. (“The rule does not allow for inmates to have enough time to reintegrate into the community before release. Several commenters raised this concern.”).

Id.

70 FR 1659-01, 2005 WL 34181 (F.R.) “Community Confinement,” Final Rule, (January 10, 2005) (“The Bureau published proposed rules on this subject on August 18, 2004 (69 FR 51213). In the proposed rule document, we explained that these rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCCs) and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months.”).

The Third, Eighth and Tenth circuits each found that the Bureau of Prisons actions were an impermissible exercise of discretion as opposed to the First Circuit Court of Appeals. Compare Woodall, 432 F.3d 235; Fults, 442 F.3d 1088 and Wedelstedt, 477 F.3d 1160 with Muniz, 517 F.3d 29. See generally, Codagnone, supra note 39.

At the district court level, Courts have been divided over whether the Bureau of Prisons can limit the placement of inmates to the lesser of ten percent of the sentence or six months. Upholding the policy, see e.g. Cohn, 2004 WL 240570 (S.D.N.Y. Feb. 10, 2004); Benton, 273 F.Supp. 2d. 1139. Not upholding the policy, see e.g., Monahan, 276 F. Supp. 2d 196; Iacaboni, 273 F. Supp. 2d 1015; Moore, 252 F.Supp. 2d 293.

Woodall, 432 F.3d 235.
Woodall was initially sentenced to thirty-seven months with three years of supervised release for alien smuggling. After pleading guilty to an escape charge, another six months was added to his sentence and three years of supervised release. He was released to serve his three years of supervised release. He was subsequently rearrested for possession of a controlled substance. Woodall claimed that the re-arrest was a result of his being released with “no money, no identification and no assets, into a community where he had no ties whatsoever.” At sentencing, his prior supervised releases were revoked and he was given a total sentence of thirty months. He testified that prior to his release he had requested to be placed in a halfway house, moved to an area where he had ties, or provided with some money. His requests, however, had been denied. The government did not dispute the facts.

The sentencing judge amended the sentence and requested that he spend six months in a halfway house. The Bureau of Prisons, however, informed him that because of the 2005 Rule, he was only eligible to serve the maximum of the last ten percent of his sentence or six months, whichever was less. In his case, that amounted to a maximum of only eleven weeks. Woodall challenged the 2005 Rule, claiming that the Bureau of Prisons impermissibly ignored the sentencing court’s recommendations and failed to give effect to the five required factors in section 3621(b).

The Bureau of Prisons presented three arguments in response to Woodall’s challenge. First, the Bureau of Prisons asserted that it was entitled to judicial deference because of the United States Supreme Court’s decision in Lopez v. Davis. Second, it stated that the five factors

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125 Woodall, 432 F.3d at 238. The initial sentence was thirty-seven months but following an escape another six months was added.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id. at 238, n.1.
132 Id.
133 Id. at 238 (“The Assistant United States Attorney on the case ‘urged’ that placement.”).
134 Id.
135 Id.
136 Id. at 238–39.
137 Id. at 244.
138 Lopez v. Davis, 531 U.S. 230, 244 (2001) (concluding that the Bureau of
contained in section 3621(b) were not mandatory. And finally, the Bureau of Prisons argued that when it promulgated the 2005 Rule, it considered the five factors thus complying with section 3621(b). The Third Circuit disagreed, ruling in favor of Woodall. Each argument and the Third Circuit’s reasoning for denying them are discussed briefly.

Applying Chevron, the Third Circuit concluded that Lopez was not controlling and could be distinguished from the circumstances in Woodall. In Lopez, the Bureau of Prisons was interpreting section 3621(e), which deals with substance abuse treatment. Under section 3621(e)(2)(B), the Bureau of Prisons had the discretion to reduce the period of incarceration for an inmate that successfully completed a substance abuse program, provided that the inmate that had been “convicted of a nonviolent offense.” The United States Supreme Court found that the Bureau of Prisons’ exclusion of inmates convicted of firearm possession was a proper exercise of discretion because there was not a clear legislative directive defining what it meant to be “convicted of a nonviolent offense.” The Court held that while Congress gave the Bureau of Prisons the discretion to determine if an inmate’s sentence should be reduced upon the completion of a substance abuse treatment program, it did not identify “any further circumstance in which the Bureau either must grant the reduction, or is forbidden to do so.” The Court reasoned that it was clear that Congress had expressed concern about releasing violent inmates early. The Bureau of Prisons’ interpretation of what constituted a violent offender and then excluding that individual from early release “reflected [Congress’] concern and seemed to provide a way to advance it.” The Court held that the Bureau of Prisons was entitled to judicial deference, and thus all that remained for the Court was to assess whether the Bureau of Prisons may “categorically exclude prisoners based on their preconviction (sic) conduct.”; see also, Stephanie Marino, Lopez v. Davis: Has the Bureau of Prisons Exceeded its Discretionary Power Over Early Release Programs Enacted by Congress?, 49 WAYNE L. REV. 1007 (2003) (discussing Lopez v. Davis).

139 Woodall, 432 F.3d at 244.
140 Id.
141 Id. at 246.
142a 18 U.S.C. § 3621(e).
144 Lopez, 531 U.S. at 242.
145 Id.
146 Woodall, 432 F.3d at 246.
147 Id.
Prisons’ interpretation was a reasonable one which the Court did.\textsuperscript{148} According to the Third Circuit, the same did not hold true for halfway house placement because the 2005 Rule did not “further the factors in the BOP’s enabling statute - they reject them.”\textsuperscript{149} Congress has provided the Bureau of Prisons with a clear set of factors in section 3621(b) to use when determining an inmate’s place of imprisonment.\textsuperscript{150} These factors required the Bureau of Prisons to conduct an individualized assessment of each inmate which section 3621(e) (2) (B) did not.\textsuperscript{151} The Third Circuit also held that the Bureau of Prisons alternative arguments were also misguided.

The five factors contained in section 3621(b), according to the Third Circuit, must be considered. Although the Bureau of Prisons was entitled to consider additional factors when determining an inmate’s placement, it was not permitted to ignore the five factors that were required.\textsuperscript{152} Thus, the Third Circuit went on to say that these factors are to be referenced whenever an inmate was placed, including placement in a halfway house.\textsuperscript{153} Lastly, the Third Circuit also found that the Bureau of Prisons’ argument that it had considered the five factors when promulgating the 2005 Regulations to be without merit. According to the court,

\begin{quote}
The regulations do not allow the Bureau of Prisons to consider the nature and circumstances of an inmate’s offense . . . [the] history and pertinent characteristics, or . . . any statement by the sentencing court concerning a placement recommendation and the purposes for the sentence . . . . The regulations are invalid because the Bureau of Prisons may not categorically remove its ability to consider the explicit factors set forth by Congress in § 3621(b) for making placement and transfer determinations.\textsuperscript{154}
\end{quote}

According to the Third Circuit, the Bureau of Prisons ignored the individualization that section 3621(b) required, thus the categorical exercise of discretion was impermissible.\textsuperscript{155} With regard to halfway house placement, the court concluded that Congress clearly delineated that certain

\begin{flushright}\textsuperscript{148} Lopez, 531 U.S. at 242. \textsuperscript{149} Woodall, 432 F.3d at 246. \textsuperscript{150} Id. at 247. \textsuperscript{151} Id. \textsuperscript{152} Id. \textsuperscript{153} Id. at 248. \textsuperscript{154} Id. at 244, \textit{but see} (Fuentes, J., dissenting) and Fults, 442 F.3d 1088 (2006) (Riley, J., dissenting). \textsuperscript{155} Woodall, 432 F.3d at 244; Fults, 442 F.3d 1088.\end{flushright}
factors were to be considered and that a categorical exercise of discretion therefore ignores those factors. Under section 3621(b), the Bureau of Prisons must consider the “particular circumstances of individual inmates” and the Bureau of Prisons is unable to accomplish such an assessment with a “blanket rule.” The First Circuit however did not agree.

In Muniz v. Sabol, the First Circuit, also applying Chevron, came to the opposite conclusion, finding that the 2005 Rule was valid under the Bureau of Prisons’ rulemaking authority. In reaching this conclusion, the First Circuit looked to the plain language of the statute as well, noting that there was no legislative guidance offered as to whether the Bureau of Prisons was entitled to use a categorical exercise of discretion to give effect to section 3621(b). Accordingly, the absence of clear congressional intent means that the Bureau of Prisons was entitled to judicial deference. Specifically, the First Circuit stated that the Bureau of Prisons’ interpretation of section 3621(b) was a reasonable one because the agency explained that the 2005 Rule was “promulgated with explicit reference to some of the five factors.” Because the five factors were considered in the crafting of the rule, the First Circuit reasoned that the Bureau of Prisons was acting in accord with section 3621(b) because it has the discretion to determine an inmate’s place of imprisonment. Moreover, the First Circuit remarked that agency transparency was to be lauded.

The First Circuit explained that the Bureau of Prisons had the discretion to determine an inmate’s place of imprisonment. With this discretion, the Bureau of Prisons could claim that it had conducted an individualized

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156 Woodall, 432 F.3d at 247.
157 Id. at 248.
158 Muniz, 517 F.3d at 35 (“Applying Lopez, we discern no clear expression of congressional intent to foreclose rulemaking. As an initial matter, the transfer provision in § 3621(b) leaves more to the BOP’s discretion than the assignment provision. But moreover, even the assignment provision lacks a clear expression of congressional intent to forbid rulemaking that assists BOP in its individualized determinations.”).
159 Id. See also, Miller, 527 F.3d 752.
160 Muniz, 517 F.3d at 36.
161 Id. at 39.
162 Id. at 40 (“We note also that the Bureau of Prisons has other policies that deny CCC placement in other circumstances. See Federal Bureau of Prisons, Program Statement 7310.04, Community Corrections Center (CCC) Utilization and Transfer Procedure at 10 (Dec. 16, 1998), available at http://bop.gov/Data Source/execut ed/s Policy Loc(last visited Feb. 20, 2008). Those policies restrict the transfer of inmates who are assigned a “Sex Offender” or “Deportable Alien” “Public Safety Factor” or “who require inpatient medical, psychological, or psychiatric treatment,” among others.”).
assessment of each inmate, and found that no offender was eligible to be placed in a halfway house for more than the ten percent or six month time limit. In other words, the Bureau of Prisons could mask its policy by paying lip service to section 3621(b). Instead of forcing the Bureau of Prisons to engage in this type of subterfuge, the First Circuit reasoned that it was better to know the Bureau of Prisons limited halfway house placement at the outset. The reasoning that the Bureau of Prisons may not adhere to its statutory authority is not enough to justify retaining an improper policy. While the circuits remained divided on the issue of whether the Bureau of Prisons’ categorical exercise of discretion was permissible, it did not last long.

In 2008, following the passage of the Second Chance Act, the Bureau of Prisons was required to adopt a new policy. The new policy that it adopted and later promulgated as a rule was similar to the 2005 Rule. It too limited halfway house placement to six months, but with the exception that more time would be provided after an extraordinary justification had been provided and prior written approval granted. This new rule sparked a new round of legal challenges regarding the proper exercise of discretion by the Bureau of Prisons. It was déjà vu all over again.

C. Post-Second Chance Act Placement Policy

The Bureau of Prisons, following the passage of the Second Chance Act of 2007, promulgated the presumptive six month rule, which provides that an eligible inmate shall be placed in a halfway house for a maximum of six months, unless there is an extraordinary justification and the regional director gives prior written approval. This rule was required because the Second Chance Act had amended section 3624(c), increasing the maximum amount of time that an inmate can be placed in a halfway house to a year.

163 Muniz, 517 F.3d at 40.
165 P.L. 110-199, 2008 H.R. 1593
166 70 FR 1659-01, 2005 WL 34181 (F.R.) “Community Confinement,” Final Rule, (January 10, 2005) (“The Bureau published proposed rules on this subject on August 18, 2004 (69 FR 51213). In the proposed rule document, we explained that these rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCCs) and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months.”); see also Conley & Kenney Memo, supra note 10, at (Section III(D)) (instructing Bureau of Prisons personnel on the new policy and how to apply it).
and removing the ten percent, six month temporal limitation. The presumptive six month rule has been challenged on the grounds that the Bureau of Prisons has once again ignored its statutory authority.

1. Presumptive Six Month Rule

The Bureau of Prisons promulgated the presumptive six month rule as an Interim Final Rule. In a memorandum to its personnel, the Bureau of Prisons detailed the changes to the halfway house placement policy. These changes were: the maximum amount of time that an inmate was entitled to be placed had been increased to twelve months in section 3624(c); individualized determinations would still be required using the five factors set forth in section 3621(b); judicial requests for direct placements “lack[ed] binding effect;” and the “categorical timeframe limitations” as promulgated in the 2005 Rule were no longer valid. In applying the new rule, the Bureau of Prisons explained that while an inmate was eligible for a twelve month placement, its experience demonstrated that a maximum of six months was sufficient to prepare an inmate to reenter society successfully.

Similar to the 2005 Rule, the presumptive six month rule was submitted for notice and comment. During the public notice and comment period, various stakeholders, such as inmates, individuals and organizations,

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169 Id. at § I(A), p.2.
170 Id. at § I(B), p.2.
171 Id. § I(C), p.2.
172 Id. at § I(B), p.2. (The Bureau of Prisons also informed its personnel that the process of evaluating inmates for placement would begin 17-19 months before their release date rather than 11-13 months.).
173 Id. at § III (D), p.4 (“While the [Second Chance] Act makes inmates eligible for a maximum of 12 months pre-release Residential Reentry Center placements, Bureau experience reflects inmates’ pre-release Residential Reentry Center needs can usually be accommodated by a placement of six months or less.”).
175 Public comments submitted by inmates request that the Bureau of Prisons not restrict Residential Reentry Center placement to six months absent an extraordinary justification. All of the comments submitted can be found at
submitted comments urging the Bureau of Prisons to reconsider its rule. The comments emphasized that the six month limitation would serve as a barrier to successful reentry.\textsuperscript{178} Inmates have subsequently challenged the rule on various grounds, such as the Second Chance Act requires placement in a halfway house for the maximum period of twelve months;\textsuperscript{179} the

http://www.regulations.gov/search/Regs/home.html#searchResults?Ne=11\+8\+8053\+8098\+8074\+8066\+8808\+1&Ntt=Pre-Release+Community+Confinement&Ntk=All&Ntx=mode+matchall&N=4294966525+8056.

\textsuperscript{176} Public comments submitted by individuals requested that the Bureau of Prisons not restrict Residential Reentry Center placement to six months absent an extraordinary justification. All of the comments can be found at http://www.regulations.gov/search/Regs/home.html#searchResults?Ne=11\+8\+8053\+8098\+8074\+8066\+8808\+1&Ntt=Pre-Release+Community+Confinement&Ntk=All&Ntx=mode+matchall&N=4294966525+8056.

\textsuperscript{177} Public comments were submitted by several organizations requesting that the Bureau of Prisons not restrict Residential Reentry Center placement to six months absent an extraordinary justification. Those organizations were the American Bar Association (p.2) (“The interim rule states in general terms that BOP will comply with the requirements of the Second Chance Act with respect to pre-release community confinement. However, it does not adopt a presumption in favor of a full 12 months’ pre-release community placement, as we believe Congress intended in enacting the Second Chance Act, or otherwise specify the circumstances under which a prisoner will spend a full 12 months in a community placement.”); the Federal Public Defender of the Western District of Washington (“[T]he Bureau continues to apply a presumption against optimizing the use of community confinement . . . [T]he Bureau should adopt a presumption in favor of twelve months’ pre-release placement in halfway house absent identifiable circumstances indicating that a lesser period will be sufficient . . . .”); the American Legislative Exchange Council (ALEC) (“Although the interim rule for community confinement appears to satisfy statutory requirements on its face, ALEC believes that the interim rule should be rewritten and bolstered to ensure that halfway house placement be more readily available for the full twelve months contemplated in the law, rather than six months”); Families Against Mandatory Minimums; Prison Fellowship; Justice & Mercy, Inc.; and the Mentor Corps.

\textsuperscript{178} http://www.regulations.gov/search/Regs/home.html#searchResults?Ne=11\+8\+8053\+8098\+8074\+8066\+8808\+1&Ntt=Pre-Release+Community+Confinement&Ntk=All&Ntx=mode+matchall&N=4294966525+8056 (During the comment period, there were one hundred and forty-seven comments entered regarding the Bureau of Prisons’ decision to change its halfway house placement policy.)

\textsuperscript{179} Daraio v. Lappin, 2009 WL 303995 (D.Conn. 2009) (“[Daraio] contends that the BOP rarely, if ever, grants pre-release community confinement in excess of 180 days, although specifically authorized to do so under the express terms of
presumptive six month rule is an impermissible exercise of discretion; and the Bureau of Prisons has exceeded its statutory authority under sections 3624(c) and 3621(b). To date, however, the inmates’ challenges of the Bureau of Prisons’ new rule have achieved mixed success with several appellate courts agreeing with the Bureau of Prisons.¹⁸⁰

2. Challenges to the Presumptive Six Month Rule

Inmates have had mixed success in challenging the Bureau of Prisons’ presumptive six month rule.

a. Successful Inmate Challenges

In Strong v. Schultz,¹⁸¹ the petitioner, Douglas Strong was convicted of bringing in undocumented immigrants and sentenced to thirty-three months imprisonment.¹⁸² Strong was initially referred to serve sixty days in a halfway house.¹⁸³ He challenged the placement on the grounds that it was contrary to sections 3621(b) and 3624(c) as amended under the Second Chance Act.¹⁸⁴ His reasoning was that he was entitled to be considered for a full twelve month placement following the passage of the Second Chance Act and because of his lack of a violent criminal history. Moreover, he contended that a twelve month placement was appropriate because of his serious medical conditions, which included an “HIV diagnosis, the removal of his spleen, and the need for various medications” and his need for extended substance treatment because of “his long history of drug addiction.”¹⁸⁵

Strong argued that the Bureau of Prisons’ six month placement designation as expressed in its internal memorandum¹⁸⁶ is “contradicts

¹⁸⁰ Strong v. Schultz, 599 F.Supp.2d 556 (2009), see infra, Section II.C.2 for a in-depth discussion of the case; Carmichael v. Holinka, 2009 WL 2512029 (W.D. Wis.) (ordering the Bureau of Prisons to transfer the petitioner to a halfway house or re-evaluate the placement designation using the five factors in section 3621(b)).
¹⁸² Id. at 557.
¹⁸³ Id. at 558.
¹⁸⁴ Id.
¹⁸⁵ Id.
¹⁸⁶ Conley & Kenney Memo, supra note 10.
Congress’s directive that CCC placement time be of sufficient duration to provide the greatest likelihood of successful reintegration into the community.” 187 Strong further argues that the Bureau of Prisons’ actions of determining his placement in accord with its internal memo “deprived [him] of the statutory opportunity to be individually considered for CCC placement for a period of up to one year on the basis of the neutral criteria identified by Congress” in section 3621(b). 188 The following adequately sums up how the Bureau of Prisons presumptive six month rule is viewed by some. “Instead of striving to implement the intent of Congress ‘to provide the greatest likelihood of successful reintegration into the community,’ the BOP, in a bit of institutional arrogance, announced that, notwithstanding the will of Congress, the presumptive norm would continue to be a maximum of six months RRC placement.” 189 The Bureau of Prisons’ response was that its memorandum and its policy adequately reflect the changes in the Second Chance Act.

The Bureau of Prisons increased Strong’s placement following an amended judgment of conviction. 190 It still, however, capped his placement at six months, stating that six months was enough time for him to successfully reintegrate back into society. 191 The Bureau of Prisons further contended that the revised placement was “determined pursuant to the Second Chance Act,” 192 thus arguing that the petition should be dismissed on the merits. 193 The District Court disagreed, holding that the Bureau of

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187 Schultz, 599 F.Supp.2d at 560.
188 Id.
189 Id.
190 Id. at 558 (“[O]n August 20, 2008, United States District Judge Dana M. Sabraw amended Petitioner’s judgment of conviction to provide for two years of supervised release and to delete the supervised release condition requiring Petitioner to reside in a CCC for 120 days . . . Petitioner’s Unit Team reconsidered Petitioner’s CCC placement date in light of this development. On October 2, 2008, Warden Schultz signed a second Institutional Referral for CCC Placement, which provides for a six-month placement.”).
191 Id. at 558-59 (“Inmate Strong is being referred for Residential Reentry Center placement for a period of 180 days, pursuant to the Second Chance Act. The Unit Team has determined the recommended placement is of sufficient duration to provide the greatest likelihood of successful reintegration into the community. He will be able to use this time to establish employment and enhance family ties.”).
192 Conley & Kenney Memo, supra note 10.
193 Schultz, 599 F.Supp.2d at 559 (The Bureau of Prisons also argued that the Strong failed to exhaust his administrative remedies after the second referral. The court, rightfully so, dismissed that claim on the grounds that it would not have been expedient for Strong to submit to second appeal process given the five
Prisons should reconsider Strong for placement in a halfway house for the duration of his sentence, which would have been for a maximum of nine months because of when the petition was heard.\textsuperscript{194} The court’s reasoning for this decision was based upon a review of sections 3621(b) and 3624(c) under \textit{Chevron}.

According to the court, Congress limited the discretion of the Bureau of Prisons when determining the duration of an inmate’s placement in a halfway house with its language that “each placement is ‘of sufficient duration [not to exceed 12 months] to provide the greatest likelihood of successful reintegration into the community.’”\textsuperscript{195} The court explained that with the increase in the period of time that may be spent in a halfway house in conjunction with the “sufficient duration” requirement, “Congress intended that each inmate would be considered for a placement of the longest duration-12 months.”\textsuperscript{196} The court based its holding on the premise that Congress amended both sections in an effort to provide inmates with the best opportunity to reenter society successfully. The court stated, “Obviously, an underlying premise of these amendments is that the more time an inmate spends in a CCC before he or she is released from BOP custody, the more likely it is that his or her community reintegration will be successful.”\textsuperscript{197} Not every court agreed.

\textbf{b. Unsuccessful Inmate Challenges}

In \textit{Miller v. Whitehead},\textsuperscript{198} a consolidated case, four inmates with months to complete the first one. “Given that it took five months to exhaust administrative remedies the first time around, dismissal of the Petition as unexhausted would effectively moot Petitioner’s § 2241 claim through no fault of his own. [T]he purposes of exhaustion would not be served by requiring a second round of exhaustion, since Strong is challenging the validity of the BOP’s April 14, 2008, guidance, not its application. This Court will therefore excuse the failure to exhaust administrative remedies.”\textsuperscript{199}

\textsuperscript{194} Id. at 563 and (PAGE NO) n. 4.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 562 (The court readily acknowledged that not every placement would be for the full twelve months but that the Bureau of Prisons was required to conduct an individualized assessment. “[T]he ultimate placement may be less than 12 months, if warranted by application of the § 3621(b) factors, \textit{i.e.}, the nature and circumstances of the offense, the inmate’s history and pertinent characteristics, and any statement by the sentencing court.”).
\textsuperscript{197} Id.
\textsuperscript{198} 527 F.3d at 755 (YEAR) (“Inmate Gary Miller requested transfer to an Residential Reentry Center for the last 73 months of his ten-year sentence. Fernando Lovato requested transfer for the final 16 to 18 months of his ten-year
varying amounts of time remaining on their sentences sought to be transferred to a halfway house for more than six months. Each inmate however was denied the transfer because he did not establish an “extraordinary justification” for a placement in excess of six months. The inmates contended that the “extraordinary justification” requirement was impermissible because it ignored the five factors in section 3621(b), thus failing to provide each with an individualized assessment. Moreover, the inmates argued that the extraordinary justification amounted to an additional factor that Congress did not require for placement.

The Eighth Circuit, changing course, agreed with the lower court that the Bureau of Prisons was authorized to require an “extraordinary justification” for a placement longer than six months. According to the Eighth Circuit, the inmates were not placed in a halfway house for more than six months because they failed to establish an “extraordinary justification.” Citing Lopez, the Eighth Circuit, explained that the Bureau of Prisons, as the decisionmaker, has the authority to engage in this type of rulemaking “to resolve issues of general applicability unless Congress clearly expresses their intent to withhold that authority.” The Eighth Circuit determined therefore that the “extraordinary justification” requirement was a permissible exercise of agency discretion.

The Eighth Circuit further stated that the extraordinary justification requirement was not a non-statutory factor that was being improperly considered, but instead a standard for deciding whether an inmate should be placed in a halfway house for more than six months because they failed to establish an “extraordinary justification.” According to the policy statement, “[a]n inmate may be referred up to 180 days, with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval and the Chief USPO in the inmate's sentencing district to determine whether the sentencing judge objects to such placement.”. PS 7310.4 (9)(a)(1), p. 8. The “extraordinary justification” rule was not considered a violation because 18 U.S.C. § 3624(c) had the ten percent or six month timeframe limitations.

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199 Id. (“The Bureau of Prisons rejected the various requests. The warden advised Miller, Lovato, and Lauer that each had not established an ‘extraordinary justification’ for serving more than 180 days in a Residential Reentry Center.”).

200 Id. at 757.

201 Id. at 755. The “extraordinary justification” for placement in excess of six months has been a part of the Bureau of Prisons practice and policy dating back to the 1998 Program Statement. According to the policy statement, “[a]n inmate may be referred up to 180 days, with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval and the Chief USPO in the inmate's sentencing district to determine whether the sentencing judge objects to such placement.”. PS 7310.4 (9)(a)(1), p. 8. The “extraordinary justification” rule was not considered a violation because 18 U.S.C. § 3624(c) had the ten percent or six month timeframe limitations.

202 Miller, 527 F.3d at 757.

203 Id.
placed in a halfway house for more than six months.\textsuperscript{204} The Court found that while “ordinarily a placement of more than [six months] is not appropriate under [section] 3621(b) . . . a particular inmate still has the opportunity to show in the individual circumstance of his case, a longer placement would be justified.”\textsuperscript{205} Others courts also agreed with the Eighth Circuit, paying particular attention to the extraordinary justification requirement and emphasizing that it was a proper exercise of discretion.\textsuperscript{206}

The Eight Circuit and other courts that ruled in this way are incorrect. The presumptive six month rule firmly caps the length of time that an inmate can be placed in a halfway house, a prospect that Congress did not intend when it passed the Second Chance Act and amended sections 3621(b) and 3624(c). The presumptive six month placement, along with the requirement that a showing of an “extraordinary justification” be made to increase the length of time in a halfway house, is similar to the categorical exercise of discretion reflected in the 2005 Rule. Both rules undermine Congress’ intent to have the Bureau of Prisons conduct an individualized assessment of each inmate pursuant to section 3621(b). Moreover, the removal of the ten percent, six months limitation from section 3624(c) is further proof that Congress did not intend to have inmates restricted to a six month placement in a halfway house. Congress’ intent was clear and unambiguous in both statutes, thus the Bureau of Prisons is not entitled to judicial deference. If, however, a court were to decide that the statutes were ambiguous, the Bureau of Prisons’ interpretations would still be unreasonable under a hard look review.

\textbf{III. REVIEWING THE BUREAU OF PRISONS’ PLACEMENT POLICY}

The Bureau of Prisons’ presumptive six month rule is an impermissible

\textsuperscript{204} Id.
\textsuperscript{205} Id. at 758 (emphasis in original).
exercise of agency discretion because it disregards the statutory mandate of section 3621(b), to conduct an individualized assessment of each inmate, and section 3624(c), to assure that each inmate has a reasonable opportunity to reenter society successfully. Moreover, the Bureau of Prisons’ reliance on its experience as the basis for the policy is misguided. The policy fails to give effect to Congress’ intent in amending the statutes when it passed the Second Chance Act. The issue of whether the Bureau of Prisons’ halfway house placement policy adheres to its statutory mandates and is a proper interpretation of sections 3621(b) and 3624(c) is a question of statutory construction. Under either Chevron or hard look review, it would be determined that the Bureau of Prisons is engaged in an impermissible exercise of discretion and thus is not entitled to judicial deference.

A. Chevron Analysis

Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, the court uses a two-step test to determine whether an agency’s statutory construction is entitled to deference. A reviewing court under step-one of Chevron analyzes the statutory language to determine whether Congress spoke clearly to the precise issue in question. If Congress did speak clearly to the issue, thus lacking ambiguity, the courts and the agency are required to abide by the statutory language. If, however, the court finds that the statute is ambiguous, the court then proceeds to the second step of Chevron. Under step-two, a reviewing court evaluates whether the agency’s statutory interpretation is reasonable. If the court determines that it is reasonable, then the court is required to defer to the agency’s interpretation. Courts take different approaches to assessing

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207 INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (Justice Stevens declined to defer to the agency’s interpretation of the term, primarily because the Court found that the interpretation was inconsistent with clear congressional intent.)


209 Congress has not granted to the Bureau of Prisons policymaking authority that is entitled to deference. See, U.S. v. Mead, Corp. 533 U.S. 218 (2001).


211 Id. at 842 – 43.

212 Id. at 842.


215 Id.

216 Id. at 866; INS v. Aguirre-Aguirre, 526 U.S. 415, 421 (1999); Auer v.
reasonableness. Some are quite deferential, while others apply a more rigorous scrutiny, known as a hard look review.

1. Step One – Did Congress Speak to the Precise Issue?

In step-one of a Chevron analysis, the reviewing court seeks to determine whether Congress spoke to the precise issue. The court, in making this determination will use “traditional tools of statutory construction,” such as an examination of the statutory text, dictionary definitions, canons of construction; statutory structure; legislative purpose; and, legislative history. Under this approach, the court begins

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Robbins, 519 U.S. 452, 457 (1997). Courts rarely find an agency’s actions unreasonable under the traditional assessment which mirrors the standards under the arbitrary and capricious test. With the contemporary approach, courts have engaged in a more rigorous assessment of the agency’s actions, a “hard look” approach to determine whether the agency’s interpretation comports with the intent of Congress.

219 NLRB v. Food and Commercial Workers, 484 U.S. 112, 123 (1987). In general, traditional tools of statutory construction are considered to be an examination of the statutory text and dictionary definitions; the statutory structure and framework; legislative purpose; legislative history; and canons of construction. See generally, A Guide to Judicial and Political Review of Federal Agencies, John F. Duffy and Michael Herz, eds., American Bar Association (2005), §§ 3.0221 – 2.0225 (pp. 58-82).
by focusing on the statutory language, looking at individual words, sentence structure, and other rules of syntax. But that is not where it ends.

In reviewing a statute, courts also review the statutory context. Courts will look at acts that may affect the statute that were passed either contemporaneously or subsequently to the statute under review. Moreover, the reviewing court is also guided by common sense. When determining whether Congress spoke to the precise issue, a court will look at whether “Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” This approach of reviewing the statutory language and context can best be summed up as taking a “gestalt approach” to determine whether Congress was clear and unambiguous in expressing its intent.

Using a gestalt approach, it is evident that Congress was clear and unambiguous in its requirement that the Bureau of Prisons considers the five factors in section 3621(b) and conducts an individualized assessment of each inmate. Consequently, a reviewing court should conclude that the Bureau of Prisons’ presumptive six month rule is not in accord with its statutory mandates under sections 3621(b) and 3624(c), and thus exceeds its statutory grant of discretion.

a. The Statutory Language of 18 U.S.C. § 3621(b)

Under section 3621(b), Congress mandates the Bureau of Prisons to act and allows it to exercise discretion. The statute reads,

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

\textsuperscript{225} Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989); Brown & Williamson Tobacco Corp., 529 U.S. at, 132; Gardner, 513 U.S. at 118 (A “reviewing court should not confine itself to examining a particular statutory provision in isolation.”).
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 – (1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence . . . and (5) any pertinent policy statement issued by the Sentencing Commission . . . .

In the first sentence, Congress’ use of the word “shall” indicates that the Bureau of Prisons is required to perform this duty. In the second sentence, the use of the word “may” indicates that the Bureau of Prisons has the discretion to determine which facility shall be placed. The discretion, however, is qualified. The restriction on its discretion is that the Bureau of Prisons is required to “consider” five factors. Courts, reviewing the statute in response to earlier policy changes, have differed on whether the five statutory factors limit the Bureau of Prisons discretion. The majority of courts that have reviewed section 3621(b), however, have determined that the Bureau of Prisons is required to assess an inmate’s placement according to these factors, and their assessment is correct.

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228 18 U.S.C. § 3621(b).
229 18 U.S.C. § 3621(b) Levine, 445 F.3d at 80 (“The statute (given in full, supra ) employs the word ‘shall,’ and thus obliges the BOP to ‘designate the place of the prisoner’s imprisonment.’”).
230 18 U.S.C. § 3621(b); Levine, 445 F.3d at 80 (“Congress’s use of the language ‘may designate’ in this provision seemingly endows the BOP with ‘broad discretion.’ [T]he fact that the statute differentiates between the use of ‘may’ and ‘shall’ in adjacent sentences indicates the drafters’ mindfulness of the significance of those terms.”).
231 18 U.S.C. § 3621(b); Muniz, 517 F.3d at 35 (“The plain language of the statute [section 3621(b)] contains a grant of discretion and a command that the BOP consider the five factors when exercising that discretion.
232 Goldings, 383 F.3d at 33 (Howard, J., concurring) (“In making assignments and transfers, Congress suggested that BOP consider several factors including the resources of the facility, the nature and circumstances of the offense, the history and characteristics of the prisoner, any recommendations by the sentencing court, and pertinent policy statements from the Sentencing Commission. These factors are non-exclusive and do not bind or limit BOP’s exercise of its discretion.”).
233 Rodriguez v. Smith, 541 F.3d 1180, 1186 (9th Cir. 2008); Wedelstedt, 477 F.3d at 1161.; Levine, 455 F.3d at 82; Woodall, 432 F.3d at 245; Fults, 442 F.3d at 1092. But see Muniz, 517 F.3d at 35.
By using the word “considering,” which means “taking into account,” Congress has indicated its intent. Congress wants the Bureau of Prisons to take the factors into account when determining an inmate’s place of imprisonment. Apart from the definition of the words, the sentence structure also indicates that Congress intended the Bureau of Prisons to use the factors. Moreover, Congress’ intent in this regard can be seen plainly when the second sentence is read without the subordinate clauses. “The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau . . . considering . . . .” It is readily apparent that Congress intended the designation of an inmate to “any available penal or correctional facility,” including a halfway house, to be made after the Bureau of Prisons had considered the five factors.

An alternative reading that may be proffered by the Bureau of Prisons and its policy is that the word “considering” and the five factors modify the preceding subordinate clause. That reading, however, would be incorrect. Those inclined to find that the Bureau of Prisons’ discretion is unfettered are likely to raise the argument that Congress inserted the word “considering” and the five factors to modify the phrase “that the Bureau determines to be appropriate and suitable.” This phrase however modifies the phrase “whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted.” Congress sought to insure that the facility that

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236 The issue as to whether a halfway house constituted a penal or correctional facility was contested earlier by the Office of Legal Counsel. It was decided that a halfway house was a place of imprisonment. Timothy Flanigan, “Statutory Authority to Contract With the Private Sector for Secure Facilities,” (March 25, 1992). The Bureau of Prisons which supported the holding that a halfway house was a place of imprisonment changed course, challenging that designation. Goldings, 383 F.3d at 25 (“The defendants . . . argue that a CCC is not a ‘place ... of imprisonment’ as required by the first sentence of § 3621(b) . . . .” In subsequent appeals, however, the Bureau of Prisons dropped this argument. Rodriguez, 541 F.3d 1185, n.5 (“[T]he BOP itself has acknowledged that § 3261(b) grants it the authority to ‘place offenders sentenced to a term of imprisonment in [RRCs].’”).
238 Id.
was selected to place an inmate was “appropriate and suitable.” The five factors modify the discretion on the designation of placement, thereby qualifying the Bureau of Prisons’ discretion.

A review of the plain text of the language and the sentence structure is definitive evidence that Congress intended that the designation of an inmate’s place imprisonment be an individualized assessment that is conducted in accord with the five factors, particularly since factors two and three relate specifically to the individual inmate. Although the core of section 3621(b) has remained relatively unchanged since its adoption, Congress did amend it in the Second Chance Act, addressing direct judicial placements. Congress amended section 3621(b) by adding the following sentence at the end of the paragraph after the fifth factor. “Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.”

The sentence speaks to the issue of direct judicial placement, proclaiming clearly that no “order, recommendation, or request by a sentencing court” is binding. Reviewing this sentence in light of the 2002 Policy, it appears as if Congress approves of the manner in which the Bureau of Prisons has elected to exercise its discretion. That is not the case. The statement merely codifies the agency’s longstanding practice with regard to direct judicial placements. The placements were judicial requests that the Bureau of Prisons either elected to or declined to accept. While the Bureau of Prisons accepted eighty percent of these they were not automatic and hence not binding. Therefore, this statement merely codifies the Bureau of Prisons’ longstanding practice.

The plain language of section 3621(b) clearly indicates that the Bureau

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239 Id.
240 18 U.S.C. § 3621(b)(2)-(3)
242a PL 110-199, April 9, 2008, 122 Stat 657, § 251 (“(b) COURTS MAY NOT REQUIRE A SENTENCE OF IMPRISONMENT TO BE SERVED IN A COMMUNITY CORRECTIONS FACILITY.—Section 3621(b) of title 18, United States Code, is amended by adding at the end the following: "Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.").
242 18 U.S.C. § 3621(b)
243 Borges, supra note 40, at 173.
of Prisons is required to consider the five factors contained therein when determining an inmate’s place of imprisonment.\textsuperscript{244a} The presumptive six month rule is an \textit{a priori} determination that the Bureau of Prisons makes when designating an inmate’s place of imprisonment. By limiting an inmate’s placement in halfway house to six months, the policy is no longer individualized because it has created a blanket policy that disregards the section 3621(b)’s statutory mandate to consider the five factors. Specifically, the policy ignores the two factors – “nature and circumstances of the offense” and “history and characteristics of the prisoner” – that relate specifically to determining the correct placement for each individual inmate.\textsuperscript{244} 

Moreover, the extraordinary justification exception that the Bureau of Prisons provides does not protect the rule from this infirmity.

While the extraordinary justification exception appears to provide access beyond the six month ceiling, the timing of when the exception is considered is flawed. The statutory language of section 3621(b) is clear. Congress requires the Bureau of Prisons to take the five factors into account prior to making its placement decision. Congress did not intend for the Bureau of Prisons to conduct a post hoc assessment of evidence provided by an inmate in his effort to secure a longer placement. The presumptive six month rule is simply a categorical exercise of discretion by a different name. A categorical exercise of discretion by any other name would still be a statutory violation. The Bureau of Prisons is likely to raise a similar defense to that offered in response to the legal challenges to the 2005 Rule, relying once again on \textit{Lopez}.\textsuperscript{245} 

A court may also use certain canons of construction to conclude that the agency’s interpretation is incorrect.\textsuperscript{246} The statutory language may appear to be ambiguous, but applying a particular canon of construction the court determines that that the agency’s interpretation is not entitled to

\textsuperscript{244a} Muniz, 517 F.3d at 35 (“The plain language of the statute [section 3621(b)] contains a grant of discretion and a command that the BOP consider the five factors when exercising that discretion. The BOP “shall designate the place of the prisoner's imprisonment.” 18 U.S.C. § 3621(b). The BOP is provided the discretion to choose “any available penal or correctional facility that meets minimum standards of health and habitability ... that the Bureau determines to be appropriate and suitable, considering” the five factors.”). 

\textsuperscript{244} 18 U.S.C. § 3621(b)(2) and (3). 

\textsuperscript{245} Lopez, 531 U.S. 230 (2001). 

\textsuperscript{246} See, Section II, supra. 

deference. 248 “In other words, although the court finds the statutory language is ambiguous, it holds that a particular canon of construction rules out the agency’s interpretation because it is inconsistent with the statute as interpreted with the guidance the canon.”249 The canons of statutory construction upon which the courts have often relied are: the democratic process;250 the protection underenforced constitutional norms;251 and the protection of social policies, including regulatory norms.252 Of these three, the canon of construction that is most pertinent is the social policy canon.253

248 Id. at 1283-84 (referring to “instances of belatedly discovered clear meaning” as part of step-one analysis.)

249 The cannons that are referenced with respect to the democratic process account for problems in the environment in which legislation is drafted. Bernard Bell, Using Statutory Interpretation to improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J.L. & POL. 105, 106 (1997) (stating that allowing agencies to exercise their discretion to apply or reject “interpretative methodologies” that are “designed to improve the legislative process may undermine their effectiveness.”); Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593, 607-11 (1995).

250 See Lawrence Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978) (defining the concept of underenforced constitutional norms); Qualcomm Inc., 181 F.3d 1370 (applying the canon of constitutional doubt to the agency interpretation which raised serious constitutional concerns); Edward J. DeBartolo Corp., v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 578 (1988) (declining to defer to the NLRB when the statutory construction raised First Amendment concerns.)


252 The use of these canons at step-one is not universally accepted.

[T]he proper use of these canons is often intertwined with the sort of policy decisions for which agencies are better suited than courts. Some courts therefore do not apply them at step one . . . On the other hand, if courts view these canons as relatively settled default rules that provide an interpretive scheme against which Congress legislates, they may feel comfortable using them at step one to ascertain congressional intent.

A Guide to Judicial and Political Review of Federal Agencies, John F. Duffy and
This canon of construction is aimed at protecting “certain principles or groups,” such as construing remedial statutes broadly or interpreting laws to favor Native Americans. In regard to the Bureau of Prisons’ placement policy, the social policies that are being advocated and protected are twofold: reducing recidivism and increasing public safety.

The reentry movement, with the Second Chance Act as its signature piece of legislation, is focused on improving the reentry prospects of inmates following release from incarceration. The current data demonstrate that within the first year after release, approximately one-third of inmates will re-offend, and within in three years, approximately two-thirds. The new offenses will have new victims, thus endangering the public and decreasing public safety. In this context, non-corrrectional stakeholders have focused on post-release assistance programs that provide housing, education and job training, among other services. Upon release, the Bureau of Prisons no longer has the authority to impact the lives of inmates.

Michael Herz, eds., American Bar Association (2005), § 3.02253 (p. 77). See e.g., King v. St. Vincent’s Hospital, 502 U.S. 215, 220-21 n.9 (1991) (There is a presumption that Congress’ legislation is enacted with these interpretive rules in mind.).


256 2007 WL 4896761 (Vera Inst. Just.) (“Policy makers have increasingly come to recognize the importance of providing greater support to offenders throughout the reentry process, as illustrated, for instance, by passage of the Second Chance Act in the House of Representatives in November 2007. Growing attention to the challenges of successful reentry may ultimately affect the work not only of social services agencies but also of the court system and law enforcement agencies. For instance, some communities are now experimenting with specialized reentry courts that give judges a pivotal, coordinating role in managing reentry.”).
Hence, it must impact reentry at the pre-release custodial stage. Because of the changing demographics of inmates and the increase in need for longer and more comprehensive residential reentry programming, the Bureau of Prisons capping placement at six months and failing to conduct individual assessments is “inconsistent” with the social policy being advocated.

Although section 3621(b) directs the Bureau of Prisons to designate the place of imprisonment, the contextualization of the statute further demonstrates that Congress’ intent was clear and unambiguous. The place to begin is with the statutory language of the companion placement statute, section 3624(c).

b. The Statutory Context of 18 U.S.C. § 3621(b)

In the Second Chance Act, Congress makes several substantial changes to section 3624(c) that indicate that the Bureau of Prisons is not entitled to presumptively limit an inmate’s placement to six months. Congress continues to require that the Bureau of Prisons provide a set of conditions for each inmate to foster successful reentry. In the first sentence of section 3624(c), similar to prior versions, Congress uses the word “shall” to obligate the Bureau of Prisons to provide a set of “conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.”

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259 18 U.S.C. § 3624(c) (2008) (“The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.”); In interpreting the old section 3624(c), the court in Goldings stated, (“By its plain language, § 3624(c) provides that the BOP ‘shall take steps’ to “assure” that prisoners serve a reasonable part of the last ten percent of their prison terms “under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community” 383 F.3d 17, 20-21 (1st Cir. 2004). This language imposes an affirmative obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world. It is true that this obligation is qualified. Section 3624(c) does not mandate placement in a CCC prior to release, and it requires the BOP to assure that a prisoner spends the last part of his sentence under pre-release conditions only if practicable. However, a qualified obligation differs from a grant of discretion.”); Prows, 981 F.2d at 470 (“§ 3624(c) operates as “a legislative directive focusing on the development of conditions to facilitate an inmate's
Prisons has this duty, Congress recognizes that there may be limitations and does not wish to “tie the hands of the Bureau of Prisons,” hence the inclusion of the phrase “to the extent practicable.” By inserting this phrase as a modifier of the mandatory requirement, Congress acknowledges that the Bureau of Prisons may not be able to fulfill this duty at all times, thereby creating a qualified affirmative obligation. The more controversial part of the sub-section, however, has been determining the effect of time limits contained in section 3624(c) on the Bureau of Prisons’ placement discretion.

Prior to the passage of the Second Chance Act, section 3624(c) had the following language. “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.” It was interpreted by some as a limitation on the Bureau of Prisons’ placement discretion and by others as having no effect at all. In the Second

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260 Goldings, 383 F.3d at 20-21 ("Under § 3624(c), the BOP must ensure placement under pre-release conditions except where no such placement is practicable. The provision thus reflects Congress's intent to impose upon the agency a duty to prepare prisoners for reentry into the community, without tying the hands of administrators in deciding where prisoners are to be placed. The BOP is not free to disregard that duty.") (emphasis in original).


262 Wedelstedt, 477 F.3d at 1166; Goldings, 383 F.3d at 23 (“By its plain language, § 3624(c) provides that the BOP “shall take steps” to “assure” that prisoners serve a reasonable part of the last ten percent of their prison terms “under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community.” This language imposes an affirmative obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world. It is true that this obligation is qualified."); Monahan, 276 F.Supp.2d at 210 (“The plain language of § 3624(c) places no curbs on BOP discretion as to place of confinement prior to the last six months or 10% of confinement. The provision's purpose is not to set strict conditions on when the BOP can designate a prisoner to community confinement. The statute in fact burdens the BOP with a duty (albeit a “qualified” one). See also, Prows et al. v. Ashcroft, 248 F.Supp.2d at 572.

263 Muniz, 517 F.3d 29; Wedelstedt, 477 F.3d 1160; Goldings, 383 F.3d 17; Levine, 455 F.3d 71; Woodall, 432 F.3d 235; Elwood, 386 F.3d 842; Fults, 442 F.3d 1088.

264 18 U.S.C. § 3624(c)(2007)

265 The Bureau of Prisons’ position prior to 2002 was that its placement discretion was not limited. After the Office of Legal Counsel’s memorandum proclaiming that the BOP’s interpretation was unlawful, it changed its position. Previous courts have ruled that the time limits restrict the Bureau of Prisons’
Chance Act, Congress increased the overall maximum amount of time for placement in any community correctional facility to twelve months while simultaneously limiting an inmate’s home confinement to the lesser of ten percent or six months. By the plain text of the statute, it is clear that an inmate is eligible to be placed in a community correctional facility which includes halfway house for up to twelve months. The only six month limitation is for home confinement which Congress made explicit by setting the home confinement provision apart. Congress clearly expresses its intent that an inmate shall only be limited in a particular condition not halfway house placement or any others.

Another textual change that is instructive as to the congressional intent is section 3624(c) (6) (2008). In this sub-section, Congress requires the Bureau of Prisons issue regulations that comply with the amendments in the Second Chance Act. The sub-section reads,

The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than [ninety] days after the date of the enactment of the Second Chance Act of 2007, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is - (A) conducted in a manner consistent with section 3621(b) of this title; (B) determined on an individual basis; and (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

The section clearly indicates that Congress obligates the Bureau of Prisons consideration of transferring an inmate to a halfway house until ten percent of the sentence remains. They have also held that statute limits the amount of time that an inmate can serve in a halfway house to the lesser of either six months or ten percent of the sentence. For an in-depth recounting of the numerous changes and legal maneuverings, see Section II, supra.

Other courts have held that time limits do not place any barriers on when and for how long a placement can be. For an in-depth recounting of the numerous changes and legal maneuverings, see Section II, supra.

18 U.S.C. § 3624(c)(1)

Marcus Nieto, The Changing Role of Probation in California’s Criminal Justice System, CRB-96-006 (1996) (p.53) Home confinement is a judicial or administratively imposed condition that requires an offender to remain in his or her residence for any portion of the day.

18 U.S.C. § 3624(c)(2)

18 U.S.C. § 3624(c)(1)

to adopt a set of regulations that will provide the greatest opportunity for an inmate to successfully reenter society. Moreover, this sub-section states unequivocally that the Bureau of Prisons’ placement is to be an individualized process\(^\text{272}\) and “of sufficient duration to provide the greatest likelihood of successful reintegration into the community.”\(^\text{273}\) Most importantly, this sub-section requires that the Bureau of Prisons’ regulations are to be “conducted in a manner consistent with section 3621(b).”\(^\text{274}\) This sub-section has the most compelling evidence of Congress’s intent that halfway house placement is not only to be individualized, but also that the Bureau of Prisons also is to use the five factors in section 3621(b).\(^\text{275}\) It is abundantly clear from the text alone that the Bureau of Prisons has exceeded the bounds of its discretion because its presumptive six month rule fails to adhere to sections 3621(b) and 3624(c). This conclusion is bolstered even further by looking at the purpose of the Second Chance Act.

The overall purpose of the Second Chance Act is to reduce recidivism and to increase in public safety.\(^\text{276}\) In an effort to address those dual concerns at the federal level, Congress dedicates a section in the Second Chance Act to improving federal reentry initiatives,\(^\text{277}\) providing incentives to prisoners to participate in reentry skill development.\(^\text{278}\) Congress also recommends that the Bureau of Prisons use the maximum amount of time allowed for halfway house placement as an incentive to encourage inmates to take advantage of reentry programming.\(^\text{279}\) Congress further recognizes that the federal reentry initiative should tailor reentry programs to the individual and not consider reentry as a one-size–fit-all approach.\(^\text{280}\) Thus,


\(^{275}\) Cf. Lopez, 531 U.S. at 237 (“The statute [Section 3621(e)(2)(B)] grants no entitlement to any inmate or class of inmates, the Court of Appeals noted, and it does not instruct the Bureau to make ‘individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses.’”).

\(^{276}\) 42 U.S.C. § 17501 (“The purposes of this Act are: (1) to break the cycle of criminal recidivism, increase public safety . . . .”).

\(^{277}\) 42 U.S.C. § 17541.

\(^{278}\) 42 U.S.C. § 17541(a)(2).

\(^{279}\) 42 U.S.C. § 17541(a)(1) Incentives for a prisoner who participates in reentry and skills development programs which may, at the discretion of the Director, include— (A) the maximum allowable period in a community confinement facility

\(^{280}\) 42 U.S.C. § 17541(a)(1) (“The establishment of a Federal prisoner reentry strategy to help prepare prisoners for release and successful reintegration into the community, including at a minimum, that the Bureau of Prisons: (A) assess each prisoner’s skill level . . . at the beginning of the term of imprisonment of that
while Congress could have accepted the Bureau of Prisons’ statutory interpretations following the policy change in 2002 and 2005, it did not.

Congress was no doubt aware of the unease with regard to the changes of the Bureau of Prisons’ placement policy, and could have easily retained the ten percent, six month policy. In doing so, Congress would have affirmed the Bureau of Prisons’ policy stance, along with its interpretation that it was permitted to restrict placement based upon a categorical exercise of discretion. It did not. In the alternative, Congress could have also elected to give the Bureau of Prisons unfettered discretion, which it chose not to do. Instead, Congress expanded the time limit for placement and reiterated the importance of using halfway houses. As previously noted, Congress explicitly required the Bureau of Prisons to issue regulations that were consistent with section 3621(b), and highlighted the need for individual assessments prior to placements. The presumptive six month rule therefore does not accomplish those goals.

Lastly, using common sense, a reviewing court would determine that Congress did not intend for the Bureau of Prisons to enact a policy that would limit placement, thereby undermining the goals of reentry. “Congress is not likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” The economic importance of halfway house placement is clear. Inmates that are placed in halfway houses are more likely to succeed and not recidivate. The more time that an inmate spends in a halfway house means a reduction in incarceration costs which in this current economic downturn allows limited resources to be diverted elsewhere. The restricted use of halfway houses

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286 U.S. Dept. of Justice, Federal Bureau of Prisons, Program Statement 7310.04, “Community Corrections Center Utilization and Transfer Procedure” (12/16/98). (“Participating in community-based transitional services may reduce the likelihood of an inmate with limited resources from recidivating, whereas an inmate who is released directly from the institution to the community may return to a criminal lifestyle.”) p. 1.
under the presumptive six month rule keeps incarceration costs high because it caps the length of time that an inmate can spend in a halfway house. Collaterally, the policy has prompted numerous legal challenges for almost a decade. Finally, the extraordinary justification exception requires institutional staff to re-evaluate an inmate after a decision has been made rather than conduct the individualized assessment in advance. Apart from these economic issues, there is also a political component.

Reentry is a social policy that has achieved national importance and continues to garner attention. The fact that Congress amended the provisions that govern halfway house placement in the Second Chance Act is a strong indication that Congress intended that the placement of federal inmates in such facilities would be commonplace and not limited. In omitting a specific time limit for placement, Congress allowed the Bureau of Prisons to place an inmate in a halfway house for a period of time that satisfies the statutory demands of section 3624(c) but in no way did Congress intend for the Bureau of Prisons to create a presumption limiting that placement of an inmate to six months.

The question of whether the Bureau of Prisons’ discretion to cap the placement of an inmate transferred to a halfway house to six months was addressed by Congress in clear and unambiguous language. The Bureau of Prisons is to place an inmate in a halfway house only after considering the five factors contained in section 3621(b) and to place that inmate in a halfway house for a reasonable time period to insure successful reentry. Congress’ language indicates that the Bureau of Prisons’ presumptive six month rule not only contravenes the statutory mandates of sections 3621(b) and 3624(c), but it also exceeds the discretion that has been granted to the agency. If, however, a court were to find that Congress was not clear and ambiguous, then that would necessitate a review under step two of Chevron to assess whether the Bureau of Prisons interpretation was reasonable. Although courts rarely disagree with an agency’s interpretation of an ambiguous statute, the Bureau of Prisons would not prevail in this instance.

shift in correctional policy and the court’s response.” at 23. (“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.”).

288 See, Section II, supra.
289 See Section I, supra.
290 Donald S. Dobkin, 17-SPG Kan. J.L. & Pub. Pol'y 362, 373-74, (“To date, an agency’s decision has not been invalidated by the Supreme Court under step two of Chevron (though several Courts of Appeal have done so.”).
2. Step Two – Unreasonable Interpretation

Under step-two of *Chevron*, a court will review an agency’s interpretation of a statute after having concluded that the statutory meaning is either silent or ambiguous to determine whether the agency’s interpretation is reasonable. If the court finds that the interpretation is a reasonable one, the court will defer to the agency.\(^{291}\) By deferring to the agency, the court is recognizing not only the agency’s expertise but also the “democratic accountability of agencies.”\(^{292}\)

In conducting a step-two analysis, Courts will look to statutory materials and the agency’s reasoning process.\(^{293}\) Because the reliance upon statutory materials resembles the analysis undertaken at step-one, it has been suggested that such analysis remain at step-one.\(^{294}\) This Article adopts that position and will limit the step-two analysis of the reasonableness of the Bureau of Prisons’ actions to the agency’s reasoning process. To determine reasonableness, courts look to see whether the agency’s interpretation is supported by a reasonable explanation and is logically coherent.\(^{295}\) Although it is rare that a court will determine an agency’s actions unreasonable, it is not unprecedented.\(^{296}\) This type of examination is also


\(^{293}\) It has been noted that the step-two analysis occurs at a “high level of generality.” *Chevron* U.S.A. Inc., 467 U.S. at 844 (cited by NationsBank of N.C. v. Variable Annuity Life Ins. Co, 513 U.S. 251, 257 (1995)).


known as an arbitrary and capricious review, similar to the review under the Administrative Procedures Act.  

The review of an agency’s action under step-two is not restricted to a single methodology. The court in Chevron noted that a court must affirm the agency’s interpretation even if it is not the best interpretation possible or the one that the court would have endorsed. The agency’s interpretation is therefore not impermissible merely because it differs from other potential interpretations. Under this review, the court has stated that,

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The Bureau of Prisons has arbitrarily and capriciously selected six months as the length of time to place all inmates. It claims that its experience has shown that six months is enough time for an inmate to adequately prepare for reentry. Moreover, the Bureau of Prisons asserts that its policy incorporates the five factors required under section 3621(b) and that the extraordinary justification exception does not restrict an inmate’s

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297 Arbitrary and capricious review has been described in a variety of ways, thus leaving the standard of review unclear. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (describing arbitrary and capricious review as “searching and careful.”).


300 Chevron U.S.A., Inc. 467 U.S. at 844.

301 Id. at 843 n. 11.


303 See Lappin, supra note 29; Vroegh, supra note 29.

304 Woodall, 432 F.3d at 247-48 (“The BOP has stated, and the District Court agreed, that it considered the statutory factors in promulgating the 2005 rules.”).
placement. The Bureau of Prisons further explains that its interpretation
of section 3621(b) should be considered the same as its interpretation of
section 3621(e) which was held to be valid in Lopez v. Davis. The
Bureau of Prisons’ reasoning process is inaccurate.

First, the experiential data that the Bureau of Prisons offers appears to
be anecdotal and unsupported. Discovery requests seeking the information
have gone unanswered. The Bureau of Prisons has exercised discretion
in adopting a rule that responds to the changes in the Second Chance Act,
but it has failed to properly exercise this discretion. In other words,
Congress has delegated to the Bureau of Prisons the discretion to designate
the place of imprisonment and to provide reentry programs for an inmate.
Congress has not however designated to the Bureau of the Prisons the
discretion to incorporate the five factors into its policy. A policy that does
so denies the inmate the benefit of an individualized assessment.

Second, the policy contravenes the Bureau of Prisons’ pre-2002
statutory interpretation. Although a change in an agency’s statutory
interpretation does not signify that the new interpretation is unreasonable,
it is instructive, pointing to a lack of proper reasoning in arriving at the new
policy. The initial change in the policy was arrived at by an external third
party, the Office of Legal Counsel. Their belief was that the Bureau of
Prisons’ statutory interpretation was erroneous, thus unlawful. From the
reasons offered, the basis of that conclusion was more political than
empirical, especially when it was noted that white collar offenders
benefitted more often than others. White collar bias is a false perception -

305 Daraio, 2009 WL 303995 *5 (D.Conn.) (“As a result, it is permissible for
the BOP to search for ‘extraordinary justification’ before granting an RRC
placement in excess of 180 days provided that the BOP considers the five-factor
statutory list. This is so because ‘extraordinary justification’ essentially acts as a
’substandard for deciding whether to grant a request for extended placement in an
RRC’.”) (internal citations omitted); Fariduddin v. Morrison, 2007 WL 107678, *1
(D. Minn.) (“requiring “extraordinary justification” to extend CCC placement
beyond six months does not violate § 3621(b) because it does not preclude the
completion of an individualized assessment. Indeed, it implies that an
individualized determination is necessary to determine whether CCC placement
beyond six months is warranted.”).


307 Stephen Sady, Memorandum In Support of Amended Petition for Writ of
Habeas Corpus, Pierce v. Thomas, Attachment A.

308 Chevron U.S.A., Inc., 467 U.S. at 863-64; Rust, 500 U.S. at 186-87; Indep.
Bankers Ass’n v. Farm Credit Admin., 164 F.3d 661, 668 (D.C. Cir. 1999).

309 OLC Memo of 12/13/02, supra note 58.

310 Id.
Although that may have been the perception, it was unfounded.\textsuperscript{311} Specifically, the assertions were that this type of placement evidenced a practice of bias in favor of a certain class and race of inmates.\textsuperscript{312} The change in the policy however will have a negative impact on female inmates, specifically African-American women.\textsuperscript{313} The Bureau of Prisons’ policy was hijacked by politics and not proof. Rather than maintain its open transfer policy, the Bureau of Prisons conceded, promulgating a policy that was contrary to its statutory mandates and contrary to congressional intent.

The Bureau of Prisons has stated that its discretion under section 3621(b) is similar to that exercised under section 3621(e), which was upheld in \textit{Lopez}.\textsuperscript{314} Several courts held correctly that the language of section 3621(e) and because it was ambiguous, then the Bureau of Prisons was entitled to provide an interpretation to fill the statutory gap left by Congress. Section 3621(b) has no gap. Congress has laid out the five factors and has emphasized repeatedly the necessity of conducting an individualized assessment. Therefore, any policy that presumes to place an inmate in a halfway house for a set period of time prior to evaluating that inmate under the five factors is arbitrary and capricious and not deserving of deference.

A court looking at the Bureau of Prisons’ reasoning process should determine that its statutory interpretation of section 3621(b) is

\textsuperscript{311} Todd Bussert, Peter Goldberger and Mary Price. “New Time Limits on Federal Halfway Houses: Why and how lawyers challenge the Bureau of Prisons’ shift in correctional policy and the court’s response.” at 23. (“[Bureau of Prisons] 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 benefitted from this longstanding practice . . . 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 the Enron types.’”).


\textsuperscript{313} Cutler v. United States, 241 F. Supp 2d 19, 23 n.3 (D.D.C. 2003) as cited in Todd Bussert, Peter Goldberger and Mary Price. “New Time Limits on Federal Halfway Houses: Why and how lawyers challenge the Bureau of Prisons’ shift in correctional policy and the court’s response” at 23 (“[M]ore than a third of prisoners designated to serve their entire sentences in CCCs at the time of the policy change were female, even though women comprise less than 7 percent of the general federal prison population.”); Borges, supra note 40, at 142 (“It is important to note that most of the prisoners affected by the policy are not corporate tycoons, but rather single mothers on welfare, low-end drug dealers, check forgers, and student loan offenders.”).

\textsuperscript{314} 531 U.S. 230 (2001).
unreasonable. Past challenges, especially to the 2005 Rule, indicate that courts are more than likely to be divided. In fact, the Eighth Circuit which sided with the petitioners when challenging the 2005 Rule has since reversed course with respect to challenges to the new presumptive six month rule. A review under step-two may result, incorrectly, in an affirmation of the presumptive six month rule depending upon the circuit because courts are less rigorous and more deferential at step-two. In an effort to increase the rigor of judicial review of agency interpretation, courts have applied a hard look review. Under this doctrine, there is no question that the presumptive six month rule would be found to be an impermissible exercise of discretion and struck down.

**B. A Hard Look at the Bureau of Prisons’ Placement Policy**

In reviewing whether an agency’s statutory interpretation is reasonable, courts also employ a hard look review, which is more a stringent analysis

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315 70 FR 1659.
316 Miller v. Whitehead, 527 F.3d 752, 756 (8th Cir. 2008) (“The inmates here argue that like the regulation in Fults, the program statement categorically excluded a class of inmates from the opportunity to be transferred. We reject this contention . . . .”).
of an agency’s actions than determining whether the interpretation is reasonable. Under this type of review, courts will tend to look more closely at the “substantive rationality” of the agency’s actions and also “more broadly at the agency’s reasoning process.” The purpose of a hard look review is to insure that an agency has taken a critical look at the issue before it, and has employed a reasoned process in its decision-making.

In practice, courts have looked at the relationship between the statutory purposes or requirements and the agency’s interpretation. Courts seek to determine whether there has been a “clear error in judgment” on the agency’s part, or whether the agency’s interpretation is so implausible that it could not be ascribed to a difference in view of the product of agency expertise. Moreover, courts will also look at whether the agency has failed to consider key aspects of the issue presented, such as the impact, cost, or the “full range of facts affecting its policy decision.” Furthermore, courts have looked to whether the agency has failed to respond to relevant arguments or comments. With this type of review,

Decisions, 1987 DUKE L.J. 387, 419 (1987). See also, 33 Fed. Prac. & Proc. Judicial Review § 8355 (“[T]he court focuses on the validity and appropriateness of the administrative decisionmaking with intense scrutiny of the decision itself. It looks for signs or ‘danger signals’ that the administrative decisionmaking was not adequate.”).


Citizens to Preserve Overton Park, Inc., 401 U.S. at 416


Am. Iron & Steel Inst. v. EPA, 115 F.3d 979 (D.C. Cir. 1997); Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73 (1st Cir. 1993).

Timpinaro v. SEC, 2 F.3d 453 (D.C. Cir. 1993).


courts are not merely deferring to the agency’s judgment and thus abdicating judicial responsibility, rather the court is adhering to its proscribed role of critically analyzing the agency’s actions.\(^{329}\) Although there are courts that engage in a hard look review, the admonition that the court is not to substitute its own judgment for that of the agency is still applicable.\(^{330}\) A hard look review of the Bureau of Prisons’ presumptive six month placement policy would yield the result that the Bureau of Prisons has acted improperly and exceeded the boundaries of its discretion by creating an \textit{a priori} rule that limits an inmate’s halfway house time to six months.

1. The Bureau of Prisons Uses Impermissible Factors

Courts will set aside an agency’s action if the agency relied upon factors that are not to be considered or ignored those that are to be considered.\(^{331}\) The presumptive six month rule is an example of the Bureau of Prisons’ failure to consider the five factors required to be considered under section 3621(b).\(^{332}\) The implementation of a policy that presumes that a placement of six months is sufficient to achieve the reentry needs of each individual inmate based upon undocumented agency statements disregards Congress’ intent under section 3621(b). Moreover, the rule ignores the stated purposes

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\(^{331}\) Natural Resources Defense Council v. Kempthorne, 506 F.Supp.2d 322, 347 (E.D.Cal. 2007); Defenders of Wildlife v. Babbitt, 958 F.Supp. 670, 685 (D.D.C. 1997) (“Although the Court must defer to an agency’s expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts. Here, the FWS has consistently ignored the analysis of its expert biologists as to each of the five statutory factors, basing its decision on unsupported conclusory statements as well as facts which are directly contradicted by undisputed evidence in the Administrative Record. The FWS decision not to list the Canada Lynx and grant it the protections of the ESA is arbitrary and capricious, applied an incorrect legal standard, relied on glaringly faulty factual premises, and ignored the views of its own experts. Consequently, it must be set aside.”).

\(^{332}\) 18 U.S.C. § 3621(b).
and goals of the Second Chance Act which was passed to improve the reentry prospects of returning offenders.

By claiming that six months is enough time, the Bureau of Prisons has is treating all federal inmates alike. The presumptive six month rule exceeds the discretion granted to the Bureau of Prisons in the same way that 2005 Rule based upon a categorical exercise of discretion exceeded that discretion. The matching of an inmate to a specific facility is intended to be based upon the five express legal factors in section 3621(b): the resources of the facility, statements of the sentencing court, any pertinent policy statement of the Sentencing Commission; the nature of the offense and the characteristics of the offender. The promulgation of a rule and the adoption of a blanket agency policy, however, ignore the individualized assessment that is required. This requirement is clearly reflected in the two factors that relate specifically to the offender—the nature of the offense and the characteristics of the offender. Moreover, the rule also fails to give proper effect to the factor that mandates the Bureau of Prisons to acknowledge the statements of the sentencing court when making its placement decision. The rule therefore violates the legal mandate of the statute outright. The Bureau of Prisons has suggested that the presumptive six month rule is a valid exercise of discretion because of the extraordinary justification exception. That, however, is incorrect.

At first glance, the extraordinary justification exception appears to allow for an individual assessment of each inmate, thus complying with the demands of section 3621(b). The exception as a remedy for the rule’s infirmity is misguided. The exception, which is raised by the inmate, provides for a post-hoc rationale to increase the amount of time in a halfway house. Section 3621(b) requires the Bureau of Prisons to make a determination in advance of considering the five factors. This additional non-specific and non-identified factor was never contemplated by Congress.

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333 18 U.S.C. § 3621(b)(1)-(5)
334 Wedelstedt, 477 F.3d at 1168 ("The BOP cannot validate this otherwise invalid regulation by claiming to have categorically considered the five statutory factors during the rulemaking process. The individualized nature of three of the five factors—the nature of the prisoner's offense, the prisoner's history and characteristics, and the sentencing judge's statement—made such consideration impossible."). But see, Goldings, 383 F.3d at 33 ("Even if the statutory criteria for making assignments and transfers could be read to guarantee some sort of individualized treatment, it is apparent to me that BOP would still have the authority to make a categorical rule excluding some or all CCC placements, except as required for end of sentence placements governed by § 3624(c)").
335 18 U.S.C. § 3621(b)(2)-(3)
336 18 U.S.C. § 3621(b)(4)
While the five factors to be considered are not an exhaustive list and other factors can be considered, the enumerated five factors must be considered, and prior to the designation of the place of imprisonment. Furthermore, the exception is far too imprecise, requiring a more critical review by the courts.

In the end, a reviewing court may find that the Bureau of Prisons did not rely upon impermissible factors and that this reasoning is unpersuasive. Several courts did so when responding to challenges to the 2005 Rule. Upon further examination using additional methods under a hard look review, such as looking to the relationship between the agency’s action and the purpose of the statute, a court would determine that the Bureau of Prisons’ statutory interpretation is arbitrary and capricious.

2. No Relationship to Statutory Purpose or Requirements

An agency’s action will be set aside if its action is a “clear error in judgment.”337 The purpose of section 3621(b) is to insure individualized assessments prior to any placements. The presumptive six month rule does not allow that occur. It undermines not only the purpose of section 3621(b) but it also disregards the requirement of section 3621(b). Section 3621(b) recognizes that the Bureau of Prisons has constraints in this regard which is why it has allowed the Bureau to designate “any available penal or correctional facility.”338 And yet, while Congress has delegated the authority to determine which facility, it has provided a set of guidelines that are to be adhered to when matching an inmate to a specific facility which implicates the length of time that inmate shall spend in such a facility. To assume that each inmate is well-served with a six month stay in a halfway house ignores the underlying purpose and requirement of the statute to place each inmate according to an individualized assessment. The same can be said for the companion statute section 3624(c).

The purpose of section 3624(c) is to insure that an inmate has a reasonable opportunity to successfully reenter society.339 The presumptive six month rule thwart the statutory purpose and requirement of this statute as well. Under this statute, Congress purposefully enlarged the maximum amount of time to be spent in a halfway house. Congress has recognized the inherent difficulties that inmates face upon release and have provided a mechanism for increased pre-release assistance. The Bureau of Prisons rule

337 Citizens to Preserve Overton Park, Inc., 401 U.S. at 416 ("[T]he court must consider . . . whether there has been a clear error of judgment.").
339 18 U.S.C. § 3624(c) affirmative duty; 18 U.S.C. § 3621(b) discretionary authority.
is contrary to that purpose. The rule does, theoretically, adhere to the requirement that the Bureau of Prisons provide a set of conditions for successful reentry but the time limit that it has decided is appropriate does not provide a “reasonable opportunity.” Apart from a finding that the rule is inconsistent to the statutory purpose and requirements, the Bureau of Prisons has also failed to consider key aspects of the issue.

3. The Bureau of Prisons Disregards Key Aspects of the Issue

A reviewing court will determine that an agency’s action is to be set aside if it did not properly consider important aspects. Courts have invoked this basis for reversing an agency’s decision as a means to invalidate an agency’s policy decision. The Bureau of Prisons has stated that the presumptive six month rule is based upon their experience that half a year is enough time for an inmate to achieve the goals of reentry. In its estimation of the amount of time, the Bureau of Prisons has failed to consider an important aspect of the placement issue. The time that an inmate spends in a halfway house is part of a larger legislative overhaul of reentry. The longer the placement time in such a facility increases the likelihood that an offender will be successful in their bid to break the cycle of recidivism.

Halfway houses provide an environment where offenders can engage in law-abiding behavior while continuing to be in a structured environment that provides support. The placement affords the offenders with the opportunity to engage in law-abiding activity without being thrust back into a community setting without assistance and that may have been a contributing factor to commit the initial offense. It is a buffer between prison and the community that provides a controlled environment to address the deficits that may have existed prior to conviction. This type of environment affords the inmate with a period of readjustment that allows him the opportunity to mitigate the negative effects of prison, and to find

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341 “An agency action will be set aside if the agency failed, without adequate justification, to give reasonable consideration to an important aspect of the problems presented by the action, such as the effects or costs of the policy choice involved, or the factual circumstances bearing on that choice.”
343 Stephen R. Sady, Memorandum In Support of Amended Petition for Writ of Habeas Corpus in Pierce v. Thomas.
344 Donald Clemmer, CORRECTIONAL CONTEXTS: Contemporary and Classical Readings (3rd Ed.) Edward J. Latessa and Alexander M. Holsinger, eds. ch. 8 2006; The Impact of Time-Served and Regime on Prisoners' Anticipation of
stable employment. The time spent in a halfway house gives the inmate the opportunity either to reconnect with his family and to restore relationships or to remain connected, rather than being subject to the negative impact of being incarcerated in a traditional penal facility. Thus, Congress increased the maximum length of time that an inmate could be placed in a halfway house to provide the inmate with a greater opportunity to be successful upon reentry.

When inmates prepare for release, the reentry programming accomplishes two related goals. First, the inmate must undergo a transition process of de-prisonization or de-institutionalization. In other words, it is necessary for the inmate to move beyond the psychology of survival associated with being incarcerated and adapting to a lifestyle whereby every move is constricted. Secondly, the halfway house must assist the inmate in acquiring a skill set that may have never existed or atrophied while incarcerated. Congress recognized that a longer placement is not only useful but an integral and easy way to improve an inmate’s reentry prospects. Congress did not contemplate that the Bureau of Prisons would


346 Borges, supra note 40, at 142 (“Now, the Bureau of Prisons has been ordered by the Justice Department not to accommodate judicial recommendations. As a result, non-violent offenders will be sent to prisons where they will be placed with hardened criminals.”).

347 Much has been written about prison culture and that the tools necessary to survive while incarcerated are antithetical to free society.
create a policy to limit placement, particularly in light of the fact that Congress elected not to affirm the Bureau of Prisons’ 2002 Policy or 2005 Rule. Congress expressly selected a time limit that was twice as long as the Bureau of Prisons.\textsuperscript{348} Moreover, the Second Chance Act cleared up confusion surrounding the numerous changes to the Bureau of Prisons’ placement policy.\textsuperscript{349} In the Congressional Record, the importance of reentry and the reduction of recidivism are repeatedly referenced.\textsuperscript{350} From that language, it is clear that Congress sought to provide a holistic approach to reentry that benefits the individual offender, the children and family of offenders, and the community at large.\textsuperscript{351} The presumptive six month rule is in direct opposition to Congress’ intended purpose.\textsuperscript{352} Lastly, courts will review an agency’s actions in light of whether the agency has responded to relevant arguments or comments.

4. Failure to Respond to Relevant Arguments or Comments

A reviewing court seeking to determine whether an agency’s interpretation is reasonable will look at whether the agency’s actions are responsive to relevant arguments or comments.\textsuperscript{353} In accord with the directive in the Second Chance Act, the Bureau of Prisons promulgated an interim rule, which it submitted for public notice and comment.\textsuperscript{354} The public comments contend that a six month placement is not enough time for an inmate to readjust to law-abiding society and thus be successful upon

\begin{itemize}
\item \textsuperscript{348} 18 U.S.C. § 3624(c).
\item \textsuperscript{349} See Section II, supra.
\item \textsuperscript{350} S10717, Sen. Biden (October 7, 2004); S4430, Sen. Kennedy (April 12, 2007); H5691, Congressman Davis (May 23, 2007) and H8280 (July 23, 2007); E1644, Congressman Rangel (July 27, 2007); H12717, Congressman Jackson-Lee (Nov. 5, 2007) and (Nov. 6, 2007) But see, H5283, Congressman Gohmert (May 16, 2007).
\item \textsuperscript{351} Second Chance Act of 2007, P.L. 110-199, 2008 H.R. 1593.
\item \textsuperscript{352} Stephen R. Sady, Federal Bureau of Prisons Oversight Hearing: The Bureau of Prisons’ Should Fully Implement Ameliorative Statutes to Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration (July 21, 2009); Stephen R. Sady and Lynn Deffebach, Update on BOP Issues Affecting Clients Before and After Sentencing (February 2007)
\item \textsuperscript{353} A Guide to Judicial and Political Review of Federal Agencies, John F. Duffy and Michael Herz, eds., American Bar Association (2005), § 8.028 (p. 191)(“An agency decision will be set aside if the agency failed to consider submitted arguments, or respond to relevant and significant comments, made by the participants in the proceeding that gave rise to the agency action.”).
\item \textsuperscript{354} 73 FR 62440
\end{itemize}
reentry back into society.\textsuperscript{355} The comments therefore requested that the Bureau of Prisons reconsider its rule and change it before it became final. Various stakeholders, such as the families of inmates, organizations and the inmates, requested a rule that provides for longer halfway house placements.\textsuperscript{356} Of the more than one hundred entries, there was not a single comment that supported the presumptive six month placement absent an extraordinary justification policy.\textsuperscript{357}

Although the information that was submitted appears to be anecdotal and not supported by evidence, the same, however, can be said of the Bureau of Prisons reliance upon agency experience as the basis for the rule. The recommendations by the public represent a broad spectrum of stakeholders: current and former offenders, family members of offenders, legal associations and community organizations. Each has offered its opinion that the presumptive six month rule is flawed because it fails to provide an adequate amount of time which means that the rule was not individually based. The Bureau of Prisons’ response to the comments has been unpersuasive and it has not proffered any evidence in support of its claims that a six month placement is sufficient. This lack of attention and failure to address the public comments is a classic reason for reversal under hard look review. The public notice and comment period offers the Bureau of Prisons ample opportunity to respond to each comment and demonstrate its reasoning behind the promulgation of the rule. The Bureau of Prisons’ reasons, however, are inadequate, thus further signaling that the Bureau of Prisons’ interpretation is unreasonable and that it has exceeded the bounds of its discretion. The Bureau of Prisons rule also ignores relevant arguments about the importance of halfway house placement.

The Second Chance Act is not a run-of-the-mill piece of legislation. It was highlighted by three presidents\textsuperscript{358} and survived three Congresses.\textsuperscript{359} Eventually, it was passed as a bi-partisan legislative effort with the express purpose of responding to the growing concerns about the increase in the numbers of inmates exiting correctional facilities annually, and the increase in the cumulative number of inmates in communities. As a result, Congress was well aware that business as usual with respect to reentry was ineffective. Hence, Congress expressly increased the length of time that an inmate was eligible to spend in a halfway house.\textsuperscript{360}

It is inescapable that Congress intended the Bureau of Prisons to take

\footnotesize{\textsuperscript{355} See Section II.C. and notes 174-178, supra.}
\footnotesize{\textsuperscript{356} Id.}
\footnotesize{\textsuperscript{357} Id.}
\footnotesize{\textsuperscript{358} See supra, n. 4.}
\footnotesize{\textsuperscript{359} Id.}
\footnotesize{\textsuperscript{360} 18 U.S.C. \S 3624(c).}
greater advantage of halfway houses as a resource for reentry. 361 Halfway houses, although structured, are less restrictive. Inmates, therefore, gradually transition from incarceration back to society.362 These facilities reduce the burden and stress associated with that transition, thereby allowing inmates to readjust, not only to living freely in society, but also to performing basic and necessary societal functions, such as maintaining employment and paying rent and other bills.363 Moreover, halfway houses provide an in-house support network for the full range of obstacles that offenders may face upon release, such as finding suitable and steady employment, and providing counseling for substance abuse and mental health. Unlike traditional correctional facilities, halfway houses are designed to house inmates whose release dates are closer and thus in the right state of mind for reentry. Apart from the individual, halfway houses also benefit the inmate’s family and the community at large.

Halfway houses allow inmates and families the opportunity to reconnect and to reestablish interpersonal relationships that may have been impeded or severed outright due to the offender’s incarceration. Because of institutional space limitations, security designations, or other requirements, inmates are often housed in facilities that are far from their communities, and thus families. Due to the distance and travel costs associated with visitation, such as transportation, housing, and food, families are often limited in their interactions with inmates. Halfway houses provide a transitional space where inmates and families can become reacquainted with each other without the immediate pressures associated with sharing the same living environment.

The Bureau of Prisons previously interpreted the two statutes, sections

361 Borges, supra note 40, at 201 (“Halfway houses and community confinement centers provide an effective alternative to prison for white-collar offenders because they serve as a punitive sanction for offenders serving a short term of imprisonment. Furthermore, confinement centers make the transition back into the community easier for offenders by allowing them to participate in work-release programs, community activities, treatment, and maintain ties to family members, including children or ill parents.”)

362 Id. at 142 (“Moreover, halfway houses have played a small, but important, role in helping ex-offenders reintegrate into society.”).

363 Roberts, supra note 35, at 56 (“While in CCCs, inmates prepare for release by participating in specialized training programs stressing family and work adjustment, drug treatment, and relapse prevention strategies and by securing post-release employment and living accommodations. Community volunteers provide support in helping CCC residents successfully reintegrate into the community.”). See, id, (“[I]t is reasonable to conclude that halfway houses, offering work training, education, treatment, employment, and connections to family ties for offenders, are better able to rehabilitate and reintegrate the offender back into the community.”).
3621(b) and 3624(c), to allow early transfers to\textsuperscript{364} or direct judicial placements into halfway houses. The Bureau of Prisons itself has expressly stated that such facilities serve an important function in reducing recidivism, particularly for inmates that have “limited resources.”\textsuperscript{365}

Halfway houses, according to the Bureau of Prisons, operate as a necessary transitional stage for inmates moving from more secure correctional environments to living free in society.\textsuperscript{366} In acknowledging the important function that halfway houses serve,\textsuperscript{367} the Bureau of Prisons remarked that eligible inmates should be released to the community through such a transitional stage rather than directly to the community.\textsuperscript{368} In fact, the

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\item \textsuperscript{364} Borges, \textit{supra} note 40, at 142 (“Under the former policy, the Bureau of Prisons had the authority pursuant to 18 U.S.C. § 3621(b) to place low-level, non-violent offenders in community confinement centers or halfway houses. Section 3621(b) gives the Bureau of Prisons the sole authority to determine the placement of federal offenders sentenced by federal judges, whether it is to prison or a halfway house . . . Under the old policy, federal judges had the ability to recommend, when appropriate, that non-violent offenders serve their short terms of imprisonment in community confinement centers rather than prisons. This practice was routinely honored. Thus, by its own initiative or by judicial recommendation, the Bureau of Prisons had the authority under its former policy to send low-level, non-violent offenders to community confinement centers.”)
\item \textsuperscript{365} U.S. Dept. of Justice, Federal Bureau of Prisons, Program Statement 7310.04, “Community Corrections Center Utilization and Transfer Procedure” (12/16/98). (“Participating in community-based transitional services may reduce the likelihood of an inmate with limited resources from recidivating, whereas an inmate who is released directly from the institution to the community may return to a criminal lifestyle.”) p. 1
\item \textsuperscript{366} Id. Purpose and Scope. (“[A]n excellent transitional environment.”)
\item \textsuperscript{367} The Bureau of Prisons pioneered the way by using halfway houses early in its history as an effective tool. Roberts, \textit{supra} note 35, at 55 (“The Bureau of Prisons was a key player in the development of community corrections. In 1960, community corrections was in its infancy. The three halfway houses that then existed in the United States were operated by religious organizations to provide shelter for recently released ex-prisoners who had nowhere else to live.”); PAUL W. KEVE, \textsc{PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS} 216 (Southern Illinois University Press 1991). (In 1961 after his appointment as Attorney General, Robert Kennedy implemented a “project to inaugurate prerelease guidance centers, the Bureau’s first move into the use of halfway houses.”); \textsc{ESCAPING PRISON MYTHS: SELECTED TOPICS IN THE HISTORY OF FEDERAL CORRECTIONS} 13, 15, 19 (John W. Roberts, ed., 1994) (discussing the expansion and increased usage of halfway houses at different points in time).
\item \textsuperscript{368} U.S. Dept. of Justice, Federal Bureau of Prisons, Program Statement 7310.04.
\end{itemize}
Bureau of Prisons has fought to retain the ability to place inmates in halfway houses by challenging an earlier interpretation that determined that such facilities were not to be used. Moreover, halfway houses are a more cost effective form of imprisonment than traditional penal facilities thus benefitting the entire community financially. Although the Bureau of Prisons has identified such benefits, it continues to promulgate the six month rule citing agency experience as the reason. In the end, the Bureau of Prisons may come to the conclusion that a six month length of stay is an appropriate amount of time for an inmate to spend in a halfway house in order to successfully reenter society, however, the Bureau of Prisons cannot fail to engage in an individualized assessment, which Congress explicitly states must occur.

In 2005, the courts differed as to whether the Bureau of Prisons’ categorical exercise of discretion was proper. Unlike the presumptive six month rule, the issue of whether the Bureau of Prisons was entitled to engage in a categorical exercise of discretion was unresolved because the passage of the Second Chance Act mooted the question. The question, however, has been resurrected and is ripe for judicial review. “It’s déjà vu all over again.” This time, however, the courts need to respond with a definitive answer, which is unlikely to be forthcoming.

The courts have consistently relied upon two doctrines to deny petitioners judicial access – failure to exhaust administrative remedies and mootness. In light of what is at stake, decreasing recidivism and increasing public safety, the federal courts should relax their adherence to the failure to exhaust an administrative remedy requirement and adopt a public importance exception to the mootness doctrine. These two doctrines are proving to be obstacles that are preventing an extensive judicial review of the Bureau of Prisons’ actions.

IV. DOCTRINAL OBSTACLES TO JUDICIAL REVIEW OF PLACEMENT POLICY

If a person can convince a court to review the case, they at least have a chance of winning the court over. The problem however, is that the courts

369 Macaroni, 251 F. Supp.2d at 1022-1023
370 I would also disagree with the Bureau of Prisons’ assessment. If the Bureau of Prisons’ placement of six months or less had been effective then the recidivism rates would not have been as high with thin the first year or release or within the first three years. While the high recidivism rates cannot be full attributed to placing inmates in halfway houses for a maximum of only six months, it begs the question why Congress expanded the time limit to twelve months and why during the public and notice comment period opponents recommended twelve month placement?
are using a number of doctrines to block review – exhaustion\textsuperscript{371} and mootness.

\textbf{A. Failure to Exhaust Administrative Remedies}

An inmate who fails to exhaust the administrative process\textsuperscript{372} will not be heard unless the court recognizes an exception that permits the inmate to circumvent the administrative process.\textsuperscript{373} The purpose for the exhaustion doctrine is to allow the administrative agency the opportunity to redress a party’s grievance without judicial interference.\textsuperscript{374} The exhaustion doctrine

\begin{footnotesize}

\textsuperscript{372} –Darby v. Cisneros, 509 U.S. 137, 144 (1993) The exhaustion of administrative remedies is a judicial doctrine that requires an individual to submit a grievance to the agency’s administrative remedy process before seeking relief from the courts. The purpose of the requirement is to recognize that the agency has been delegated primary responsibility for enacting Congressional programs; to allow the agency an opportunity to remedy the grievance without judicial interference; and to provide a record if judicial review is warranted.

\textsuperscript{373} Esters v. Jett, 2009 WL 3417900, *3 (D.Minn. 2009) (“The BOP has established a three-tiered administrative remedy program to address prisoner concerns relating to any aspects of confinement. The first tier of the process requires that an inmate initially seek informal resolution of the grievance and, if there is no informal resolution he must present the complaint to the warden of the facility of confinement. Thereafter, at the second tier, an unsatisfactory response from the warden may be appealed to the BOP Regional Director, and finally, the response of the Regional Director may be appealed to the Central Office of the BOP at the third tier. A prisoner's complaint has been exhausted, and is thereby subject to district court review, upon receipt of the Central Office response.”) (internal citations omitted); Williams v. Outlaw, 2009 WL 5184329 (E.D.Ark.); Jones v. Zenk, 495 F.Supp.2d 1289 (N.D. Ga. 2007); Kennedy v. Berkebile, 2009 WL 151207 (N.D.Tex.). \textit{See also}, Legal Resource Guide to the Federal Bureau of Prisons (2008), Section G (p. 34) (detailing the Administrative Remedy Program and the time limits).

has several exceptions\textsuperscript{375} that are invoked to relieve the petitioner of the duty of having to navigate the established administrative process prior to seeking judicial review. The exceptions that have previously been recognized are: irreparable harm; reconsideration or administrative appeals; express or implied waiver; futility; manifest violation of constitutional rights; purely legal issue; procedural challenge; challenge of bias or

exhaustion doctrine permits the agency to perform this function, including in particular the opportunity for the agency to apply its expertise and to exercise the discretion granted it by the legislature. Second, it is more efficient to permit the administrative process to proceed uninterrupted and to subject the results of the process to judicial review only at the conclusion of the process. Three, agencies are not part of the judicial branch; they are autonomous entities created by the legislature to perform a particular function. The exhaustion doctrine protects the agency autonomy. Fourth, judicial review of agency action can be hindered by failure to exhaust administrative remedies because the agency may not have an adequate opportunity to assemble and analyze the facts and to explain the basis for its action. Fifth, the exhaustion requirement reduces court appeals by providing the agency additional opportunities to correct its prior errors. Sixth, allowing some parties to obtain court review without first exhausting administrative remedies may reduce the agency’s effectiveness by encouraging others to circumvent its procedures and by rendering the agency’s enforcement efforts more complicated and more expensive.”). \textit{See}, Myers v. Bethlehem Shipbuilding Corp, 303 U.S. 41 (1938) (discussing the application of the exhaustion doctrine); McKart v. United States, 395 U.S. 185, 193 (1969) (“A primary purpose is . . . the avoidance of premature interruption of the administrative process . . . The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.”); McCarthy, 503 U.S. at 145 (“Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.”).

\textsuperscript{375} \textit{See} Layton & Fine, \textit{The Draft and Exhaustion of Administrative Remedies}, 56 GEO.L.J. 315, 322-331 (1967). McCarthy, 503 U.S. 140 (“This Court’s precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action . . . Second, an administrative remedy may be inadequate ‘because of some doubt as to whether the agency was empowered to grant effective relief’ . . . [and] Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.” citing, Gibson v. Berryhill, 411 U.S. 564 (1973)). Embodied in the futility exception are two others that have been separated out and are applicable here but will be discussed in the context of the futility exception. They are a challenge of bias or prejudgment and unreasonable delay. 33 Fed. Prac. & Proc. Judicial Review § 8398.
prejudgment; exercise of judicial discretion; unreasonable delay; or those expressly created by statute. An inmate challenging an action of the Bureau of Prisons first submits an informal request to the institutional staff regarding the issue. If that proves to be unsatisfactory, the inmate then submits a formal written request for an administrative remedy. Upon receipt of such a request, the warden of that facility has twenty days in which to respond. If that response is still unsatisfactory, the inmate is permitted to submit an appeal to the Regional Director within twenty days. Following the submission of such an appeal, the Regional Director has thirty days in which to respond. If the inmate is still dissatisfied, the inmate has thirty days to file an appeal with the Bureau of Prisons' General Counsel. At that time, the General Counsel has forty days to respond. The Administrative Remedy Program exists in order to allow Bureau of Prisons to remedy the problem without judicial intervention and to establish an appropriate record for the court if judicial intervention is required. Although the program is important, the court has acknowledged that there are circumstances in which the failure to exhaust the administrative remedies is excusable and it is a matter of judicial discretion. Federal inmates have relied upon two exceptions to the exhaustion requirement-futility and irreparable injury. Neither of which has proved successful overwhelmingly successful. Curiously, inmates have not asserted the following exceptions — challenge of bias or prejudgment; unreasonable delay; and questions of law, to obtain judicial review.

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376 Gibson, 411 U.S. 564; Southwestern Bell Tel. Co., 138 F.3d 746.
378 28 C.F.R. § 542.13
379 Id. at § 542.14
380 Id. at § 542.18
381 Id. at § 542.15
382 Id. at § 542.18
385 Id.
386 Unlike the exhaustion requirement in the Prison Litigation Reform Act, 42 U.S.C. § 1997e, which mandates that prisoners complete the administrative review process before seeking a judicial remedy, federal inmates challenging the Bureau of Prisons halfway house placement policy can submit an exception to the requirement.
1. Futility: Adequacy of Remedy v. Judicial Inevitability

Under the futility exception, a petitioner can seek judicial review of an agency decision without first exhausting the agency’s administrative program. In assessing whether the futility exception to the exhaustion requirement is applicable, courts have interpreted the exception differently. Some courts have focused on the “adequacy of the remedy,” finding that that the administrative agency must be able to provide the relief requested. Others have focused on whether a judicial proceeding is inevitable. If it is a foregone conclusion that judicial action will occur, then it is futile to have the petitioner proceed. The courts that have denied the countless petitions challenging the Bureau of Prisons’ placement policies have focused on whether the Bureau of Prisons can provide an adequate remedy. By declining to review a petition because of the inmate’s failure to exhaust the administrative remedy and by not recognizing the futility exception, the courts have focused on the agency’s ability to provide a remedy rather than whether the agency will potentially change its decision.

Inmates seeking to challenge the Bureau of Prisons’ halfway house placement policy have maintained that it would be a waste of time to follow through with the Bureau of Prisons’ administrative remedy because the agency has predetermined the outcome. A District Court explained,

The court finds that Ms. Ferguson need not exhaust administrative remedies that are mere apparitions. While the Government is correct that the exhaustion doctrine normally bars direct resort to the courts, that is not true where pursuing administrative remedies would be futile ‘because it is clear that the claim will be rejected’. Where an agency has adopted a new rule or policy and announced that it will follow that policy, especially where that policy has its origin

387 Johnson v. Department of Corrections, 635 N.W.2d 487 (Iowa Ct. App. 2001) (noting that the administrative code provided an adequate administrative remedy to the inmate seeking parole); Moulton v. Napolitano, 205 Ariz. 506, 73 P.3d 637 (Ct. App. Div. 1 2003), review denied, (Mar. 16, 2004) (focusing on the power of the administrative agency to provide relief and not the probability of providing such relief.); Neiman v. Yale University, 270 Conn. 244, 2004 WL 1574253 (2004) (noting that the possibility of an adverse decision does not constitute futility.).
389 Ferguson, 248 F.Supp.2d at 563.
above the Bureau's General Counsel Office, it is pointless to require a complainant to follow the administrative procedure. The people who would review Ms. Ferguson's claims in the Bureau have absolutely no power to alter her designation. The new ‘policy’ was based on an interpretation that was handed down from on high in the Department of Justice. Thus, an administrative appeal could only work to delay this matter.  

Federal inmates are claiming that the Bureau of Prisons has pre-determined that six months in a halfway house is satisfactory. The presumptive six month rule has its origins in the 2002 Policy which was recommended by the Office of Legal Counsel and supported by the Department of Justice. Therefore, it is pointless to require an inmate to comply with the Bureau of Prisons’ administrative remedy process.

The standard used to assess whether it would be futile to pursue the review process is whether “it is clear beyond a reasonable doubt that the agency will not provide the relief requested.” Furthermore, it is futile if the Bureau of Prisons “refuses to reconsider its decisions or procedures, or has stated a categorical rule to apply in a group of cases, or where further administrative review would result in a decision on the same issue by the same body.” All of which are applicable with respect to an inmate seeking such a placement. For these inmates, it has become readily apparent that the Bureau of Prisons has no intention of changing its placement policy and transferring offenders to halfway houses for more than six months.

The Bureau of Prisons has argued, unpersuasively, that its presumptive six month rule adequately reflects the increase in placement time provided in section 3624(c). It also claims that it has modified the time frame for evaluating an inmate’s placement to comply with the amended statute. The rule, however, contradicts these assertions.

Under the presumptive six month rule, the Bureau of Prisons has determined in advance how much time is enough for each inmate. The increased “period of evaluation” merely reinforces the adopted policy, and pays lip service to the intent of Congress in section 3621(b) to consider the five factors. Some inmates have been placed in halfway houses for more than six months, but the placement itself is not the proper focus.

_Ferguson_, 248 F.Supp.2d at 563.


Bureau of Prisons is not following the process set forth by Congress thereby forcing an inmate to challenge the placement decision. By requiring exhaustion of the administrative remedy process, the courts are implicitly supporting the Bureau of Prisons’ continued and willful disregard of the five factors in section 3621(b). The time spent navigating an administrative remedy process whose outcome is pre-determined wastes valuable time which could be devoted to preparing an inmate to reenter society. Even if an inmate manages to navigate the administrative remedy process and eventually prevails in court, the maximum amount of placement time will no longer be available. The Bureau of Prisons data on halfway house placement demonstrates that futility.

In response to a Freedom of Information Access request, the following data was provided. Of the 8,945 inmates that were listed on the Bureau of Prisons’ website in October, 2009 as being placed in a halfway house, the Bureau of Prisons provided information on only 2,275 of them. Of that number, there were two percent, or fifty-six inmates that had received a halfway house placement in excess of six months. The Bureau of Prisons provided no rationale for the unaccounted inmates. Moreover, the Bureau of Prisons stated that the information pertaining to the extraordinary justification exception was not centralized but kept at each individual facility. There is no concrete information as to why only fifty-six inmates had received longer placements.

One may posit that the Bureau of Prisons would argue that because these inmates were placed for more than six months the administrative review process works, and thus it is not futile to require adherence to the process. Therefore, its actions therefore are not contrary to its statutory mandate. This argument however would miss the point. The question is not whether the Bureau of Prisons can provide the remedy sought, i.e. a longer placement, but rather whether the exhaustion requirement is futile because the outcome has been predetermined. It is in that light that courts need to acknowledge the futility exception.

When the Bureau of Prisons adopted the 2002 Policy, the change limited the placement of inmates to a period of either the last ten percent of their sentence or six months, whichever was less. Each subsequent change to the Bureau of Prisons’ policy and rule that has been adopted has reaffirmed the six month limitation with the Bureau of Prisons asserting different reasons for the policy’s validity, such as a prior erroneous

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394 Information received as a Freedom of Information Access (FOIA) request. A copy is on file with the author.
395 See Section II.B.1.b., B.3 and C.2.b., supra.
statutory interpretation\textsuperscript{396} or a categorical exercise of discretion.\textsuperscript{397} In addition, the Director of the Bureau of Prisons and other officials have reiterated that six months is enough time for an inmate to be placed in a halfway house to be able to reenter society successfully. If the Director has indicated that six months is sufficient amount of time\textsuperscript{398} and the regional directors must provide written approval of longer placements,\textsuperscript{399} it stands to reason that the Bureau of Prisons’ officials are more than likely to decline an administrative appeal challenging the placement determination. Hence, the futility exception has been satisfied. Inmates have also asserted that the Bureau of Prisons’ policy constitutes an irreparable injury in their efforts to obtain judicial access and not exhaust the administrative remedy, but to no avail.

2. Irreparable Injury: Larger Than the Individual

Under the irreparable injury exception, courts will allow a petitioner to forego the administrative process provided that the petitioner makes “a clear showing of extraordinary injury, as by showing that an award of damages at a later date will not adequately compensate the aggrieved party.”\textsuperscript{400} Courts have narrowly construed this exception, however, to prevent petitioners from claiming speculative injuries as a means by which to evade administrative review, thus supplanting the agency’s decision-making with that of the courts. While that approach may be proper in other contexts, it is shortsighted when applied to halfway house placement which is an important piece of the reentry puzzle.

The Second Chance Act was passed specifically to reduce recidivism

\textsuperscript{396} Id.

\textsuperscript{397} Id.

\textsuperscript{398} See Statement of Harley G. Lappin, Director Federal Bureau of Prisons, United States Department of Justice Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security “Federal Bureau of Prisons Oversight,” (July 21, 2009), supra note 28. See also, Proceedings from the Symposium on Alternatives to Incarceration (July 14-15, 2008) found at http://www.USSC.GOV/SYMPO2008/NSATI_O.htm. at 272 (“BOP studies indicate that an inmate can receive the full benefit of a Residential Reentry Center after only six months.”) and at 283 (Statement by Jerry Vroegh, Administrator, Community Corrections and Detention Services Branch, Federal Bureau of Prisons.).

\textsuperscript{399} See 73 FR 62440; Conley & Kenny Memo (4/14/08); and P.S. 7310.04 (12/16/98).

and to increase public safety. Congress expressly expanded the amount of time that an individual could be placed in a halfway house from six to twelve months.\textsuperscript{401} Moreover, in the Second Chance Act, Congress repeatedly stressed that in order for reentry to be successful it is necessary to provide offenders with housing, employment, medical care, drug treatment, and the opportunity to reunite with family.\textsuperscript{402} Transitioning from a correctional facility to a free, law-abiding life requires more than a change of address; it requires the inmates to acquire new skills and a new attitude. Halfway houses provide an inmate with an opportunity to make that transition. Moreover, the longer the period of transition the more likely that an inmate can build an employment record, acquire lost or never attained skills, and reverse the effects of prisonization\textsuperscript{403} and be able to positively reconnect with families. Apart from these two exceptions that have been unsuccessful, there are others that could serve as a basis to allow judicial access without having first exhausted the administrative remedy process.

3. Questions of Law: Additional Factors Considered

Under this exception, a petitioner can avoid having to exhaust the administrative remedy “where the agency disregards a specific and unambiguous statutory . . . directive.”\textsuperscript{404} By declaring that an inmate will

\textsuperscript{401} Some may suggest that the expanded time limit was to end the debate once and for all as to the proper placement policy. Congress could have resolved the years of confusion by declaring six months as the limit to halfway house placement. Yet, it specifically increased the amount of time.


\textsuperscript{404} 73 C.J.S. Public Administrative Law and Procedure § 93 (The exception in its totality reads as follows: “A failure to exhaust administrative remedies may be justified when the only or controlling question is one of law, or where the issue is one of facial validity or construction or interpretation of a statute or regulation. Similarly, the rule of exhaustion of remedies will not usually apply where the validity of the administrative remedy itself is challenged, or where the agency disregards a specific and unambiguous statutory, regulatory or constitutional directive.”). \textit{See also}, State ex rel. Golembeske v. White, 168 Conn. 278, 362
be presumptively placed in a halfway house for six months absent an extraordinary justification is a question of law.

Under section 3624(c)(6), the statute requires the Bureau of Prisons to act in a manner that is consistent with section 3621(b), to be determined on an individual basis, and of “sufficient duration to provide the greatest likelihood of successful reintegration into the community.” The Bureau of Prisons’ _a priori_ declaration that a six month placement is appropriate for reentry ignores two of the five factors in section 3621(b) and the individualization that is required. Moreover, it presumes that all federal inmates are similarly situated before the evaluation takes place. The presumption therefore is a pre-determined length of placement that each counselor at the individual institution uses as a baseline; thus, the likelihood of increased placement is not readily considered. Furthermore, inmate claimed that the mere question of receiving time in excess of six months garnered the response that such an inquiry would result in solitary confinement.

4. _Bias or Predetermination Issue_

The presumptive six month rule is a policy that demonstrates bias and prejudgment on the part of the agency. In _McCarthy v. Madigan_, the court stated that exhaustion is not necessary where the agency is biased or has predetermined the issue. In deciding that an agency is biased in this manner, prejudgment may be based on the fact that the agency has ruled on the issue in another circumstance involving another party. If so, then the exhaustion requirement may be satisfied.

The presumptive month rule has been repeatedly challenged. Inmates have routinely failed. The fact that inmates continuously challenge this policy indicates that the Bureau of Prisons has created a policy that it does not seek to change unless required to do so by the courts. The requirement that an inmate exhaust the administrative remedy serves no legitimate purpose. By denying access and requiring exhaustion, inmates face an unreasonable delay, another recognized to the exhaustion doctrine.

5. _Unreasonable delay_

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407 McCarthy, 503 U.S. 140.
Under this exception, a delay that ultimately renders the administrative remedy inadequate will suffice for the court to allow a petitioner judicial access without requiring exhaustion. According to the Supreme Court, exhaustion is not required when an unreasonable administrative delay has rendered the administrative remedy inadequate.\textsuperscript{408} That is precisely the case with an inmate challenge of the Bureau of Prisons’ presumptive six month rule.

When the Bureau of Prisons determines that an inmate shall be placed in a halfway house for a specified period of time that is less than the maximum allowed under section 3624(c), it is inevitably going to be challenged on the grounds that the length of stay is insufficient and the process used to determine the placement is contrary to section 3621(b). The remedy being sought by an inmate is placement in a halfway house for the maximum length of time. The administrative remedy process cuts into the twelve month time period. Therefore, the delay will render the remedy inadequate.

The reliance on the exhaustion doctrine to deny judicial access contributes to the continued application of a misguided rule. Furthermore, it undermines the legislative intent of sections 3621(b) and 3624(c) which is to increase the reentry prospects of inmates. Not only do the courts invoke this doctrine to deny access, but they also apply the mootness doctrine which has the same ultimate result of denying judicial review.

\textit{B. Mootness Doctrine Prevents Challenges}

The application of the mootness doctrine, which denies inmates the opportunity to obtain judicial review of the Bureau of Prisons’ halfway house placement policy, implicitly reaffirms a misguided statutory interpretation. Without the mootness doctrine preventing access, the courts would determine using \textit{Chevron} that the Bureau of Prisons’ policy contravenes congressional intent to use the five factors in section 3621(b). Moreover, courts would also determine that the Bureau of Prisons has exceeded the discretion granted to the agency by Congress. Following the changes to the Bureau of Prisons’ halfway house placement policy, numerous federal inmates filed habeas petitions but were never heard because the inmates had been transferred to halfway houses, thus the petitions had become moot.

Federal courts will typically dismiss an action when there is no longer a “case” or “controversy” for the court to decide, thus mootness prevents a court from hearing a case when it is unable to provide the remedy being

\textsuperscript{408} Gibson, 411 U.S. at 575 (Delay often renders the administrative remedy inadequate.); Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591–592 (1926) (An applicant need not wait “indefinitely” before seeking relief.).
sought. In the case of a federal inmate seeking a transfer to a halfway house, the inmate has been transferred and thus has obtained the remedy that the court would provide. The case or controversy is no longer active and has been resolved. Although the inmate has been placed in a halfway house, this remedy is unacceptable. It is not the placement that is important but the process for being considered for placement and the length of time that an inmate is placed.

The statutory requirement of section 3621(b) requires the Bureau of Prisons to consider five factors on an individual basis, which the presumptive six month rule does not do. The statutory intent of section 3624(c) contemplates placements up to twelve months, which the presumptive six month rule does not accomplish because of the six month cap. The mootness doctrine shields the Bureau of Prisons from a substantive review of its actions, thereby allowing the Bureau of Prisons to continue to improperly interpret sections 3621(b) and 3624(c) and deny inmates an opportunity for a longer halfway house placement. This denial of a longer placement has real life implications on the inmate’s prospect of successfully reentering society and not recidivating, thus jeopardizing the safety of others. Although the transfer to a halfway house technically moots the petition, courts have recognized exceptions to the doctrine.

Of the exceptions that have been relied upon most frequently to allow a court to continue to evaluate the merits of a claim in light of the case becoming moot, the two which offer the greatest likelihood success for an inmate are: capable of repetition yet evades review and the public importance exception.

1. Capable of Repetition, Yet Evades Review

The capable of repetition yet evades review exception is an exception to the mootness doctrine that recognizes that a challenged policy may be too short in duration for a proper review to occur, but the party challenging the policy will be faced with the action at a later date. The most celebrated example of this exception is when the court ruled on the legality of

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409 It would be difficult for federal inmates challenging the Bureau of Prisons’ placement policy to file a class action. The certification process would prove difficult because the inmates have been convicted of different offenses, have varying sentences, and their eligibility for placement rely on their conduct in the institution. Hence, it would be difficult to find a class representative or a commonality of issues for class certification.

In that instance, a woman is likely to become pregnant again in the future and will be faced with having to decide whether to terminate her pregnancy. Because the resolution of the challenged action would last longer than nine month gestation period, the legality of abortion would never be able to be reviewed.

Under this exception, mootness will not when the following two elements exist. First, "the challenged action (is) in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there (is) a reasonable expectation that the same complaining party (will) be subjected to the same action again." For inmates seeking to challenge the presumptive six month rule, the length of time between when the inmate is evaluated and receipt of maximum placement is too short in its duration, particularly if the inmate is forced to submit to the administrative remedy process. In the past, courts have been unwilling to apply this exception to an individual being rearrested and being subjected to abuse by a law enforcement officer. The exception requires that there be a "reasonable expectation" of facing the adverse agency. Courts may therefore want to reconsider this position in light of the evidence on recidivism. The placement of an individual in a halfway house has a direct impact on the success or failure of that individual upon release. As the recidivism data indicates, one-third of individuals are more likely to recidivate within one year of release and approximately two-thirds will recidivate within three years. Inmates that are released without some form of pre-release custody are more likely to re-offend than those who have a less abrupt transition from incarceration to freedom. With the increased attention devoted to reentry, the courts should adopt the public importance exception to the mootness doctrine that is applied in some state courts.

2. Adopting a Public Importance Exception

A number of state courts recognize a public importance exception to the

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412 Id.
415 Allred v. Webb, 641 So. 2d 1218 (Miss. 1994).
416 See, Langan and Levin, supra 256.
417 See, Sady, supra note 99.
418 See, Langan and Levin, supra 256.
mootness doctrine. The exception allows a court to resolve an otherwise moot issue if that issue involves a substantial public interest. In order for the exception to be applied, it is necessary to demonstrate a “clear showing” of each of the following: “(1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable to guide public officers; and (3) the question is likely to recur.”

The length of time that a federal inmate should be placed in a halfway house satisfies each of these elements. Each of the elements of the public importance exception is addressed below.

a. Public Nature of the Question

The Bureau of Prisons’ halfway house placement policy is of public interest because it is central to the successful reentry of federal inmates. Moreover, the initial change in its policy and now the current presumptive six month rule changed a longstanding practice that enabled an inmate to be transferred or to be placed directly in halfway house at any point in the sentence and for any length of time.

Reentry has regained the national spotlight. It has been highlighted in three successive presidential administrations. It was the impetus for one of the most far reaching bipartisan legislative efforts, the Second Chance

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420 Cinkus v. Village of Stickney Municipal Officers Electoral Bd., 886 N.E.2d 1011, 1017 (2008) (presenting the elements necessary to establish the public importance exception to the mootness doctrine); In re Shawn P., 916 A.2d 399, 406 (2007) (“A court may decide a moot question where is an imperative and manifest urgency to establish a rule of future conduct in matters of important public concern, which may frequently recur, and which, because of inherent time constraints, may not be able to be afforded complete appellate review.”); Dyer v. Securities and Exchange Commission, 266 F.2d 33, cert. denied, 361 U.S. 835, 80 (1959). (“In still wider horizon, there also is a recognized right of judicial discretion, in the public interest, to deal with the validity or propriety of administrative regulations and actions, where they have justiciably been brought into court, even though they may perhaps have ceased thereafter to have a direct significance in the particular situation. This does not mean that a court is required or has the right to engage in a decision of this character in every such situation; but it is judicially entitled to do so where it appears that some general benefit may public-wise, or in relation to the possibility of further similar litigation, come from having it established whether the administrative agency has acted within or without its authority.”). In Cinkus, the case deals with an interpretation of a statute that impacts elections. In In re Shawn P, the issue is about a juvenile defendant. See Section I, supra.

421 See, Section I, supra.
Act, is dedicated to creating a holistic response to assisting ex-offenders as they transition from incarceration to freedom. It is clearly a public issue. For federal inmates, a key component for successful reentry is the halfway house, on which various stakeholders, such as judges, attorneys, and inmates had come to rely.

The halfway house placement policy has been of immediate interest to those directly involved in the representation, the sentencing, and the placement of inmates. For these stakeholders, the last decade of policy changes has brought uncertainty, particularly with the numerous changes. Following the adoption of the 2002 Policy, the Bureau of Prisons has struggled to find an appropriate interpretation of its two governing statutes, sections 3621(b) and 3624(c). It adopted the 2005 Rule on the grounds that it was a categorical exercise of discretion. The Second Chance Act amended both statutes and the Bureau of Prisons promulgated the presumptive six month rule. With the increased focus on reentry and providing inmates with the best opportunity to be successful upon release and the numerous changes in policy, this issue has been one of public interest. Moreover, with the changing demographics in the federal institutions, halfway houses will become an increasingly more important tool.

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422 See, Section II.C. supra.
424 Id. Sec. 251
425 Larry M. Fehr, “Statement before the United States Sentencing Commission ‘The Sentencing Reform Act of 1984: 25 Years Later.’” (May 28, 2009) at http://www.ussc.gov (page 5). (“In contrast, in 1940, the federal prison population was 24,360. That number did not change significantly for 40 years, so that in 1980, the population was 24,640. From 1980 to 1989, the inmate population more than doubled to almost 58,000. During the 1990s, the population more than doubled again, reaching 134,000 at the end of 1999. The current population is expected to increase to over 215,000 by the end of 2011. Annually, the Bureau returns 45,000 federal inmates to our communities, a number that will continue to increase as the population grows.”); U.S. Department of Justice, Federal Bureau of Prisons.” About the Federal Bureau of Prisons” at http://www.hawaii.edu/hivandaids/About_the_Federal_Bureau_of_Prisons.pdf (page 3). (“Most of the challenges affecting the Bureau today relate to the agency’s growth. At the end of 1930 (the year the Bureau was created), the agency operated 14 institutions for just over 13,000 inmates. In 1940, the Bureau had grown to 24 institutions with 24,360 inmates. Except for a few fluctuations, the number of inmates did not change significantly between 1940 and 1980 (when the population was 24,252); however, the number of institutions almost doubled (from 24 to 44) as the Bureau gradually moved from operating large institutions confining inmates of many security levels to operating smaller, more cost effective
The halfway house provides an opportunity to reduce criminal justice administration costs. On the back end, the placement of inmates is less expensive than traditional penal facilities. On the front-end, if inmates reenter society successfully and become law-abiding then they won’t re-offend, thus reducing the costs of re-prosecution or re-incarceration. With these economic underpinnings, the issue is foremost in the minds of many. Apart from being of public interest, there needs to be an authoritative resolution to guide the many public officers that must implement the policy.

b. Authoritative Resolution is Desirable to Guide Public Officers

The second element to be satisfied is that an authoritative resolution is desired and would serve as a guide to public officers. The administrators of the halfway house placement policy are guided by a Policy Statement which identifies the changes to the policy following the passage of the Second Chance Act. The new policy indicates that the evaluation period prior to placement will be increased and that placement in excess of six months will not occur without prior written approval of the regional director. From the language of the policy statement, it is clear what has to occur with respect to placement. The problem, however, is not the clarity in the policy statement but whether the action is in accord with the statutory mandate and whether the evaluators have a clear understanding of what constitutes an extended placement.

There are a number of cases in which the unit team member has evaluated and recommended placement in excess of six months, only to be overruled by another actor in the chain of command. With the repeated denials or reduction of recommended placement time, lower level officers are unclear as to what is an appropriate placement. On the one hand, the statute states that an inmate is to be given individual consideration and can receive as much as twelve months in a halfway house. The Bureau of Prisons’ stated policy provides inmates with six months only. The institutional actors are therefore caught between the statutes, section 3621(b) and 3624(c), and the Bureau of Prisons’ policy. Moreover,
adherence to the agency policy is an employment decision that may in fact be unlawful. Hence, a resolution from the courts that the placement is statutorily mandated and permitted along with a non-exhaustive list of extraordinary justifications would serve as better guide.

The Bureau of Prisons has the discretion to decide placement. Moreover, the review of placement decisions by the Bureau of Prisons administrators who have oversight responsibility of the entire placement process allows greater consistency within a region and across the process. Thus, the Bureau of Prisons would undoubtedly argue that there is no need for an “authoritative resolution” and that the courts should not consider this exception. The Bureau of Prisons’ interpretation overlooks the inconsistency and the change in policy for the last ten years for both staff and inmates. A decision on whether the placement policy has been judicially reviewed would guide staff to craft a placement plan that adequately reflects the statutory mandate and serves the purpose of reentry.

c. Question is Likely to Recur

The final element necessary for a court to entertain an issue after it has been mooted is whether the question is likely to recur. The placement policy of federal offenders in halfway houses has been an unresolved question following the adoption of the 2002 Policy. It continues to be an issue. The Second Chance Act neither resolved the inmates’ challenges to the Bureau of Prisons’ current interpretation nor the lack of support for the Bureau of Prisons’ policy from criminal justice agencies and entities invested in the issue. Moreover, each inmate that is either denied placement or placed in a halfway house for six months will result in a challenge to the policy. Instead of postponing judicial review of whether the agency is properly engaging in the placement of federal inmates in halfway houses, it would behoove the court to entertain the issue and resolve it once and for all.

Halfway house placement has long been deemed important for inmates, but it is also important for their families, to establish an employment record, and for resurrecting family ties.430

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430 Macaroni, 251 F. Supp.2d at 1022-1023 (“R]eliance on the availability of a community confinement designation derived not just from the statute . . . but also on the undisputable fact that . . . such a designation makes eminently good sense. When one remembers that persons placed in community corrections are generally
[F]or the defendant . . . imprisonment in a halfway house usually means the inmate will be residing closer to his or her home community, can continue employment outside the facility during the day, and can maintain ties with vulnerable family members, such as children or ailing parents . . . For innocent third parties, particularly children, the economic and emotional devastation caused by a parent's distant incarceration can be, to some extent, palliated. With the inmate employed, families can stay off welfare; with a parent available, children can avoid placement in foster homes. For the Government wishing to recognize substantial assistance provided by a cooperating defendant this option also holds out advantages during plea negotiations, and at sentencing. Finally . . . the Number One beneficiary of community corrections is the American Taxpayer, since the cost of community confinement, when it serves the interests of justice, is far less than the price tag on more conventional forms of imprisonment.431

Halfway houses have long been recognized, even by the Bureau of Prisons, as a tool for reentry.432 Inmates that are not transited back to society via a halfway house are more likely to re-offend. For the individual inmate, they will likely be considered for placement at a future date, unless the inmate commits more violent crime thus making them fully ineligible. Apart from the individual, other similarly situated inmates will continue to challenge the placement policy causing the Bureau of Prisons to respond and waste additional resources by fighting the litigation. Hence it is imperative that the courts review the placement policy of the Bureau of Prisons.

Although a review is what is advocated to determine whether the Bureau of Prisons’ policy has exceeded its discretion, the policy should be

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431 Macaroni, 251 F. Supp.2d at 1022-1023.

432 JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY, THE URBAN INSTITUTE PRESS, WASHINGTON D.C. (PAGE NO.) (2005) (“Corrections agencies sometimes provide housing as a buffer between prison life and life in the free world. Typically called ‘halfway houses,’ these facilities offer prisoners near the end of their sentences a structured and regulated environment as they adjust to life in the community.”); Prisoner Reentry Book re: prisonization
an automatic twelve month placement whereby an inmate is at the six month threshold. At this evaluation, the inmate can be transferred to home confinement as dictated by section 3624(c)(2). If the inmate is not ready for that responsibility, then the inmate can remain in the halfway house.

V. CONCLUSION

Reducing recidivism and increasing public safety are twin goals of the Second Chance Act. The Second Chance Act resurrects the concept of rehabilitation by providing a holistic response to the needs of ex-offenders as they attempt to reenter society following incarceration. The Second Chance Act provides reforms across state, federal and tribal jurisdictions. It targets juveniles, adults, and elderly offenders, and it provides alternatives for first-time offenders. Of the numerous changes made by the Second Chance Act, the provision devoted to reforming existing correctional policies at the federal level, particularly the length of time that federal inmates spend in halfway houses is of paramount importance. The Second Chance Act increased the amount of time that an inmate may spend in such facilities to twelve months but the Bureau of Prisons has resisted placement in excess of six months without an extraordinary justification and prior written approval of a Regional Director. This requirement is contrary to the statutes that guide the Bureau of Prisons’ placement policy, is an impermissible exercise of discretion, and an unreasonable interpretation of the statute. Inmates however have been overwhelmingly precluded from changing the agency’s actions because of the judicial doctrines of exhaustion and mootness. Given the importance of reentry for the individual and the larger community, courts should relax the standards of access by recognizing that the Bureau of Prisons has pre-determined the placement decision. Moreover, reentry is of such importance that the courts should also adopt a public importance exception to overcome the mootness doctrine. After gaining access, a judicial review would reveal that the Bureau of Prisons is not entitled to deference and that its policy is an impermissible exercise of discretion.