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Sentence Credit for Pre-Trial Defendants Released to Residential Detention Facilities

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I. INTRODUCTION

Most individuals consider continued confinement to a residential detention facility and denial of access to phone, mail, and family visits to constitute involuntary detention. The majority of the federal courts of appeal do not agree, however, and will not grant sentence credit to a federal offender for time spent, as a condition of bond, in a "treatment center" or "halfway house."[1] These same courts, without exception, grant sentence credit to individuals who are remanded to these residential facilities after conviction.[2] This inequity violates the purpose of the Bail Reform Act of 1966 (the "Act"),[3] which ensures even-handed and

1. The terms "treatment center," "halfway house," and "residential detention center" refer to institutions to which defendants are conditionally released.

2. The Bureau of Prisons grants sentence credit to post-conviction defendants for time spent in treatment centers or halfway houses regardless of the conditions of incarceration.

3. Prisoners—Credit for Confinement Prior to Sentence, 18 U.S.C. §§ 3142 et seq. (1988 & Supp. 1991); H.R. Rep. No. 1058, 86th Cong., 2d Sess. 1-2 (1960), reprinted in 1960 U.S.C.C.A.N. (80 Stat.) 3288, 3288-90; Bail Reform Act of 1966, H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4, 16 (1966), reprinted in 1966 U.S.C.C.A.N. 2293, 2294, 2306 ("Bail Reform Act").

uniform execution of sentences.[4] Congress sought to correct the inequities in the federal system for accused persons who did not make bail and therefore spent a longer time in jail than an accused person with an identical sentence who qualified for bail.[5]

The Act offers guidance to judges and magistrates in their treatment of pre-trial defendants by providing court officials with four options in pre-trial hearings. A judicial officer may: (1) release the suspect on his own recognizance or on a secured or unsecured bond; (2) detain the individual to revoke a previous conditional release or deport an illegal alien; (3) detain the suspect until his trial; or (4) release the individual on a "conditional release," subject to certain specified requirements.[6]

The United States Attorney General may give sentence credit for pre-trial detention under 18 U.S.C. Section 3585(b).[7] Defendants may file requests for credit for pre-trial detention with the Bureau of Prisons (BOP)[8] and the Attorney General.[9] The Attorney General decides whether to grant credit after defendants begin serving their sentences. The decision to award or to withhold credit generally is straightforward. Suspects who are unconditionally released or released on bond must serve their full sentences. Alternatively, suspects detained by order of the court because they pose a danger to society or because they might

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4. Bail Reform Act at 16. Legislative history indicates that Congress passed the Act in response to the inequities arising when one individual could not make bail and was remanded to federal facilities.

5. See note 4. Before passage of the Act, individuals incarcerated before trial did not receive sentence credit for time served prior to conviction.

6. 18 U.S.C. § 3142. This section provides that the decision whether to release or detain the defendant should be based on the officer's perception of the risk that the defendant poses to society. Id. If the officer determines that the accused is likely to commit additional crimes if released, then the need to protect the community becomes sufficiently compelling to justify detention. Id. Otherwise, the officer is advised to set a bail that will ensure the individual's presence at trial but that also will enable the defendant to enjoy his freedom until trial. Comprehensive Crime Control Act of 1984, Title I, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.), 3182, 3190-91 ("Crime Act").

7. 18 U.S.C. § 3585(b). In *United States v. Wilson*, 112 S. Ct. 1351 (1992), the Supreme Court ruled that only the Attorney General was empowered to grant sentence credit for pre-trial detention. The Court ruled that the judiciary did not have concurrent jurisdiction to grant such credit. Id. at 1354.

8. See 28 C.F.R. 542.10-.16 (1987) (outlining the entire appeal process). The Bureau of Prisons, a government agency headed by the Attorney General, is empowered to grant sentence credit for pre-trial detention to defendants. 28 C.F.R. § 0.96 (1989). The Bureau of Prisons has adopted a policy denying credit to all individuals released to residential detention facilities. 18 U.S.C. §§ 3152-3154. For the text of the Bureau of Prisons' statement, see note 141.

9. 28 C.F.R. § 0.96(c). The Attorney General delegated all power regarding the determination of places of confinement to the Bureau of Prisons.

flee before trial receive sentence credit for the time served while incarcerated and awaiting trial.[10]

The circuit courts are split, however, as to whether conditionally released defendants deserve sentence credit for the time they are remanded to treatment facilities or halfway houses.[11] Judges may be tempted to use the conditional release program to protect the public and as a response to the prison overcrowding problem. By releasing the defendants subject to numerous restraints as specified in 18 U.S.C. Section 3142(c)(1), the judges serve both goals.[12] Under the conditional release programs considered in this Note, defendants are released from jail if they agree to remain in, and abide by, the rules of a treatment center until trial. When the Attorney General has not granted sentence credit, many defendants have filed habeas corpus petitions seeking sentence credit for their time spent in treatment facilities.[13]

Section 3585(b) of Title 18 mandates that credit be given to defendants for time served "in official detention" prior to sentencing.[14] The circuit courts' analyses of Section 3585 determines whether defend-

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10. For example, if the individual was detained in jail for 30 days prior to a federal conviction, that 30 days would he applied against the imposed sentence. An individual sentenced to 180 days would be detained for, at most, another 150 days.

11. Although the Ninth and Eleventh Circuit Courts of Appeals have granted credit, see *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990), and *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1983), most other circuit courts have denied similar petitions without consistent rationales. See *Randall v. Whelan*, 938 F.2d 522 (4th Cir. 1991); *United States v. Smith*, 869 F.2d 835 (5th Cir. 1989); *Ramsey v. Brennan*, 878 F.2d 995 (7th Cir. 1989); *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (en banc); *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989).

12. 18 U.S.C. § 3142(c)(1). This subsection states that if the judicial officer determines that releasing the defendant on his own recognizance will decrease the safety of the community or the probability of the individual's appearance at trial, the officer must condition the defendant's release. Id. Conditional releases vary from being highly restrictive on the individual's freedom to requiring simply that the individual remain in the custody of another or report periodically to a specified law enforcement official. Id. § 3142(c)(1)(B)(i-xiv). The legislative history of § 3142 cautions that the restrictive conditions to be imposed must be justified by a need to protect society or to ensure the defendant's presence at trial. Crime Act at 3197. The officers are advised to "weigh each of the discretionary conditions separately with reference to the characteristics and circumstances of the defendant before him and to the offense charged. . . ." Id.

13. See, for example, *United States v. Insley*, 927 F.2d 185 (4th Cir. 1991). See also *Randall*, 938 F.2d 522.

14. Section 3585(b) governs sentence credit for time spent in detention prior to conviction and provides as follows: "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent *in official detention* prior to the date the sentence commences. . . ." (emphasis added).

This section replaced 18 U.S.C. § 3568, which previously governed sentence credit. Section 3568 provided: "The Attorney General shall give any person [convicted of an offense] credit toward service of his sentence for any days spent *in custody* in connection with the offense or acts for which sentence was imposed." 18 U.S.C. § 3568 (1966) (repealed 1987) (emphasis added). Although some courts disagree, most have held that the change in the language from "in custody" to "in official detention" is irrelevant for purposes of interpreting sentence credit. See *Woods*, 888 F.2d at 655. But see note 11 and accompanying text. The change to "in official detention" accom-

ants will receive sentence credit for time spent in a residential facility as a condition of bond. Circuit courts typically consider at least one of the following factors in deciding whether a defendant should receive sentence credit: (1) the degree of restraint and the conditions of the defendant's incarceration, (2) the BOP's statement precluding sentence credit for pre-trial incarceration, and (3) the results that a Fifth Amendment equal protection analysis would render. Although the federal courts of appeals use the same set of criteria for evaluation, they disagree about whether a federal offender may receive credit for time spent in a treatment center or halfway house as a condition of bond.[15]

Most circuit courts deny credit, although with inconsistent rationales,[16] even though the individual's liberty is significantly infringed. These courts offer at least three justifications for the denial: (1) "official detention" in Section 3585 refers only to custody of the Attorney General, (2) the conditions of confinement in a residential facility are not sufficiently similar to incarceration and therefore do not merit credit,[17] and (3) the BOP's statement precludes sentence credit if the defendant is not confined to jail and prevents any additional analysis by the courts.[18]

By contrast, in its 1989 decision *Brown v. Rison*,[19] the Ninth Circuit declined to follow the reasoning of the other circuits and granted sentence credit for time spent in a community center prior to trial. In reaching its decision, the *Brown* court examined the then-applicable statute, 18 U.S.C. Section 3568;[20] the conditions of Brown's detention;[21] and the BOP's position on sentence credit.[22] The *Brown* court ulti-

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panied the Crime Act (cited in note 6), which was meant to achieve uniform and even-handed sentencing.

15. Of the federal courts of appeals, only the Ninth and Eleventh Circuits have granted sentence credit; however, the District Court for the District of Columbia also has awarded credit. See *Brown*, 895 F.2d 533 (holding that conditions at a treatment center were sufficiently close to incarceration to warrant sentence credit); *Johnson*, 696 F.2d 1334 (finding that post-sentence inmates in the same facility received credit for time served and holding that denial of the same credit to pre-sentence detainees violates the Fifth Amendment's Equal Protection Clause). Even though the defendant in *Johnson* received sentence credit, the court limited its holding to the specific facts of the case because the state failed to present evidence at trial that the defendant was not similarly situated to post-sentence detainees. Id. at 1338-40. The court left open the possibility that credit would be denied in the future if the government carried its burden of presenting a rational reason for the disparate treatment. Id. See also *United States v. Davis*, 763 F. Supp. 638 (D.D.C. 1991).

16. See note 11 and accompanying text.

17. *Woods*, 888 F.2d at 653.

18. See *Ramsey*, 878 F.2d at 996. See also *Randall*, 938 F.2d at 525.

19. 895 F.2d 533 (9th Cir. 1990).

20. Id. at 535-36. The *Brown* decision came down before the change in statutory language referred to in note 14. As discussed in the text accompanying that note, however, the change in language did not alter the Ninth Circuit's approach to credit.

21. Id. at 536.

22. Id. at 537 (Wallace, J., dissenting).

mately based its decision on the degree of restraint imposed on the defendant while he was at the center.[23] Brown was detained for 306 days, was required to be at the center between 7 p.m. and 5 a.m. every day and was denied all contact with the outside world while at the center.[24] He also was subjected to drug testing, employment requirements, and travel restrictions.[25] The Ninth Circuit stated that these restraints on his liberty constituted "custody" and merited sentence credit under 18 U.S.C. Section 3568.[26] Federal courts in the Ninth Circuit continue to grant sentence credit to individuals who are conditionally released to residential detention facilities.[27]

The current split in the jurisdictions results in unequal treatment for individuals who are incarcerated under similar conditions. Although incarceration might be merited, defendants have the right to expect that their period of incarceration will not be based on which court has jurisdiction over their appeal.[28] To ensure equitable application of sentence credit under Section 3585 and to fulfill the Bail Reform Act's[29] original goal of uniform and even-handed sentencing, the United States Supreme Court should determine what types of pre-trial conditional release programs, if any, merit sentence credit.

This Note addresses the question of whether and under what circumstances defendants deserve sentence credit when confined to residential facilities as a condition of bond. Part II discusses the various interpretations of 18 U.S.C. Section 3585 advanced by the circuit courts to deny or grant credit for time spent in residential facilities. These various interpretations indicate that Supreme Court intervention is necessary to provide the circuit courts with a uniform definition of "in official detention" and a unified interpretation of the statute. Part III examines other relevant factors that the courts consider when deciding whether to grant or deny sentence credit. Arguably, the most important consideration in determining what constitutes "in official detention" is

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23. Id. at 536.
24. Id.
25. Id.
26. Id.
27. See *United States v. Mori*, 798 F. Supp. 629 (D. Haw. 1992). See also *Mills v. Taylor*, 967 F.2d 1397 (9th Cir. 1992). Although the Ninth Circuit's decisions suggest that the circuit uses a balancing test to determine if the conditions of incarceration merit sentence credit, all the recent decisions in that circuit have granted credit to all individuals confined to residential facilities, regardless of the conditions of confinement. This approach is unwise because courts should use a balancing approach to determine whether the restraints on an individual significantly impinge his freedom and warrant sentence credit.
28. Under the present system, a defendant who commits a crime in the Ninth Circuit and spends time in the treatment center will receive credit toward the ultimate sentence, whereas defendants in the other circuits will not receive credit for this time.
29. See Bail Reform Act at 16 (cited in note 3).

whether the defendant's liberty is sufficiently impinged by the release conditions to warrant sentence credit. Additionally, Part III argues that several courts' interpretations of the BOP's statement regarding sentence credit are unreasonable and create an equal protection violation. Part IV suggests that current prison conditions require immediate attention and that innovative approaches to incarceration that will protect the public without violating defendants' constitutional rights need to be developed. Finally, Part V criticizes the current ad hoc approach taken by the courts in granting sentence credit. The Supreme Court should adopt the balancing test articulated by the Ninth Circuit in *Brown,* grant sentence credit based on individualized evaluations of the conditions of incarceration, and promulgate guidelines describing the conditions of restraint that serve both the punitive and rehabilitative goals of incarceration and merit credit under Section 3585. At a minimum, this resolution ensures that all defendants will receive uniform treatment and resolves the current split in the circuits.

II. STATUTORY INTERPRETATION: ASCERTAINING THE MEANING AND INTENT OF 18 U.S.C. SECTION 3585

Section 3585(b) governs awards of sentence credit for pre-trial detention.[30] When defendants submit habeas corpus petitions seeking sentence credit for time spent in residential facilities as a condition of bond, courts generally begin their analysis by interpreting this statute. The outcome of the habeas corpus appeal hinges on this analysis. For example, in *United States v. Woods,*[31] the Tenth Circuit stated that a court must first decide whether Section 3585 ever entitles a criminal defendant to credit for pre-trial custody in a conditional-release environment before analyzing what constitutes official detention.[32]

Scholars employ several competing theories when attempting to interpret a statute's proper meaning. These theories include the "plain meaning rule,"[33] "purposivism,"[34] "intentionalism,"[35] and "practical

30. 18 U.S.C. § 3585.

31. 888 F.2d 653 (10th Cir. 1989).

32. Id. at 654-55.

33. William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 Stan. L. Rev. 321 (1990). The "plain meaning rule," or textualism as Eskridge and Frickey call it, suggests that the words of a statute alone convey its meaning. Id. at 340-45.

34. Id. at 332-39. Eskridge and Frickey offer this term to explain a second theory advanced by legal scholars that legislators design each statute or law with a specific purpose or objective. Id. at 333. According to the theory, the purpose determines the meaning of the statute. Id.

35. Id. at 325-32. Intentionalism is a theory that is extremely similar to purposivism. Id. at 325. The interpreter attempts to determine the legislature's intent in passing the law and to enforce it consistent with these aims. Id.

reasoning."[36] Each theory uses an objective set of criteria to ensure proper interpretation of all statutes under all circumstances and to restrain the judiciary's interpretative freedom.[37] This subpart examines the courts' various interpretations of Section 3585 and the resulting disparity in defendants' treatment.

A. Plain Meaning of 18 U.S.C. Section 3585

The starting point for statutory interpretation must be the language of the statute itself.[38] Proponents of the "plain meaning rule" argue that the applicability of a law should be based solely on the wording of the statute, as determined by its common-sense meaning.[39] The Supreme Court has stated repeatedly that clear statutory language must be the source of the law.[40] Proponents argue that the statute's language provides the only unbiased standard by which the law's meaning can be determined because it prevents judicial freedom of interpretation.[41] Additionally, proponents assert that only this method gives the public the opportunity to know the law's requirements.[42]

Courts interpreting Section 3585 must consider two questions: first, whether the phrase "in custody" significantly differs from the term "in official detention," and second, what qualifies as "official detention" and thereby merits sentence credit.

1. "In Custody" Versus "In Official Detention"

When deciding whether to order sentence credit for certain pretrial detention, courts first consider whether the change in the language of Section 3585,[43] adopted with the Crime Act,[44] significantly impacts the statute's approach to sentence credit for conditionally released pre-

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36. Id. at 345-62. Eskridge and Frickey advance the practical reasoning approach to statutory interpretation. Id. at 345. They suggest that the Supreme Court currently uses this approach, which requires consideration of many influential factors. Id. Their theory is actually a combination of the other single-factored theories but also weighs the political and social forces influencing the decision to adopt the statute. Id.

37. Id. at 324-25.

38. *K-Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1831-34 (1988) (Scalia, J., concurring in part and dissenting in part).

39. Eskridge and Frickey, 42 Stan. L. Rev. at 340-41 (cited in note 33).

40. Id. Justice Holmes said, "We do not inquire what the legislature meant; we ask only what the statute means." Id. at 340 (quoting Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899)). See also Eskridge and Frickey, 42 Stan. L. Rev. at 341 (citing *Caminetti v. United States*, 242 U.S. 470, 490 (1977)).

41. Eskridge and Frickey, 42 Stan. L. Rev. at 340.

42. Id.

43. See note 14 and accompanying text.

44. Pub.L. No. 98-473, §§ 212, 235, 1984 U.S.C.C.A.N. (98 Stat.) 1976, 1987, 2031.

trial detainees.[45] The original statute, Section 3568,[46] granted sentence credit to defendants "in custody,"[47] whereas Section 3585 of the Crime Act grants sentence credit to those "in official detention."[48]

No court has held that the change in language altered the meaning of the statute.[49] For example, in *Mills v. Taylor*,[50] the Ninth Circuit stated that the new language of Section 3585, "in official detention," was synonymous with Section 3568's "in custody;" therefore, that court found that Congress did not intend to change the types of situations that merit sentence credit.[51] Similarly, in *United States v. Woods*,[52] the Tenth Circuit found the change in statutory language irrelevant for purposes of awarding credit.[53] The Fourth and Fifth Circuits have agreed.[54]

Although all circuit courts have examined the same statutory language when determining defendants' Section 3585 petitions, they have reached opposite results. The Fourth, Fifth, and Tenth Circuits have ruled that defendants remanded to residential detention centers to await trial are not in "official custody" or "official detention" and therefore are not entitled to sentence credit.[55] By contrast, the Ninth Circuit

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45. Id.

46. Section 3568 was the predecessor of Section 3585. See note 14.

47. 18 U.S.C. § 3568 (repealed 1987).

48. See note 14 and accompanying text.

49. The statute's legislative history neglects to provide any interpretative guidance and therefore has invited the current dispute over the statute's intended meaning. As noted above, the courts have ruled that the change is insignificant for sentence credit. Judge Butzner in the Fourth Circuit contested this view, citing traditional rules of statutory interpretation—that a change in language is indicative of a change in meaning or application. See *Randall v. Whelan*, 938 F.2d 522, 527-28 (4th Cir. 1991) (Butzner, J., dissenting). Judge Butzner stated that because the legislative history is silent on the meaning of "official detention," courts should refer to prior sections of the statute for guidance. Id. This approach is consistent with the traditional view of statutory interpretation. See Norman J. Singer, 2A *Sutherland Statutory Construction* § 46.05 at 103 (Clark, Boardman, Callaghan, 5th ed. 1992), which states, "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to he construed." Under this analysis, the term "detention" should he afforded the same meaning throughout the Crime Act. This would suggest that official detention only occurs when a defendant is detained by an officer under 18 U.S.C. §§ 3141-3156. See *Mills v. Taylor*, 967 F.2d 1397, 1399 (9th Cir. 1992).

50. 967 F.2d 1397 (9th Cir. 1992).

51. Id. at 1399.

52. 888 F.2d 653 (10th Cir. 1989).

53. Id. at 655.

54. The Fourth Circuit consistently holds that the change in the statute has no bearing on the awarding of sentence credit. See *Randall v. Whelan*, 938 F.2d 522 (4th Cir. 1991), and *United States v. Insley*, 927 F.2d 185 (4th Cir. 1991). The Fifth Circuit has stated that "there is no meaningful distinction between 'in custody' and 'official detention.' " *Pinedo v. United States*, 955 F.2d 12, 14 (5th Cir. 1992).

55. See *Randall*, 938 F.2d at 524; *Pinedo*, 955 F.2d at 13; *Woods*, 888 F.2d at 655-56.

held that the conditions of detention in residential facilities constitute "official detention" and merit sentence credit.[56]

2. "Official Detention"—Only the Attorney General?

The second and more important question of statutory interpretation raised by Section 3585(b) is what constitutes "official detention." Based on their interpretation of "official detention," many circuit courts have denied sentence credit to pre-trial detainees for time spent in treatment centers but have awarded sentence credit to post-conviction detainees in the same facility.[57] These courts contend that, unless defendants are subject to the Attorney General's control, they are not "in official detention" and cannot qualify for sentence credit under Section 3585(b).

The inequities of these sentencing disparities are readily apparent. For example, a defendant remanded to a halfway house by a judge in a bail hearing would not be entitled to any credit for the time spent awaiting trial, whereas a post-sentence individual remanded to the same halfway house by the Attorney General would be granted sentence credit. In *Moreland v. United States*,[58] the conditionally released defendant was subject to twenty-four-hour-a-day detention for over two weeks.[59] The conditions of his confinement "mirrored those imposed on jail inmates."[60] Moreover, the defendant was remanded to a center that also housed post-sentence individuals who did receive sentence credit for their time spent in the center.[61] The Eighth Circuit held that official detention required that the defendant be subject to the control of the Attorney General and thereby subject to federal penalties for escape.[62] Therefore, the Eighth Circuit refused Moreland's credit request and ruled that the conditions of the defendant's detainment, although identical to those of the post-sentence individuals, were irrelevant for purposes of calculating sentence credit.[63]

Employing a similar analysis, the Fourth Circuit in *Randall v. Whelan*[64] stated that the term "in custody" was essentially synonymous

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56. *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990) (interpreting 18 U.S.C. § 3568). See also *Mills*, 967 F.2d 1387 (interpreting 18 U.S.C. § 3585).

57. *Woods*, 888 F.2d at 656. See also *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (en banc). This apparent inequity has led to several challenges under the Fifth Amendment's Equal Protection Clause. See note 4 and accompanying text.

58. 968 F.2d 655 (8th Cir. 1992).

59. Id. at 665. (Heaney, J., dissenting).

60. Id.

61. Id. at 657.

62. Id. at 659-60.

63. Id. at 661.

64. 938 F.2d 522 (4th Cir. 1991).

with "in official detention" and referred to the custodian's legal authority rather than the conditions of the defendant's confinement.[65] The *Randall* court suggested that the only common link between federal inmates housed under vastly different conditions is that they are all subject to the authority of the Attorney General.[66] Accordingly, that court held that unless a defendant is under the Attorney General's control, he is not "officially detained" and therefore is ineligible for sentence credit under Section 3585.[67]

The courts that follow the *Moreland* and *Randall* line of analysis base their denial of sentence credit solely on the jailor's identity.[68] These courts suggest that because defendants who are released on a condition of bond are still under the control of the court, they are not "in official detention" and consequently do not qualify for sentence credit. This result is inconsistent with a plain meaning interpretation of the statute. The text of the statute does not specify that official detention requires the Attorney General's control;[69] therefore, a commonsense interpretation suggests that judges also are empowered to "officially detain" defendants. Furthermore, the distinction between detainment by a judge and by the Attorney General appears artificial and irrelevant to a layperson.[70] For example, in *Ramsey v. Brennan*,[71] the Seventh Circuit admitted that any "normal English speaker" would consider a defendant detained in a halfway house to be in custody.[72] The circuit courts that follow this analysis offer no justification for the distinction they recognize between detainment by a judge and detainment by the Attorney General. According to the courts, even though a judge has the authority to detain the individual, this detention is not "official."[73] This ridiculous distinction has prompted judges, defend-

65. Id. at 525. In *Randall*, the court refused to grant sentence credit to a prisoner because the court remanded him to a drug treatment center, during which time he was not answerable to the Attorney General. Id.

66. Id.

67. Id. at 526.

68. See *Starchild v. Federal Bureau of Prisons*, 973 F.2d 610 (8th Cir. 1992). See also *Ronchetti v. Richards*, 790 F. Supp. 117 (N.D.W.V. 1992).

69. 18 U.S.C. § 3585. See note 14.

70. The basic question is whether a judge can be vested with the authority to detain an individual but be denied the power to determine whether that detention will be credited to an ultimate sentence.

71. 878 F.2d 995 (7th Cir. 1989).

72. Id. at 996.

73. In *United States v. Wilson*, the Supreme Court ruled that only the Attorney General can determine sentence credit and only after conviction. 112 S. Ct. 1351, 1355 (1992). Many have suggested that the judiciary should have concurrent jurisdiction. However, when defendants are remanded to detention facilities prior to conviction by judges, the defendants should receive credit by appealing to the Attorney General.

ants, and lawyers to argue that sentence credit should be granted to conditionally released individuals.[74]

In *Brown v. Rison*,[75] the Ninth Circuit rejected the government's contention that "detention" did not include conditional release programs.[76] The *Brown* court defined the term "in custody" to include its "ordinary and plain meaning": detention.[77] Accordingly, it awarded the defendant credit for his time spent in a community treatment center by holding that the restraints on one's liberty approaching incarceration[78] satisfied the "in custody" requirement of Section 3568.[79]

Similarly, in *United States v. Davis*,[80] the District Court for the District of Columbia granted sentence credit to the defendant for time spent in a halfway house prior to conviction and for the time spent after conviction awaiting assignment to a correctional facility.[81] The *Davis* court stated that the confinement conditions at the halfway house satisfied the ordinary meaning of official detention.[82]

Finally, in *United States v. Wickman*,[83] Judge Lay of the Eighth Circuit disagreed with the majority and explained in a dissent that the plain meaning of "official detention" did not require the defendant to be confined in a specific type of building or to be under the control of the Attorney General.[84] Rather, he argued that a defendant was detained when he was remanded by a judge to any treatment facility and was subjected to additional sanctions and penalties for failure to comply.[85] According to Judge Lay, official detention only implied a significant loss of liberty; thus, the conditionally released defendant deserved sentence credit.[86]

Reaching a similar conclusion, the dissenting judges in *Moreland*,[87] including Judge Lay, offered an alternative interpretation of the phrase

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74. See *United States v. Wickman*, 955 F.2d 592 (8th Cir. 1992); *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (en banc).

75. 895 F.2d 533 (9th Cir. 1990).

76. Id. at 536.

77. Id. Specifically, the court stated, "[T]he conditions of Brown's confinement . . . fall convincingly within both the plain meaning and the obvious intent of 'custody' as it is used in section 3568." Id. The court held that "custody" included enforced residence at a drug treatment center when the conditions approach incarceration. Id.

78. Id.

79. Section 3568 is the predecessor statute to § 3585. See note 14 and accompanying discussion.

80. 763 F. Supp. 638 (D.D.C. 1991).

81. Id. at 644.

82. Id.

83. 955 F.2d 592 (8th Cir. 1992).

84. Id. at 594.

85. Id.

86. Id. at 595.

87. *Moreland*, 968 F.2d at 664 (Heaney, Lay, McMillan, Arnold, and Gibson, JJ., dissenting).

"in official detention." The judges suggested that, because the defendant was remanded to a residential community treatment center that acted as an agent of the criminal system, his time in the treatment center qualified as "official detention," and he therefore deserved sentence credit.[88] According to the dissenters, whenever defendants are remanded to a facility recognized by the federal system, 18 U.S.C. Section 3585 commands the Attorney General to grant them credit towards their sentences.[89]

These interpretations of Section 3585's language are consistent with the "plain meaning" that an individual generally would afford the statute. Others may argue, however, that the language of the statute is inherently ambiguous; therefore, its meaning cannot be ascertained definitively. These individuals contend that the language is susceptible to different interpretations based on context and the interpreter's value system,[90] and therefore requires judges to focus on the legislature's intent in and purpose of passing Section 3585.[91]

B. Purpose and Intent of 18 U.S.C. Section 3585

The courts often employ a second approach when interpreting statutes. "Intentionalism" requires courts to determine the legislature's intent in enacting a statute and then to apply the law accordingly.[92] Many scholars consider intentionalism to be the only legitimate theory of interpretation because the courts are agents of the legislature and should attempt to fulfill the legislative goals.[93]

A related approach is "purposivism," in which courts attempt to interpret a statute based on the legislature's purpose in adopting the law.[94] This theory rests on the assumption that the legislature passes every law with a specific purpose or objective, and that by identifying that purpose, the court successfully will apply the law.[95]

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88. Id. at 665.

89. Id.

90. Eskridge and Frickey, 42 Stan. L. Rev. at 342-43 (cited in note 33). This argument assumes that the political leanings of the interpreter will influence his or her interpretation of the statute. For example, in the instant case, a judge who is extremely concerned with prisoners' constitutional rights is more likely to grant sentence credit than a judge who is worried about the effect of crime on society.

91. Eskridge and Frickey, 42 Stan. L. Rev. at 325-332.

92. Id.

93. Id. at 326.

94. Professor Max Radin suggested this approach in Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930), and in Max Radin, *A Short Way with Statutes*, 56 Harv. L. Rev. 388 (1942).

95. Eskridge and Frickey, 42 Stan. L. Rev. at 332-33 (cited in note 33) (citing Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 166-67 (Cambridge, 1958)).

Unfortunately, it often is impossible to discover the legislature's intent or purpose for enacting a statute. Legislative history, the records designed to give researchers insight into the impetus for the legislation, often is incomplete[96] and can be imprecise.[97] Critics argue, therefore, that both intentionalism and purposivism fail to provide a proper standard for statutory interpretation because they, like textualism, enable judges to make ad hoc determinations about the law.[98]

Although the courts have tried to determine whether Congress intended to grant sentence credit to defendants under Section 3585 for time spent in residential detention centers prior to trial,[99] they have realized that the legislative history offers little insight. For example, in his *Wickman* dissent, Judge Lay argued that the legislature's intent is determinative in construing the meaning of "official detention," but he stated that the history of Section 3585 was too scant to provide insight into legislative objectives.[100] He argued, however, that the Bail Reform Act's[101] goal to increase the number of individuals who received sentence credit and the conditions of incarceration that merited credit indicates that Congress intended Section 3585 to grant sentence credit to conditionally released individuals whose liberty was significantly impinged.[102]

Congress probably did not intend to deny credit to individuals incarcerated with severe liberty restraints. In fact, the legislature probably did not consider granting sentence credit for time spent in residential detention facilities when the Crime Act originally was promulgated in 1984. This lack of foresight by Congress highlights the weakness in the "intentionalism" and "purposivism" approaches to statutory interpretation: the interpreter has no idea of the legislature's actual intention and is left to determine how Congress would respond to this issue. Given the current condition of federal penal institutions and the interest in protecting the public without unduly trammelling

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96. Eskridge and Frickey, 42 Stan. L. Rev. at 328-31. In part, legislative history is always incomplete because it is written only by certain individuals who voted for the law. Although perhaps successful in conveying both their intent in passing the law and the discussions prior to the vote, the history cannot provide a definitive view of the entire legislative body's intent.

97. Id.

98. Id. at 327-29, 333-39.

99. See *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990); *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989); *Randall v. Whelan*, 938 F.2d 522 (4th Cir. 1991); and *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (en banc).

100. *United States v. Wickman*, 955 F.2d 592, 593 (8th Cir. 1992) (Lay, J., dissenting).

101. See Bail Reform Act (cited in note 3).

102. *Wickman*, 955 F.2d at 594 (Lay, J., dissenting). One can infer through the history of the statute that Congress intended to increase the class available to receive credit because this has been the trend since Congress first granted sentence credit for pre-trial custody in 1960 for instances when a minimum sentence was mandated.

prisoners' constitutional rights, Congress probably would have commanded courts to base their credit decisions on the conditions of the defendant's incarceration.

C. *Practical Reasoning*

Professors Eskridge and Frickey criticize the traditional approaches to statutory interpretation for failing to provide "objective and determinative answers" free from the influence of prevailing values.[103] They suggest that interpretation of a statute is impossible without considering outside influences.[104] According to Professors Eskridge and Frickey, the United States Supreme Court actually interprets statutes through a system of practical reasoning;[105] rather than attempting to disassociate themselves from outside forces, the Court tries to interpret statutes "reasonably."[106] The Justices consider a wide variety of factors including statutory language, intent and purpose of the statute, related statutory policies, current political values, and fundamental fairness.[107]

For example, the *Brown* court analyzed the language of the statute and considered both the BOP's statement on sentence credit and the other circuits' opinions denying credit to pre-trial detainees, yet the court chose to disregard the majority approach and grant credit.[108] The court based this decision on its concept of fairness, stating that "in custody" should not be interpreted to "exclude enforced residence under conditions approaching incarceration."[109] The *Brown* court held that denial of sentence credit to an individual whose liberty was significantly infringed was unfair.[110]

The practical reasoning approach to statutory interpretation is the appropriate mode of analysis for Section 3585 for several reasons. The courts cannot consider only the text of the statute, especially when they interpret the language ambiguously. The reasonable interpretation of 18 U.S.C. Section 3585 demands that pre-trial detainees who are restrained at the same facilities as post-sentence detainees be afforded the same rights and granted sentence credit for time spent remanded to

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103. Eskridge and Frickey, 42 Stan. L. Rev. at 345 (cited in note 33).

104. Id.

105. Id. at 345-48.

106. Id.

107. Id. at 348-52. This approach is similar to other methods employed by many of the courts. When interpreting § 3585, the courts weigh a variety of factors to determine if credit is warranted. See discussion in text accompanying notes 15-18.

108. *Brown*, 895 F.2d at 535-36.

109. Id. at 536.

110. Id.

the residential facility. The BOP, however, refuses to acknowledge and correct this obvious inequity.

III. Critical Factors Influencing the Credit Decision

All courts examine the statutory language of Section 3585 but rarely conclude their analyses at that point. Many courts that employ the practical reasoning approach to their interpretation of Section 3585 attempt to justify their decisions by using three other factors: the conditions of incarceration, the BOP's policy on sentence credit for conditional release programs, and a Fifth Amendment equal protection analysis. This Part evaluates the various courts' positions on each of these factors and suggests alternative interpretations that would result in extremely different but more equitable outcomes.

A. Conditions of Incarceration

Most circuit courts contend that the degree of incarceration and the conditions of restraint are irrelevant for determining whether a defendant is "in official detention" and thereby entitled to sentence credit.[111] These courts disregard the true issue raised by conditional release programs: whether a particular defendant's liberty was sufficiently restricted by the conditions of his confinement to warrant sentence credit for the time remanded to the treatment center.

For example, in *United States v. Insley*,[112] the defendant, a single female, was remanded to the custody of her parents.[113] The Fourth Circuit restricted the defendant to her parents' home except when she needed to attend church and work.[114] After sentencing, the defendant sought sentence credit for the time spent conditionally released.[115] The court rejected the defendant's petition, stating that her conditional release did not constitute custody.[116]

The Fourth Circuit further explored this analysis in *Randall v. Whelan*,[117] in which the court stated that courts should not determine sentence credit by an evaluation of the regulations and physical constraints on a conditionally released prisoner.[118] The court explained

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111. See, for example, *Randall v. Whelan*, 938 F.2d 522 (4th Cir. 1991); *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (en banc); *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989).

112. 927 F.2d 185 (4th Cir. 1991).

113. Id. at 186.

114. Id.

115. Id.

116. Id.

117. 938 F.2d 522 (4th Cir. 1991).

118. Id. at 525-26.

that this approach would "mire the judiciary in a swamp of factual and circumstantial details that would likely produce inconsistent and standardless decisions."[119] The *Randall* court therefore deferred to what it considered the more knowledgeable BOP and enforced the BOP's policy that denied sentence credit to all conditionally released prisoners.[120]

Similarly, in *United States v. Woods*,[121] the Tenth Circuit ruled that "in official detention" does not mean stipulations or conditions imposed upon release but requires complete, physical imprisonment in a place of confinement.[122] The court then implied, however, that it denied the defendant credit because the restrictions at the halfway house to which Woods was remanded did not equal the deprivation of liberty experienced by an individual incarcerated in a jail-type facility.[123] The court's analysis implies that it used a balancing test, like the one used by the Ninth Circuit in *Brown*, to determine whether the conditions of restraint were sufficiently similar to those in a jail facility to warrant sentence credit.

The *Randall* court's justification for denying the defendant credit is ludicrous. By refusing to consider the circumstances of incarceration, the judiciary currently is producing the "inconsistent and standardless decisions" that the Fourth Circuit sought to avoid. Moreover, the *Woods* court's own analysis indicates that when determining whether sentence credit is merited, it is proper and necessary to consider the conditions of incarceration.[124] In that case, the court considered the degree of restraint imposed on Woods during his incarceration when deciding whether to award him credit. Finally, under the standard advanced by the *Woods* court, the defendants in *Moreland* in the Eighth Circuit,[125] *Brown* in the Ninth,[126] and *Davis* in the D.C. District Court[127] would have received credit because they were subject to "complete physical incarceration in a place of confinement."[128] These defendants were subject to twenty-four hour confinement. Under the

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119. Id. at 525. It is ironic that the Fourth Circuit suggested that the current standard used by the courts results in even-handed sentencing. As evidenced by the cases cited, the varying approaches of the circuits result in similar inequities.

120. Id. at 526.

121. 888 F.2d 653 (10th Cir. 1989).

122. Id. at 655.

123. Id. at 656.

124. Id. at 655-56.

125. *Moreland*, 968 F.2d 655. See text accompanying notes 167-176 for a detailed discussion of the conditions of Moreland's incarceration.

126. *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990). See text accompanying notes 19-25 for details of Brown's confinement.

127. *United States v. Davis*, 763 F. Supp. 638 (D.D.C. 1991).

128. *Woods*, 888 F.2d at 655.

Woods analysis, the Tenth Circuit should allow defendants to earn sentence credit when faced with similar conditions.[129] Despite the language of its opinion, however, the Tenth Circuit probably would not have granted these defendants credit because they were not remanded to federal penal institutions.

Many courts suggest that they are making credit determinations based on conditions of incarceration but are not willing to adopt the balancing approach articulated by the Ninth Circuit, which weighs the degree of restraint that a residential facility imposes on a detainee's freedom when deciding whether that defendant deserves sentence credit. Most courts, however, grant credit only if the defendant was remanded to a penal institution. By contrast, in *United States v. Wickman*, Judge Lay suggested in a vigorous dissent that "official detention" does not require "prison-like confinement" and that restraint of a defendant's liberty satisfies the statute's requirements.[130] Judge Lay argued that even house arrest satisfies "official detention" and qualifies for credit.[131]

In *United States v. Davis*,[132] the District of Columbia's District Court granted the defendant sentence credit for the time she spent in a halfway house awaiting trial.[133] The court distinguished the Tenth Circuit's denial of credit in *Woods*,[134] stating that the conditions of Davis's confinement approached those of incarceration.[135] Davis was incarcerated twenty-four hours a day and faced prosecution if she left the center for more than two hours at a time.[136] The *Davis* court ended its opinion by stating: "The conditions of confinement at the halfway house fall under the ordinary and obvious meaning of official detention."[137] Although the court agreed that the BOP's position deserved deference, the court rejected that interpretation.[138]

This bright-line rule exaggerates the inequities in the federal criminal justice system. The Bail Reform Act sought to ensure that individuals who were sentenced to serve the same amount of time did not receive disparate treatment. Section 3585 clearly states that individuals in "official custody" should receive credit toward their sentence. Indi-

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129. See text accompanying notes 167-76, 19-27, and 132-38 for discussion of these cases.

130. *United States v. Wickman*, 955 F.2d 592, 595 (8th Cir. 1992) (Lay, J., dissenting).

131. Id. at 595 n.3 (citing the Federal Sentencing Guidelines that equate a day in prison with one of home detention).

132. 763 F. Supp. 638 (D.D.C. 1991).

133. Id. at 639.

134. *Woods*, 888 F.2d 653.

135. *Davis*, 763 F. Supp. at 640.

136. Id. at 639.

137. Id. at 644.

138. Id.

viduals at halfway houses often are detained under restrictive conditions that mirror or exceed those at some federal correctional facilities. Courts should base credit determinations on the degree to which an individual's liberty was infringed by the conditions of his incarceration, not on the obtuse distinction between the authority of a judge and the Attorney General.

B. Bureau of Prisons' Statement

When deciding whether to award sentence credit, the courts also consider the BOP's position on sentence credit for conditionally released defendants. Because the BOP is the administrative agency in charge of the federal penal system, the federal circuit courts often defer to it by implementing the agency's policies.[139] Presently, the BOP denies sentence credit to all defendants conditionally released prior to trial[140] and justifies this wholesale denial by explaining that "the degree of restraint is not sufficient to constitute custody."[141]

The BOP's statement does not indicate that custody or "official detention" requires an individual to be subject to the Attorney General's control to earn credit; rather, the BOP's statement suggests that credit is denied solely because the degree of restraint is not sufficient.[142] Although the BOP's statement purports to deny sentence credit in all cases, the specific language implies that the conditions of confinement are determinative.[143] Yet the majority of circuit courts disagree.

For example, the Seventh Circuit in *Ramsey v. Brennan*[144] stated that although detention in a halfway house constituted custody, the court would defer to the BOP's policy because the statute was ambiguous and subject to various interpretations.[145] Accordingly, the court denied the defendant's petition for credit.[146] The court did not consider

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139. See, for example, *Randall v. Whelan*, 938 F.2d 522; *Moreland*, 968 F.2d 655.

140. See *Randall*, 938 F.2d at 524.

141. Id. at 525; Bureau of Prisons' Program Statement 5880.24 (5). Specifically, the Bureau of Prisons' Statement provides: "Time spent in residence in a residential community center . . . [under the provisions of 18 U.S.C. § 3146] as a condition of bail or bond, including the Pretrial Services Program, (18 U.S.C. § 3152-54), is not creditable as jail time since the degree of restraint provided by residence in a community center is *not sufficient restraint to constitute custody* within the meaning or intent of 18 U.S.C. § 3568." (original emphasis omitted) (emphasis added). Additionally, the statement defines "in custody" as "physical incarceration in a jail-type institution or facility."

142. Id.

143. A majority of the circuits consider only the first part of the statement and have ruled that the BOP's statement is a wholesale bar to sentence credit for an individual detained in a residential facility.

144. 878 F.2d 995 (7th Cir. 1989).

145. Id. at 996.

146. Id.

the conditions of the defendant's release, but rather stated that the BOP's statement constituted a wholesale bar to granting sentence credit to conditionally released defendants.[147]

Similarly, the Fourth Circuit in *Randall v. Whelan* stated that the BOP's policy clearly prohibited the granting of sentence credit for time spent in residential facilities.[148] The court, citing the Seventh Circuit's position in *Ramsey*,[149] stated that courts should defer to the BOP's greater knowledge of federal penal policy.[150]

By contrast, in *Brown*, the Ninth Circuit stated that, although it owed deference to the BOP, the agency's definition of custody was unreasonable because it failed to include enforced residence under conditions approaching incarceration.[151] The court acknowledged the BOP's statement regarding sentence credit but refused to follow the BOP's policy.[152] The *Brown* court therefore granted the defendant sentence credit for the 306 days he spent incarcerated at the drug treatment center[153] under extremely restrictive conditions. The Ninth Circuit continues to ignore the BOP's statement and grants credit for time spent in residential facilities as a condition of bond.[154]

Similarly, the District Court in *United States v. Davis*[155] also ignored the BOP's statement and granted the defendant credit for time spent in a halfway house.[156] The *Davis* court chided the Seventh Circuit for denying credit in *Ramsey* simply because they deferred to the BOP without recognizing that the BOP regularly grants credit to post-sentence individuals who were detained in the same facilities.[157] The *Davis* court stated that, at best, the BOP's position was unreasonable, and, at worst, created an equal protection violation.[158]

The BOP's statement implies that if the conditions of incarceration approach those of a jail-type facility, then the defendant deserves sen-

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147. Id.

148. *Randall*, 938 F.2d at 523.

149. *Ramsey*, 878 F.2d at 996. See text accompanying notes 144-47.

150. *Randall*, 938 F.2d at 525.

151. *Brown*, 895 F.2d at 536.

152. Id. The court specifically found that the highly restrictive conditions of Brown's confinement were sufficient to merit credit under § 3585.

153. Id. See notes 19-26 and accompanying text for a complete description of the conditions of Brown's incarceration.

154. See *Mills v. Taylor*, 967 F.2d 1397 (9th Cir. 1992). See also *Grady v. Crabtree*, 958 F.2d 874 (9th Cir. 1992); *Smith v. United States*, 1992 WL 55799 (9th Cir. 1992); and *Tyree v. Taylor*, 965 F.2d 773 (9th Cir. 1992). Under California law, the Attorney General now must grant sentence credit for time spent in a residential facility if the conditions of restraint approach incarceration.

155. 763 F. Supp. 638 (D.D.C. 1991).

156. Id. at 641-45.

157. Id. at 643. See *Ramsey*, 878 F.2d at 996. See notes 144-47 and accompanying text.

158. *Davis*, 763 F. Supp. at 643-44.

tence credit. The exact language of the statement suggests that the degree of incarceration is determinative.[159] This seemingly obvious interpretation contradicts the bright-line rule advanced by the BOP that no credit be given for pre-trial detention in treatment centers. Through its statement, the BOP unintentionally invites the current balancing approach employed by the *Brown* court.[160] The conditions of confinement at certain centers approach or exceed those faced by inmates in federal institutions. Thus, the BOP essentially states that sentence credit determinations should be based on the degree to which a defendant's liberty is impinged.

C. *Equal Protection Analysis*

Courts also consider whether denying sentence credit is consistent with the Fifth Amendment's Equal Protection Clause when they examine defendants' credit appeals. The Equal Protection Clause[161] guarantees that "similarly situated" individuals will be treated equally under the law.[162] If denying credit would violate the Equal Protection Clause, courts will grant it immediately.

At least three circuits have entertained equal protection challenges to the BOP's refusal to grant credit for pre-trial residential detention.[163] Two circuits have held that the divergent legal status of the pre- and post-sentence detainees provided a rational basis for the different treatment.[164] In *Johnson v. Smith*,[165] however, the Eleventh Circuit ruled that the disparate treatment violated the Equal Protection Clause.[166]

In both *Moreland v. United States*[167] and *United States v. Woods*,[168] the defendants were conditionally released to halfway houses to await their trial.[169] These halfway houses sheltered both pre-trial and

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159. The language of the BOP's statement is clear because "the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody." Bureau Program Statement No. 5880.24(5). See note 141 and accompanying text.

160. See notes 19-26 and accompanying text.

161. U.S. Const., Amend. V.

162. Id.

163. See *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (en banc); *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989); *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1983).

164. See *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 656-57.

165. 696 F.2d 1334 (11th Cir. 1983).

166. Id. Although the court found that the treatment violated the Equal Protection Clause, it suggested that the defendants' different legal status may have justified the disparity in treatment. The state failed, however, to present this evidence to the trial court, and the circuit court refused to entertain it on appeal.

167. 968 F.2d 655 (8th Cir. 1992) (en banc).

168. 888 F.2d 653 (10th Cir. 1989).

169. *Moreland*, 968 F.2d at 656; *Woods*, 888 F.2d at 654.

post-sentence prisoners.[170] The prisoners, regardless of status, were subject to the same treatment and conditions.[171] The post-sentence prisoners received sentence credit for the time they spent in the facility, but the pre-trial prisoners, including the two defendants, were denied sentence credit for their period of incarceration.[172] The defendants appealed the denial of credit, arguing that it violated the Equal Protection Clause.[173]

In these two cases, the courts began their analyses by determining whether the two classes of individuals were similarly situated.[174] Both courts ruled that the two groups were not similarly situated because the post-sentence prisoners were subject to the authority of the Attorney General and the conditionally released pre-trial defendants were subject only to the jurisdiction of the courts.[175] Accordingly, the courts ruled that denying credit to the pre-trial detainees did not violate the Equal Protection Clause.[176] These courts based their ultimate decisions on the previously discussed artificial distinction between a judge's and the Attorney General's respective powers to "officially detain" a defendant.

By contrast, in *Johnson v. Smith* the Eleventh Circuit ruled that the defendant, a pre-trial detainee subject to exactly the same treatment as post-sentence prisoners, deserved sentence credit.[177] The court ruled that the two groups were similarly situated and that failure to grant the defendant sentence credit would violate the Equal Protection Clause.[178] The court limited its holding to this specific case, however, because the state failed to offer a rational reason for the disparate treatment in the trial court.[179]

The District Court for the District of Columbia also suggested that the BOP's policy of denying credit created an equal protection violation

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170. *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 655.

171. *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 655.

172. *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 655.

173. *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 655.

174. See *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 665. The Equal Protection analysis is required when those similarly situated are subject to disparate treatment. Gerald Gunther, *Constitutional Law* 678 (Foundation, 10th ed. 1980). If two groups are similarly situated, then the government must advance a rational reason to justify the discrepancy in treatment. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

175. *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 656.

176. *Moreland*, 968 F.2d at 660; *Woods*, 888 F.2d at 656.

177. 696 F.2d 1334, 1336 (11th Cir. 1991).

178. Id. at 1338.

179. *Johnson*, 696 F.2d at 1338. The court denied the state the opportunity to present evidence justifying the different treatment on appeal because "absent special circumstances, defenses not presented and for which proof is not offered in the trial court cannot be raised for the first time on appeal." Id.

in *United States v. Davis*.[180] The court highlighted the potential constitutional violation by stating that, because both are subject to the same confinement conditions and the same penalties for escaping, defendants detained while awaiting trial are similarly situated to post-sentence defendants.[181] The court held that because the government advanced no logical reason for the distinction, denying credit raised equal protection questions.[182]

Individuals are not dissimilarly situated simply because one individual is sent to a treatment center by a judge and the other by the Attorney General. They are treated identically and subject to exactly the same restrictive conditions once at the facility. The state should be required to offer more than just the identity of the defendants' jailers to deny these defendants sentence credit. Defendants are not concerned with whether a judge or the Attorney General is responsible for ordering treatment; their freedom is infringed to the same extent in either situation.

Most courts' approach to sentence credit denies defendants their freedom and the security of knowing that the time they spent incarcerated will be credited toward their ultimate sentence. The courts' differing interpretations of the statutory text and their analyses of the other factors have resulted in extremely disparate treatment for similarly-situated individuals. The time individuals spend incarcerated for committing the same federal crime should not differ according to the jurisdiction of their indiscretion.

IV. Policy Considerations and Suggestions

The current confusion regarding the proper interpretation of Section 3585 results in extremely disparate treatment for individuals. A defendant who is remanded to a federal facility to await trial receives sentence credit, whereas an individual who is conditionally released, subject to perhaps more restrictive conditions than the first individual, is denied credit. Moreover, a defendant sent to a drug rehabilitation center in California receives sentence credit although a defendant sent to a similar facility in Tennessee is denied credit. These arbitrary distinctions primarily result from focusing on the identity of the defendant's jailor, rather than on the restraints on the defendant's liberty. The courts should adopt an approach for determining whether to grant sentence credit that examines the degree of the defendant's incarceration, not just the jailor's identity.

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180. *Davis*, 763 F. Supp. at 643-44.
181. Id. at 644.
182. Id.

The *Brown* approach is more consistent with the apparent intent and policy of the legislature in adopting 18 U.S.C. Section 3585. The legislature did not explicitly restrict the meaning of "in official detention" only to include time when the defendant was in the Attorney General's custody. The statute's plain language suggests that time served in a residential detention center should be credited towards the defendant's ultimate sentence. Upon close evaluation, the justifications offered by most circuit courts for denying pre-trial detainees sentence credit are weak. The differing authority of a judge and the Attorney General is not so disparate as to warrant the extreme diversity of position. Moreover, the policy of granting sentence credit to individuals remanded to a treatment center after sentencing and denying it to an individual remanded to the same treatment center prior to trial is an equal protection violation.

An approach based on the degree of incarceration comports with the text of Section 3585 and the legislature's apparent intent and policy in adopting the statute. This approach would ensure defendants that their term of imprisonment would be reduced by any time they have spent in federal or state custody as a result of their offenses.

This approach may meet resistance from most courts. Judges might argue that making such determinations and administering them will result in as much disparity in treatment as the current system. The practical problems of determining what type of detention merits credit, however, require only that the Supreme Court or the Attorney General delineate the time and freedom restrictions necessary to comport with federal guidelines of detention. The creation of such standards could actually decrease the number of habeas petitions for credit because the facilities entitled to federal credit can be licensed, and a list of eligible centers can be made available to federal judges and attorneys for use during bail hearings.

Additionally, the courts face increasingly overcrowded jails, which, in many cases, are subject to court orders to decrease the prison population.[183] Therefore, these courts may remand to residential detention facilities individuals who otherwise would have been refused bail and sent to a federal detention facility. The individual's freedom is being severely restricted in an attempt to protect society, and the individual is receiving treatment to enable him to become a more productive member of society. The centers foster the deterrence, retributive, and reha-

183. The statistics cited in *United States v. Wickman*, 955 F.2d 592, 595 (8th Cir. 1992) (Lay, J., dissenting), show the following: the local jail occupancy rate in 1989 was 108%, 26% of jails were under federal or state order to limit the number of inmates, and 51% resorted to detaining prisoners in other facilities due to overcrowding. Bureau of Justice Statistics Survey (June 30, 1989).

bilitative goals of incarceration;[184] therefore, the individual should receive sentence credit.

Moreover, the current overcrowding in the jails demands innovative responses by both the judiciary and the BOP. Alternative sanctions that will further the current goals of incarceration must be developed and offered. Certain jurisdictions currently use programs like electronic monitoring and house arrest, which may become more widespread if proven successful.[185] Designing additional programs and facilities that will protect society from dangerous individuals but also will enable the individuals to receive treatment for substance abuse problems or participate in supervised work programs will be more beneficial to society than simply filling slots in a federal penitentiary.

In the near future, the Attorney General and the courts will have no choice but to consider these proposed options. The current conditions in prisons suggest that these alternatives, if not voluntarily chosen, will be foisted upon prison officials by court order or through prisoner uprisings demanding action.

V. CONCLUSION

A person whose freedom is restricted cares little about the identity of the jailor. The language of 18 U.S.C. Section 3585 commands the Attorney General to grant sentence credit to an individual who is "in official detention."[186] The language of the statute appears unambiguous: a defendant is entitled to credit for time served in "official detention." The meaning afforded this phrase by most circuit courts precludes many defendants from receiving appropriate credit. This interpretation results in serious inequities that undermine the fairness of the criminal justice system.

The Supreme Court should terminate the current confusion among the circuit courts and definitively answer the question of whether individuals released to residential detention facilities prior to trial are entitled to sentence credit. The Court should adopt the *Brown* approach and make credit determinations based on conditions of incarceration that should be the guidepost for determining whether an individual is in custody and therefore entitled to sentence credit.

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184. Treatment centers seek to enable prisoners to return to civilian life without substance abuse problems.

185. See *Wickman*, 955 F.2d at 595 (Lay, J., dissenting). Judge Lay argued that individuals incarcerated under such programs should be granted sentence credit. In Judge Lay's vigorous dissent in *Wickman*, he suggested that the defendant, subject to electronic monitoring while under house arrest, was in custody and deserved credit.

186. See notes 7-10 and accompanying text.

The conditions of incarceration and the restraints on freedom should determine whether an individual deserves sentence credit. The United States criminal justice system is based on the belief that an individual should be punished for his crimes. But an accusation of guilt does not destroy a defendant's constitutional rights; whether a person's liberty is infringed prior to or after trial should be irrelevant for purposes of sentence credit. Whenever an individual is subject to severe liberty restrictions, whether it be at the command of the court or the Attorney General, that person should receive credit for that time. A balancing approach is appropriate to determine what qualifies as "detention"; the question should not revolve around the definition of "official."

The conditions of incarceration that constitute detention should be determined by the Supreme Court or the Attorney General. The Court should formulate guidelines delineating what conditions will be considered "official detention" and thereby deserve sentence credit. This approach to sentence credit would produce more consistent rulings and equitable results.

MaryEllen Sullivan