

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 CHRISTOPHER A. LOPEZ, :
4 Petitioner :
5 v. : No. 99-7504
6 RANDY J. DAVIS, WARDEN, ET AL. :
7 - - - - -X
8 Washington, D.C.
9 Monday, October 30, 2000
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.
13 APPEARANCES:
14 MARK MEIERHENRY, ESQ., Sioux Falls, South Dakota; on
15 behalf of the Petitioner.
16 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the Respondents.
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-7504, Christopher A. Lopez v. Randy J.
5 Davis.

6 Mr. Meierhenry.

7 ORAL ARGUMENT OF MARK MEIERHENRY

8 ON BEHALF OF THE PETITIONER

9 MR. MEIERHENRY: Mr. Chief Justice, and may it
10 please the Court, Ms. Brinkmann:

11 This case comes to you out of the State of South
12 Dakota, and I'd like to briefly put the setting for all of
13 you.

14 This is from Yankton, South Dakota, which was
15 the first territorial capital of the Dakota Territory. As
16 a result of that, certain institutions were created, one
17 of which was Yankton College. It was the oldest college
18 in the Dakotas and Montana. It's now closed. It closed
19 in the 1980's, and it's now a Federal prison camp. That
20 Federal prison camp has no walls. It looks like Yankton
21 College did for over a century until it was closed.

22 At that place resides today Chris Lopez. Chris
23 Lopez came to the Yankton prison camp from the State of
24 Iowa. He drove across the State of Iowa and was allowed
25 to do so by the district court to self-report to this

1 college campus, now Federal prison camp.

2 We're here today to talk about 18 U.S.C.
3 3621(e). That statute at the time that Chris Lopez was a
4 convicted person, before he was a prisoner, unambiguously
5 grants to him an incentive, and before he knocked on the
6 door to be let into prison it said to him, if you are a
7 drug abuser, which he admits he is, and if you agree to
8 undergo the program, which he does, if you've been
9 convicted of a nonviolent offense, Congress has made a
10 deal with you. We will allow you, if you successfully
11 complete the program, to be let out of prison up to 1 year
12 early. He had 72 months to serve.

13 QUESTION: But counsel, that's not what the
14 statute says. The statute says the Bureau of Prisons may
15 reduce the sentence up to 1 year. It doesn't say you have
16 a right or an entitlement, does it?

17 MR. MEIERHENRY: No. I don't urge this Court
18 that that is the case, that it's an entitlement. The
19 legislative history is clear that that was considered by
20 Congress, and Congress did not wish to make it a right
21 that if you simply go through the program yet you led the
22 gang on the campus, or you created other disciplinary
23 problems, that the Bureau of Prisons shouldn't have
24 control over the prisoner while that prisoner was
25 incarcerated, but this is something I'd like --

1 QUESTION: Excuse me. You're saying that it --
2 that -- I mean, that doesn't go far enough. All you're
3 acknowledging is that the Bureau of Prisons didn't have to
4 give you that benefit unless you successfully completed
5 the program, right?

6 MR. MEIERHENRY: That's correct.

7 QUESTION: But you're still maintaining that if
8 you successfully complete the program, if you're a model
9 prisoner and everything else, you had a right to get that
10 benefit?

11 MR. MEIERHENRY: Justice, I think that's the
12 next case. What we're here arguing today is whether
13 Chris --

14 QUESTION: Well, what does the statute say?

15 QUESTION: It says may.

16 MR. MEIERHENRY: The statute says may, but let's
17 consider the structure of it. 3621(a) is very clear.
18 3621(a) tells the Bureau of Prisons that they may not
19 release a prisoner until the expiration of the term
20 imposed, or there's a good conduct section 3624, so when
21 (e) was enacted -- and the legislative history is Congress
22 also amended section 3621(b), which says the bureau shall
23 make available appropriate substance abuse treatment for
24 each prisoner the bureau determines has a treatable
25 condition of substance addiction or abuse. All right,

1 they enact that.

2 But 3621(a) would not allow anyone to be
3 released early, so they enacted subsection (c), which is
4 entitled, substance abuse treatment, so section (e), Your
5 Honors, had to be amended to give permission to the Bureau
6 of Prisons that if people took the substance abuse
7 treatment there would be some incentive. The
8 congressional hearings are clear.

9 QUESTION: Well, you're talking about
10 legislative history, Mr. Meierhenry, and those of us who
11 resort to legislative history usually do so only where
12 something is ambiguous. We're dealing with the word may
13 here in section (b), and what is ambiguous about the word
14 may?

15 MR. MEIERHENRY: I don't think there's anything
16 necessarily ambiguous if you use another meaning of the
17 word, give permission to. I urge Your Honor that until
18 the enactment of (e), if you had substance abuse
19 treatment, if you had an incentive, the Bureau of Prisons
20 could not turn anyone loose under any circumstances.

21 What I am urging is a plain reading of this.
22 Before Mr. Lopez, so to speak, becomes a prisoner, as you
23 read this you would -- it would indicate that if you're a
24 substance abuse user and you go through the program and
25 you substantially complete it -- in other words, obey the

1 rules within the institution.

2 QUESTION: And you may -- your sentence may be
3 reduced.

4 MR. MEIERHENRY: Right, but --

5 QUESTION: See, you've got to deal with that
6 word may, Mr. Meierhenry. You're speaking as if it said
7 will be reduced.

8 MR. MEIERHENRY: No, I'm -- what happened in
9 this case, Your Honor, was that Chris Lopez, before he
10 ever walked in the institution, has been categorically
11 eliminated because he has a sentence enhancement for
12 preconviction activity. He is categorically denied
13 because of something that did not occur under the --

14 QUESTION: But that -- that may be a perfectly
15 good argument, but it -- and it seems to me it takes
16 cognizance of the word may, that Congress has already
17 decided the categories of sentences, but I don't think
18 just bobbing and weaving around the word may does your
19 argument any good.

20 MR. MEIERHENRY: Well, maybe I'm not being clear
21 that --

22 QUESTION: You're not --

23 MR. MEIERHENRY: That the Congress gave to the
24 Bureau of Prisons certain discretion, and that discretion
25 is over prisoners, not over creating categories of

1 prisoners.

2 Now, this is not a case where my client has any
3 opportunity to successfully complete for purposes of the
4 incentive the program. He's been shut out of the program.
5 To use an analogy, this statute clearly says if you go to
6 drug class, and the class --

7 QUESTION: May I interrupt you? He's not shut
8 out of the program, is he?

9 MR. MEIERHENRY: No. No, and I don't want to
10 mislead the Court.

11 QUESTION: Okay.

12 MR. MEIERHENRY: He's not shut out of the
13 program. It's the incentive. If I infer that -- it's the
14 incentive, obviously, we're talking about here. All
15 prisoners, Congress declared -- that's part of our
16 argument. Congress declared that 100 percent of all
17 prisoners by 1997 should have access to a drug treatment
18 program.

19 QUESTION: Mr. Meierhenry, how do you propose
20 that the Bureau of Prisons implement the may? You don't
21 want them to use categories like, all prisoners who have
22 engaged in violent behavior in prison. Isn't that a
23 category?

24 MR. MEIERHENRY: Yes, but it's --

25 QUESTION: All prisoners whom we do not believe

1 will be safe to let out on the streets even after the
2 program, isn't that a category? It seems to me that if
3 you're being rational, if you're trying not to be
4 arbitrary, you establish categories, so your argument that
5 may cannot mean you establish categories just leaves me
6 cold.

7 It seems to me that that's exactly what you want
8 the Bureau of Prisons to do, to be responsible, not to
9 just arbitrarily say, yeah, you get it, you don't get it.
10 That's arbitrary. That's irrational. But here they've
11 tried to establish a rational scheme. What's the matter
12 with that?

13 MR. MEIERHENRY: Well, I could argue about,
14 which I think is the next case, of whether it's rational
15 to consider Mr. Lopez is a violent person when they put
16 him in a --

17 QUESTION: Oh, I didn't think they were
18 considering him as a violent person. I thought they were
19 considering him as a person who had committed his crime
20 while, I guess, carrying a gun.

21 MR. MEIERHENRY: He had --

22 QUESTION: I didn't under -- maybe I
23 misunderstand the Government, because I didn't think the
24 Government was saying that that qualified him as a violent
25 person, because if that were the case we wouldn't be

1 talking about any discretionary category.

2 MR. MEIERHENRY: No, that's correct, and we've
3 been through that litigation history of them defining a
4 nonviolent offense as a violent offense, which was the
5 Eighth Circuit case of Martin v. Gerlinski, but the
6 answer to the problem, the problem is one of who gets in
7 the classroom. Our argument today is very simple.
8 Congress told the Bureau of Prisons who gets in the
9 classroom -- all --

10 QUESTION: Well, everybody gets in the
11 classroom. The question is, having been -- not who is
12 eligible for the program, but who is eligible for the
13 early release afterwards. As you've said to Justice
14 Stevens, there's no exclusion from the drug treatment
15 program.

16 MR. MEIERHENRY: That's correct.

17 QUESTION: And the reason there's no exclusion
18 from the program is that it says that the bureau shall
19 establish the program. If you read through 3621, what is
20 really -- it just jumps out at you, is that it keeps using
21 shall. Shall, shall, shall, until it gets to the period
22 of custody section, and there all of a sudden it shifts
23 from shall to may, which means discretion.

24 MR. MEIERHENRY: It means discretion, but it is
25 not a grant of discretion to categorically deny nonviolent

1 offenders consideration for the reduction.

2 QUESTION: May I clarify two things? If you are
3 now leaving your argument that all people who complete the
4 program successfully and are nonviolent offenders must be
5 given this reduction, if you are leaving that, and
6 shifting to an each individual is entitled to an
7 individual determination, not a categorical exclusion, if
8 you're doing that, then mustn't the bureau do the same
9 thing for nonviolent offenders who weren't carrying any
10 weapon?

11 I mean, if it's going to be a one-by-one
12 examination for a defendant that fits in your client's
13 category, wouldn't it also be one-by-one for anyone?

14 MR. MEIERHENRY: It could be. I don't have a
15 definitive answer of how to run the Bureau of Prisons,
16 except I'm here saying that this statute clearly tells the
17 Bureau of Prisons how people are to get into the program
18 for the purposes of the incentive, and that is all
19 nonviolent offenders are to be considered, and that's to
20 occur after successfully completing the program. Here
21 they've made that decision.

22 QUESTION: Well, could they make a decision
23 categorically that all people who are nonviolent offenders
24 who aren't carrying a firearm will get the reduction?

25 MR. MEIERHENRY: I think they've done that. I

1 think that's the way it practically works, unless they've
2 had disciplinary problems. I think 13 percent, according
3 to one report, the Triad Report, indicates that they were
4 not allowed because of disciplinary problems within the
5 institution.

6 QUESTION: It seems to me your argument has got
7 to be not that there can't be categorization by the
8 bureau, but that Congress has limited the kind of
9 categorization the bureau may use, that Congress has said
10 nonviolent offenders, and the bureau can't go beyond that
11 when it's talking about limiting the availability of early
12 release.

13 MR. MEIERHENRY: Chief Justice, that -- I guess
14 that is essentially what I'm saying. I'm saying that for
15 the purposes of the incentive, that everyone starts the
16 program and everyone has the opportunity to successfully
17 complete it, and call that a category if you may, that
18 it's while they're in the institution that they may be --
19 their activities may eliminate them from this category.
20 It's not something that occurred at the time of
21 sentencing, which was preconviction activity.

22 QUESTION: You're saying that the only
23 precondition category that the bureau can use is the
24 precondition category which is set forth in the statute,
25 and which implicitly excludes other pre-imprisonment

1 categories, namely, violent offender.

2 MR. MEIERHENRY: Well, there are two categories
3 when Chris -- before Chris -- when Chris Lopez is an
4 offender. It's violent, and nonviolent. The courts have
5 considered that the BOP's definition of that.

6 When he hits prison there are two categories,
7 violent and nonviolent, and my argument is that all of
8 those activities have been considered by Congress, have
9 been determined by Congress, and they wanted to broaden
10 the program.

11 QUESTION: Then why didn't they use the word
12 shall, rather than the word may?

13 MR. MEIERHENRY: Because I don't think they
14 wanted -- Congress wanted to create a right that just
15 based on completion of the program, without regard to
16 their other activities as a prisoner, that just the
17 completion of that program meant you were entitled to --
18 and I think that's the word, entitled to reduction.

19 QUESTION: You say you don't think that. I
20 mean, is there something in the legislative history that
21 specifically supports that argument?

22 MR. MEIERHENRY: Other than that it was clear,
23 and I refer to the legislative history, the report. It's
24 clear from the legislative history that Congress said that
25 this subparagraph we're discussing, they use the word

1 authorizes the Bureau of Prisons to shorten by up to 1
2 year the term of a prisoner who successfully completed a
3 treatment program. They saw it as an authorization --

4 QUESTION: Yes, but authorization is not
5 equivalent to mandate.

6 MR. MEIERHENRY: But the converse is also true.
7 Authorization is not a grant of power to create categories
8 which overrule the two made by Congress, violent and
9 nonviolent.

10 QUESTION: Well, you know, your argument that it
11 relates only to -- your argument would be a lot stronger
12 if the section, the relevant section, 2(b), didn't have
13 the word successfully in it.

14 I could understand Congress saying the Bureau of
15 Prisons may cut a year off the term of somebody who
16 completes the program. Then you could say, well, the
17 bureau can, you know, can decide for itself whether this
18 fellow, although he completed the program, has really been
19 cured or not, or, you know, factors like that, but it
20 doesn't say that. It says, it may release somebody who
21 has successfully treated -- completed the program.

22 Now, what factors do you think the may was
23 intended to let the Bureau of Prisons take into account?
24 It isn't completion of the program. No matter how
25 successfully he completed it, he still is not entitled to

1 it. Now, what could disable him from the year, other than
2 killing another inmate while he's in there?

3 MR. MEIERHENRY: I think the traditional
4 standards that are applied to good time clearly are going
5 to be the type of criteria for good time release under
6 section 36 -- 18 U.S.C. 3624, would obviously still be
7 used.

8 I mean, you have good-time release, which is the
9 only other way you can get out -- basically you can get
10 out of prison early. That was not affected by this
11 legislation. They added an incentive up to a year.

12 I think you've got to wed those two together,
13 and I think that's the discretion that the Bureau of
14 Prisons has and must have, not to create defining
15 categories of exclusion before they start, but you can
16 eliminate the good time type criteria that the Bureau of
17 Prisons is familiar with, and it would appear from
18 Congress, Congress recognized that this must be a
19 long-term program, 6 to 12 months, that it was not easy,
20 and they said the committee believes that such an
21 incentive is necessary to draw into treatment many inmates
22 who may not be willing to undergo a difficult program
23 otherwise.

24 They recognize that there's an 800-percent
25 greater chance of a drug-addicted person committing a

1 future crime, and Congress --

2 QUESTION: May I ask how you would -- the
3 statute in your view would have meant anything different
4 if the word may had been replaced by the word shall or
5 must?

6 MR. MEIERHENRY: I think then, successful
7 completion. A prisoner would have said, I successfully
8 completed this program, I must be allocated up to a year,
9 some period of time off. It is a right of mine, it is a
10 handshake Congress made with me, and I must be given it,
11 even though I violated every criteria for good-time
12 release, this and this alone --

13 QUESTION: What are those criteria?

14 MR. MEIERHENRY: Well, obviously, obeying the
15 rules of the institution, not having contraband, you know,
16 those type of --

17 QUESTION: Because if you had contraband you
18 would not have successfully completed this program.

19 MR. MEIERHENRY: Exactly. That's the discretion
20 that obviously Congress had to give to them, because part
21 of successful completion of a program is to obey the rules
22 of the institution as well.

23 QUESTION: Then it should have used shall. Then
24 it should have used shall.

25 MR. MEIERHENRY: Well, but if you use --

1 QUESTION: Because they could have said, you
2 shall release him if he successfully completed the
3 program, and you say that successfully completion of the
4 program includes obeying all the rules in the institution.

5 MR. MEIERHENRY: Well, maybe I misspoke in this
6 sense --

7 QUESTION: You certainly did.

8 MR. MEIERHENRY: Because those are two different
9 things. I mean, successful completion of the program --
10 let me use my analogy of the classroom, all right.

11 A student's in the classroom. It's clear the
12 student has power over the student in the classroom,
13 whether they complete the program, whether they obey,
14 they're in charge of grading, correct, and here the Bureau
15 of Prisons has that. But what the teacher does not have
16 control over is which students enter the school. In this
17 case, that's Congress. Congress has said, for the purpose
18 of incentive, everybody with a nonviolent offense has a
19 right to be a student and pass the course.

20 Now, here the Bureau of Prisons says, well, all
21 nonviolent offenders, yes, get to take the course, but
22 we've already said you kids in this row, you people in
23 this row will, even if you successfully do everything
24 correctly, you don't qualify, not based on what Congress
25 said --

1 QUESTION: Yes, but supposing you had a rule
2 that said, but there's a category of students who would
3 normally get a gold star but if they threw an eraser at
4 the teacher, they shall not get the gold star, and
5 supposing you have here a program that said, you are
6 entitled to the year, but if you have taken a poke at the
7 warden you shall not be released.

8 They just have a category, anybody who takes a
9 poke at the warden, even though he's successfully
10 completed the program, shall not get the 1-year benefit.
11 Would that categorical denial be consistent with the
12 statute, in your view?

13 MR. MEIERHENRY: I think that is consistent,
14 because it is activities in the prison over which the
15 bureau --

16 QUESTION: So it isn't the mere fact that it is
17 a category. Your position is that if it's a
18 pre-incarceration category, it's bad.

19 MR. MEIERHENRY: That's correct. Congress took
20 care of that. It created the two categories and left the
21 administration to the Bureau of Prisons.

22 The Bureau of Prisons here has created
23 additional -- numerous additional categories. In my
24 client's case, a nonviolent offender drug case with a
25 sentence enhancement for possession of a firearm. They've

1 created these categories in advance.

2 I'm not arguing that the Bureau of Prisons
3 doesn't have discretion over its institution. That's what
4 the statute clearly says.

5 QUESTION: And they can exercise that discretion
6 by creating categories as long as the categories are
7 directed at postincarceration conduct.

8 MR. MEIERHENRY: To the activities of the
9 prisoner while they're in prison, not to preconviction
10 activities.

11 QUESTION: It's a very sensible and logical
12 theory, but what in the statute or the legislative history
13 identifies that particular theory?

14 MR. MEIERHENRY: Nothing specifically identifies
15 it that way as opposed to my colleague's way. To me, it
16 is rational, it is something that makes sense, it is
17 something that when you --

18 QUESTION: It's more than that. I thought -- I
19 mean, come on, you're -- you'll have to give us some text
20 to hang on to.

21 I assume that what your argument is, is the
22 familiar argument, *inclusio unius exclusio alterius*, that
23 in fact the statute does identify one pre-incarceration
24 factor that will disqualify you from obtaining the year's
25 benefit, and that pre-incarceration factor is conviction

1 of a violent crime, and by adding another pre-
2 incarceration factor, namely just merely possessing a
3 firearm, you're contradicting the implicit exclusion of
4 other pre-incarceration factors. Isn't that your
5 argument? You're relying --

6 MR. MEIERHENRY: Well --

7 QUESTION: -- upon the fact that a violent
8 offender is explicitly excluded.

9 MR. MEIERHENRY: Our argument is clearly this is
10 an unambiguous statute.

11 QUESTION: Well now, you -- but Justice Scalia
12 asked you a particular question. Is that or is that not
13 your argument, and I think you --

14 MR. MEIERHENRY: Well, it is my argument. I --
15 what I was going to say, first we believe it's
16 unambiguous, but if you get into the determination --

17 QUESTION: Excuse me. Why is it unambiguous? I
18 don't understand what you mean by, it's unambiguous.

19 MR. MEIERHENRY: Well, because of the way they
20 constructed this. First of all, subsection (e) on
21 substance abuse had never been the law of the land until
22 Congress identified that this was a serious problem.
23 Okay. So they've got to enact substance abuse treatment,
24 which they do. They require the Bureau of Prisons to
25 treat 100 percent, or make available 100 percent all

1 prisoners.

2 Then they recognize, this is a tough program,
3 let's give an incentive. At first it was to all
4 prisoners, then it was -- the Senate created two
5 categories, violent and nonviolent.

6 Then it came down to substance abuse treatment.
7 They added the incentive that said -- and they couldn't
8 give them any time off up until the passage of part B,
9 period of custody, and they created two categories,
10 violent, nonviolent, and they said to the Bureau of
11 Prisons, as we have given you the discretion over the
12 years on good-time decisions, we give you that discretion
13 as well in determining who successfully completes a
14 treatment program, but we don't want to go the next step
15 and make it a right of release. We want the discretion
16 for successfully completing the program.

17 So the common sense reading appears to be, you
18 don't have to, you can take into other considerations, but
19 nothing in that step-by-step process said, Bureau of
20 Prisons, you may create additional categories that
21 categorically exclude prisoners based on preconditions.

22 QUESTION: So your answer to Justice Scalia's
23 question is basically yes. Is that correct?

24 MR. MEIERHENRY: Yes.

25 QUESTION: If the Bureau of Prisons had a

1 categorical rule that extreme recidivists, someone who had
2 been convicted four times, has been in and out of prison,
3 that four-time offenders will not be released early, would
4 that be impermissible?

5 MR. MEIERHENRY: I believe so, and I'm assuming
6 your question is nonviolent --

7 QUESTION: Yes.

8 MR. MEIERHENRY: -- for nonviolent offenses. I
9 think that's correct, that Congress considered that. We
10 may not like it, the Court may not like it. Clearly the
11 Bureau of Prisons doesn't like it.

12 QUESTION: So -- but essentially your argument
13 then comes down to the may means shall. It wouldn't make
14 any difference if the word shall had been used, or must,
15 that in this context may means shall or must.

16 MR. MEIERHENRY: It would mean that again the
17 door -- in this case, there is no door to the prison wall,
18 but it would make the difference between the natural
19 discretion the Bureau of Prisons has over the activities
20 of the prisoners inside, as opposed to their activities
21 that occurred when they were just --

22 QUESTION: So your answer is no. You don't want
23 us to read may to be shall. You want us to read may to
24 mean may, but that the scope of the discretion only
25 excludes -- only includes matters other than pre-

1 incarceration convictions, at least, right?

2 MR. MEIERHENRY: Correct. My argument is simply
3 that Congress created the excluding category, and that was
4 a violent offense, that the BOP, having created additional
5 excluding -- not based on any activity in the prison,
6 excluding categories, nothing in this act, legislative
7 history, or the purpose of this, supports reducing the
8 number of prisoners available for the incentive. It is
9 the opposite. It was an inclusive statute.

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE REHNQUIST: Thank you,
12 Mr. Meierhenry.

13 Ms. Brinkmann, we'll hear from you.

14 ORAL ARGUMENT OF BETH S. BRINKMANN

15 ON BEHALF OF THE RESPONDENTS

16 MS. BRINKMANN: Mr. Chief Justice, and may it
17 please the Court:

18 The issue in this case is whether the Bureau of
19 Prisons permissibly exercised its discretion under section
20 3621(e)(2)(B) as reflected in its regulation and program
21 statement.

22 QUESTION: Ms. Brinkmann, I take it that
23 discretion was exercised in the regulation adopted by the
24 Bureau of Prisons.

25 MS. BRINKMANN: The regulation and program

1 statement that the Bureau of Prisons promulgated was a
2 statement of policy of how the Bureau of Prisons will
3 exercise its discretion.

4 QUESTION: I notice that in an amicus brief it's
5 argued that the regulation was promulgated without
6 following the notice and comment requirements of the
7 Administrative Procedure Act, but I gather that issue was
8 not developed below and is not here.

9 MS. BRINKMANN: That's correct, Your Honor. It
10 wasn't raised below nor in this Court, nor did the court
11 below address it and, in fact, our understanding is that
12 no court of appeals has addressed that argument, but we do
13 believe, as we explain in a footnote in our brief, that it
14 is not subject to the notice and comment requirement.

15 It could go into effect as an interim
16 regulation, because it is a statement of policy, the way
17 in which the Bureau of Prisons will implement the statute,
18 and then in each case there is a determination of whether
19 a particular prisoner will be granted early release.

20 QUESTION: Are there any other instances of
21 statutes -- are there any instances of statutes where the
22 Bureau of Prisons is explicitly authorized to make
23 distinctions and decisions based on preconviction conduct?

24 MS. BRINKMANN: Yes, Your Honor, many. In fact,
25 the good conduct time statute that we -- Mr. Meierhenry

1 was discussing is in a neighboring provision. It's in
2 section 3624. It talks about the Bureau of Prisons
3 granting good conduct time, and there are two different
4 standards, and they're dependent on whether or not the
5 prisoner was convicted of a crime of violence, and in fact
6 this program statement also applies to that statute,
7 although there's no discretionary determination, so the
8 crime of violence is determined by the statutory
9 definition.

10 QUESTION: Well, do you think the bureau could
11 switch back and forth under that section that you just
12 referred to and say, although Congress said all nonviolent
13 people should be treated this way, we think some of these
14 should be treated the way violent people are?

15 MS. BRINKMANN: No, Your Honor. We believe that
16 that is a determination that Congress has made.

17 QUESTION: Why isn't the same true here, that
18 Congress has said nonviolent offenders shall be eligible
19 for this, and the Bureau of Prisons has said categorically
20 some nonviolent offenders will not be eligible?

21 MS. BRINKMANN: Because of the broad grant of
22 discretion given the Bureau of Prisons by the express
23 statutory language, Congress using the term may. There's
24 nothing in the statutory text to suggest that the
25 statutory eligibility requirements that Congress set,

1 which are two, conviction of a nonviolent offense and
2 successful completion of the program, in any way then
3 eliminate the ability of the Bureau of Prisons to consider
4 other factors in making their determination.

5 QUESTION: Suppose the bureau says, we're not
6 going to release in 1 year anyone guilty of a hate crime,
7 violent or not, we don't like people who commit hate
8 crimes, could they say that?

9 MS. BRINKMANN: Yes, Your Honor. We think that
10 would be subject to an arbitrary and capricious review,
11 but very --

12 QUESTION: Or offenses, you know, against the
13 United States Treasury. It really gets us mad. I mean,
14 it's one thing, you know, harming other private citizens,
15 but boy, it really gets us mad when you steal something
16 from the U.S. Treasury, so you're not going to be eligible
17 for 1 year.

18 MS. BRINKMANN: Yes, Your Honor. It would be
19 subject to arbitrary and capricious review. It's very
20 similar to the situation before the Court in the case of
21 INS v. Yang. That was a situation involving a waiver of
22 deportation for persons who committed --

23 QUESTION: Right.

24 MS. BRINKMANN: -- fraud at entry.

25 QUESTION: Why is a firearm use not arbitrary

1 and capricious, but -- and hate crime, is that arbitrary
2 and capricious, or not? You say that's okay?

3 MS. BRINKMANN: We think within the broad
4 expertise of the Bureau of Prisons and --

5 QUESTION: That's okay.

6 MS. BRINKMANN: If the --

7 QUESTION: Treasury, stealing from the Treasury
8 is not okay. That's arbitrary and capricious. Why?

9 MS. BRINKMANN: We -- I don't believe it would
10 be arbitrary and capricious.

11 QUESTION: Oh.

12 MS. BRINKMANN: I think that --

13 QUESTION: So all of those are okay.

14 MS. BRINKMANN: They very well may be, Your
15 Honor. They would only be subject to arbitrary and
16 capricious to determine if there was some lack of total
17 penalogical reason for that.

18 QUESTION: Well, but isn't this argument
19 available to just that point, that it is perfectly clear
20 from the legislative history that the object of allowing
21 the 1-year reduction is to provide an incentive without
22 which the drug treatment program could not be expected to
23 work.

24 I gather it's a difficult thing, and there just
25 isn't enough inducement for somebody to force himself

1 through this unless there really is going to be a
2 substantial reward, and it seems odd to me that if that is
3 the object, that Congress would have wanted, for example,
4 to exclude the entire class of gun carriers who are
5 obviously much more dangerous gun carriers, I assume, when
6 they're under the influence of drugs, from the inducement
7 that would lead, if the statistics are correct, to a
8 reduction in the number of drug-using gun-carriers. Why
9 would they exclude the inducement from all of these
10 serious categories?

11 MS. BRINKMANN: Several answers, Your Honor.
12 First of all, there is a significant participation in the
13 substance abuse treatment program of those who are not
14 eligible for early release. More than one-third of the
15 prisoners that participate in this program --

16 QUESTION: Well, that may be, but the concern of
17 the Congress was that we need an inducement to make our
18 program effective. Why -- if that is their premise, why
19 would they exclude such large categories, or entire
20 categories of offenders from that inducement?

21 MS. BRINKMANN: Congress' determination was that
22 they would give the Bureau of Prisons the authority to
23 grant that kind of incentive because, as Mr. Meierhenry
24 said, otherwise the bureau --

25 QUESTION: Well, that's the conclusion, but in

1 providing authority, why would they want to give the
2 Bureau of Prisons the authority to exclude entire
3 categories from an inducement which they thought was
4 necessary to make the program work?

5 MS. BRINKMANN: The legislative history does not
6 support the proposition that the incentive is necessary
7 for participation. Certainly it enhances participation,
8 but what Congress did was give that authority to the
9 Bureau of Prisons consistent with its repeated grant to
10 the Bureau of Prisons of broad authority in recognition of
11 the bureau's expertise --

12 QUESTION: Okay.

13 MS. BRINKMANN: -- in penalogical matters.

14 QUESTION: May I interrupt? Help me out on the
15 facts, then. I had thought that there was an indication
16 in the legislative history that there was a distinct
17 difference between the expected successful completion rate
18 with an inducement and the expected, or the actual
19 successful completion rate without an inducement. What am
20 I thinking, if it's not in the legislative history?

21 MS. BRINKMANN: There was certainly evidence
22 that there were State prison systems that had this type of
23 incentive, and it was quite effective. Congress --

24 QUESTION: Where was the evidence? Was it
25 brought before the Congress?

1 MS. BRINKMANN: I believe it was in some
2 hearings, and there was some discussion in some of the
3 reports concerning some -- a program in New York, for
4 example, but Congress did not then mandate that the Bureau
5 of Prisons grant early release to everyone who
6 successfully completed the program.

7 QUESTION: But don't you -- can we not fairly
8 infer, might we perhaps not infer, be able to infer simply
9 from the text itself --

10 MS. BRINKMANN: No, we don't believe --

11 QUESTION: -- that Congress thought the
12 inducement was important, and if it thought the inducement
13 was important, why would it want to preclude the
14 inducement from working in whole categories like this?

15 MS. BRINKMANN: It wanted to give the Bureau of
16 Prisons the authority to decide --

17 QUESTION: But that -- with respect, I don't
18 think that goes to my question. My question is, why would
19 it want to allow the Bureau of Prisons to eliminate this
20 inducement entirely?

21 MS. BRINKMANN: The Bureau of Prisons has not
22 eliminated the inducement entirely --

23 QUESTION: For the categories -- for the
24 categories.

25 MS. BRINKMANN: -- only for certain categories.

1 For the very reason that Congress repeatedly delegates
2 authority to the Bureau of Prisons in these matters.
3 Categorizing prisoners is the bread and butter of the
4 Bureau of Prisons. They do it all the time.

5 QUESTION: So you're saying we've got to look
6 beyond this statute to the fact that there is a whole
7 universe of statutes in which the Bureau of Prisons is
8 given quite extraordinary discretionary powers.

9 MS. BRINKMANN: We point to that to support the
10 clear text of the statute. The statute does not mandate
11 early release for any prisoner.

12 QUESTION: No, but the clear text just talks
13 about discretion. The question is, what is the category
14 of discretion in which it can operate.

15 You emphasize the expertise of the Bureau of
16 Prisons, which it does seem to me is terribly important.
17 They're experts on how well the prisoners have done in
18 prison, but are they experts in classifying which people
19 should be eligible for this offense?

20 Why are they experts in saying, for example,
21 hate crimes should be excluded but heroin possession might
22 not, or something like that? Why are they experts in
23 that? They don't even -- the whole notion of abolishing
24 parole suggested that the prison expertise is just about
25 what happens in prison, not what happened before.

1 MS. BRINKMANN: Your Honor, we would disagree
2 with that. The Bureau of Prisons has expertise on a daily
3 basis of categorizing prisoners, for example, for security
4 classifications. The first thing that happens to a
5 prisoner when they are placed in the custody of the Bureau
6 of Prisons is a determination of what kind of housing that
7 person should be in. The main part of that determination
8 is their criminal history, their past conduct --

9 QUESTION: But that all applies to the
10 conditions of his confinement while he's there. Do they
11 have any expertise in determining recidivism and making
12 judgments accordingly?

13 MS. BRINKMANN: Absolutely, Your Honor. They
14 make decisions about --

15 QUESTION: What are the statutes which allow
16 them to do that?

17 MS. BRINKMANN: They make decisions about
18 furlough. That's granted authority to them by Congress,
19 about the good conduct release, about placement in
20 community correction centers.

21 QUESTION: But those are things that happen
22 in -- good conduct release determines the conduct in
23 prison. The furloughs depends on conduct in prison.

24 MS. BRINKMANN: Your Honor, also it depends on
25 the criminal history of the individual, as does placement

1 in a community correction facility.

2 We would also point out that the statutory text
3 granting this authority does not have any restrictions on
4 other factors that the Bureau of Prisons consider and, as
5 I mentioned before, it's very analogous in that respect to
6 INS v. Yang, where the Court recognized that although
7 Congress had provided a statute that allowed the Attorney
8 General to grant a deportation waiver to an alien who had
9 committed entry fraud, that that nonetheless still allowed
10 the Attorney General to take into account circumstances
11 surrounding the fraud in exercising their discretion
12 whether or not to grant that waiver, and that's
13 particularly the situation here.

14 QUESTION: So it would be permissible, I
15 suppose, for the Bureau of Prisons to decide that any
16 person who entered the country illegally would be
17 ineligible for this program.

18 MS. BRINKMANN: Subject to arbitrary and
19 capricious review.

20 QUESTION: Well, it wouldn't be arbitrary. They
21 just have experience that these people tend to be
22 recidivists, or something like that.

23 MS. BRINKMANN: Yes, Your Honor, and all this
24 does is eliminate one incentive to the program. As I
25 mentioned, there is substantial participation without it,

1 and the Bureau of Prisons in its exercise of its expertise
2 and broad authority has also implemented other incentives
3 through regulation for the program.

4 QUESTION: Ms. Brinkmann, may I ask how the
5 Bureau of Prisons implements this with respect to
6 possession of drug offenders who do not carry firearms?
7 Is that also categorical? That is, does everyone who
8 commits a nonviolent offense without using a gun, who
9 successfully completes the program, do they as a category
10 get a reduction?

11 MS. BRINKMANN: Yes. Any prisoner who
12 successfully completes the program is granted -- and is
13 convicted of a nonviolent offense is granted early
14 release. It may not be the full 12 months.

15 QUESTION: How is that? You've just answered my
16 first inquiry about, it's discretion both ways, exercises
17 discretion to have categories of inclusion, exclusion. If
18 you fit that category you get released, so it's not that
19 they're doing it case-by-case for people who commit
20 nonviolent offenses without guns, but categorically for
21 the other.

22 MS. BRINKMANN: Your Honor, it is case-by-case.
23 Except, it's incorporated in this categorical
24 determination of successful completion of the program.
25 That incorporates any type of infractions, disciplinary

1 problems --

2 QUESTION: Yes, but we passed that hurdle.

3 Everyone --

4 MS. BRINKMANN: After all of that is completed,
5 yes, that is when early release is granted. It may not be
6 up to 12 months, because in the exercise of discretion the
7 Bureau of Prisons tempers the amount of early release,
8 depending on the completion of the program.

9 For example, if a prisoner is sent to the
10 community corrections facility the bureau ensures that
11 they complete the 6-month transitional drug abuse program
12 there, and that may cut into their year of early release.
13 They may end up only getting 6 months of early release,
14 for example.

15 QUESTION: Let's take the case of a nonviolent
16 offender who does not come within the bureau's regulation
17 as the gun, and so forth. Do all of them get some form of
18 early release, even though it's not the full 12 months?

19 MS. BRINKMANN: If they successfully complete
20 the program, yes, Your Honor. There are other categories,
21 of course, as we point out in the brief, that are
22 categorically denied early release, and for similar
23 reasons in the expertise of the Bureau of Prisons has
24 determined that they pose a greater threat to the
25 community when they're released, prisoners with prior

1 convictions for serious crimes such as homicide,
2 aggravated rape and assault, and also prisoners whose
3 current offense involves sexual abuse of children. Those
4 are also categorical determinations, and it is consist --

5 QUESTION: And they are regarded as nonviolent
6 offenses?

7 MS. BRINKMANN: In some instances they may be,
8 Your Honor, and the Bureau of Prisons has set forth this
9 regulation in order to further its purpose of consistency
10 and even-handedness in applying this program, and to give
11 fair notice to prisoners.

12 I'd also like to emphasize that looking at the
13 prior convictions and circumstances surrounding an
14 offense, it's reasonable when predicting and looking at
15 the threat to the danger of the community, because in fact
16 that is all conduct that occurs in the community.

17 One can say it's more rational, perhaps, to look
18 at a prisoner's use of a gun when they were in a community
19 when deciding what their conduct may be when they return
20 to the community as a postinfraction during their term --

21 QUESTION: The difficulty with that argument,
22 that assuming that the incentive does increase the success
23 rate of the scheme, the Bureau of Prisons argument seems
24 to say, we would rather have gun-carriers using drugs
25 released a year later than former gun-carriers not using

1 drugs released a year earlier, and that doesn't seem quite
2 so rational.

3 MS. BRINKMANN: We think that's precisely the
4 type of expertise, though, that Congress relies on the
5 Bureau of Prisons to bring to this type of decision.
6 That's why Congress did not --

7 QUESTION: No, but the way I just stated it, it
8 seems irrational, and are you saying that the Bureau of
9 Prisons has a reason to say that my factual assumptions
10 just don't operate, that in fact the gun-carriers just do
11 not seem to be subject to this inducement and therefore
12 it's better not even to get into the question of early
13 release? Is that their reason?

14 MS. BRINKMANN: Their theory, as they set forth
15 in the program statement, is that the use of a gun in the
16 course of a drug transaction increases the likelihood of
17 use of force and violence, and for that reason granting
18 early release is not appropriate. The full deterrent
19 effect of serving the entire sentence is something that
20 the Bureau of Prisons has determined is appropriate in
21 those types of cases.

22 QUESTION: Ms. Brinkmann, can I go back to one
23 of your responses to the Chief Justice? When he pressed
24 you on the question of previous convictions for violent
25 crimes for -- you mentioned some specific crimes, and he

1 asked, are they nonviolent crimes, and you said in some
2 instances they are, but in some instances -- or in some
3 instances they aren't, you said. But in some instances
4 they are.

5 MS. BRINKMANN: Yes.

6 QUESTION: And I assume that if we read the may,
7 or more precisely if we read the excluded category of
8 violent, of persons in prison for a violent offense as
9 being exclusive, so that the Bureau of Prisons cannot add
10 to that category, the result, I gather, would be that you
11 could have somebody who happens to be in this time for a
12 nonviolent offense, but who was convicted five times
13 before of the most heinous, violent offenses, including
14 murder, and that person would have to be released.

15 MS. BRINKMANN: Precisely, Your Honor. It's the
16 situation where the instant offense is a conviction for
17 money laundering of the hit man who has many, perhaps even
18 a series of convictions, whether in the Federal or the
19 State system. That's exactly the type of categories that
20 the Bureau of Prisons looked to in deciding to exercise
21 its discretion --

22 QUESTION: So it's quite plausible that when
23 Congress was enacting this thing, that one thing was
24 obvious, we don't want someone --

25 MS. BRINKMANN: Yes.

1 QUESTION: -- who's in there for a violent
2 offense to get out a year early, and there may be some
3 other categories, too. We don't want to trouble to list
4 all of them. We'll leave the rest to the Bureau of
5 Prisons. You're asserting that that's what they did.

6 MS. BRINKMANN: Absolutely, Your Honor, and that
7 is totally supported by the text, because of the point I
8 think Your Honor and some of the other members of the
9 Court made, when you look at the language of the
10 neighboring statute using the word shall to mandate the
11 provision of the substance abuse treatment program. The
12 Bureau of Prisons does not have discretion to not make
13 available the substance abuse program to prisoners who are
14 eligible, and the terminology in the statute for that is
15 someone who --

16 QUESTION: That's not the point. I mean, we're
17 all agreed that it has discretion. The issue is not
18 whether it has discretion or not. It's really -- it isn't
19 the may that's the issue here. The issue is whether that
20 other provision, namely the disqualification of non -- of
21 violent offenders is meant to be exclusive. That's really
22 the crucial provision here.

23 MS. BRINKMANN: And we believe it's clearly not,
24 Your Honor. That sets a statutory eligibility
25 requirement, a threshold, but there's no indication that

1 then the Congress intended to impose restriction on
2 factors that may be related to that eligibility.

3 QUESTION: Do we give the bureau chevron
4 deference on that question as to whether that provision
5 was meant to be exclusive or not?

6 MS. BRINKMANN: Yes, we believe so, Your Honor,
7 and we believe that it's regulation here is a
8 authoritative statement of its implementation of the
9 statute.

10 QUESTION: May I ask about the regulation? The
11 whole regulation isn't quoted in your brief, but the part
12 that you have quoted on page 4 refers to the offense for
13 which -- the current offense is a felony, b) that involved
14 the carrying and so forth of a gun, so the regulation
15 we're fighting about in this case is one that speaks only
16 to the current offense.

17 MS. BRINKMANN: That's correct, Your Honor.

18 QUESTION: Then is there another regulation that
19 disqualifies people because of their recidivism character?

20 MS. BRINKMANN: Yes, Your Honor. Petitioner had
21 actually provided the full regulation in their brief.
22 It's in the blue brief, the appendix, beginning on page 3,
23 and --

24 QUESTION: 3 of the appendix?

25 MS. BRINKMANN: Yes, and carrying over to

1 page -- well, page 3, you have to see that (a)(1) explains
2 that in the exercise of discretion the Director of the
3 Federal Bureau of Prisons is deeming certain categories of
4 inmates not eligible for the early release. The first one
5 is INS detainees, then we go on to pretrial inmates,
6 contractual boarders, all of which are ineligible for
7 reasons that are clear to the Bureau of Prisons in their
8 expertise of the management of prisons.

9 Subparagraph (4) talks about inmates who have a
10 prior felony or misdemeanor conviction for homicide,
11 forcible rape, robbery, or aggravated assault, or child
12 sexual abuse offenses. The next category has to do with
13 prisoners who are ineligible for the community-based
14 corrections program. Then we get down to subcategory (6),
15 which talks about inmates whose current offense is a
16 felony, and then there are four subcategories of those,
17 one being the subcategory at issue here, a felony that
18 involved the carrying, possession, or use of a firearm or
19 other dangerous weapon.

20 One of those other categories are offenses that
21 are felony -- that involve sexual abuse committed against
22 children. The other two have to do with the actual
23 attempt or threatened use of physical force. The other is
24 a felony that by its nature or conduct presents a serious
25 potential risk of physical force against that person or

1 property.

2 QUESTION: Would that be a violent offense?

3 Probably not, I guess, huh?

4 MS. BRINKMANN: One of the reasons that the
5 Bureau of Prisons set forth these was to ensure that it
6 had exercised its discretion in a regulatory manner
7 because of problems that had arisen with inconsistent
8 statutory interpretations by the lower Federal courts,
9 which create inordinate problems for the Bureau of Prisons
10 because of the -- not only that they have personnel in
11 different areas of the country implementing different
12 standards, but also prisoners are frequently transferred
13 between different circuits.

14 So they set forth -- and as pointed out, some of
15 these offenses could also be covered under the violent
16 offense category, but they wanted to set forth, out of
17 fairness to prisoners also, notice beforehand, and also
18 for the even-handed administration of the incentive.

19 QUESTION: One argument that's made is, because
20 a couple of circuits said the bureau was wrong initially
21 when it typed people who carried guns in connection with
22 possession offenses, drug possession offenses, typed them
23 violent and then said the -- and then the prison
24 responded, Bureau of Prisons responded by saying, we're
25 not -- no longer categorizing them as violent offenders,

1 we're exercising our discretion to exclude them.

2 That could be characterized as trying to do an
3 end run around the court of appeals decisions that said,
4 these crimes are not crimes of violence.

5 MS. BRINKMANN: Your Honor, we do believe that
6 the Bureau of Prisons' initial regulation actually was a
7 permissible regulation. They ran into problems in some
8 circuits because the courts -- because of their reference
9 to 924(c). The court then held that they, the Bureau of
10 Prisons, could not look to anything beyond the elements of
11 the offense. That was really the problem there.

12 So the Bureau of Prisons came back and decided
13 to, as a matter of discretion, exercise that authority and
14 make clear. We don't think there's anything impermissible
15 about that. In fact, it's consistent with
16 well-established administrative law principles that a
17 agency's hands cannot be tied because of the inartful
18 drafting of a prior regulation.

19 QUESTION: You're saying end runs --

20 QUESTION: Ms. Brinkmann, if you'll go back to
21 section 6 of appendix 4 of the petitioner's brief it says,
22 sets forth four categories, has an element, the actual
23 attempted or threatened use of physical force against the
24 person or property of another, involve the carrying,
25 possession, or use of firearm or other dangerous weapons

1 or explosives, c) that by nature conduct presents a
2 serious potential risk. What isn't included, other than
3 embezzlement and false tax returns?

4 MS. BRINKMANN: Any kind of drug offenses, Your
5 Honor, that don't involve the use or carrying of a
6 firearm, certainly, and all kinds -- I mean, this doesn't
7 just have to be drug-related offenses.

8 I can tell you, there's a substantial
9 participation, Your Honor. The Bureau of Prisons informed
10 me that currently there are approximately 16,800 prisoners
11 participating in the program at one of -- either on the
12 wait list, in the residential program, or in the
13 transitional program currently, and --

14 QUESTION: Who are eligible?

15 MS. BRINKMANN: No, Your Honor. 30 percent --

16 QUESTION: Well, but that's not responsive, is
17 it?

18 MS. BRINKMANN: But Your Honor, at least
19 one-third of those prisoners are not eligible for early
20 release. The real incentive in this program, Your Honor,
21 is a life change, and that in fact --

22 QUESTION: But then you're saying the
23 congressional -- Congress was wrong in providing an
24 incentive.

25 MS. BRINKMANN: No, Your Honor.

1 QUESTION: It wasn't needed.

2 MS. BRINKMANN: No, Your Honor, it is an
3 incentive. It's a useful tool for the Bureau of Prisons
4 to use in implementing the drug abuse program and, as I
5 mentioned before, the Bureau of Prisons has, in fact, by
6 regulation promulgated other incentives having to do with
7 the prisoner being able to obtain the maximum time in a
8 community correction facility. There are financial
9 incentives for completion of the various phases of the
10 program.

11 So that is the Bureau of Prisons implementing
12 the program and fulfilling the mandate that they make
13 available this program to any prisoner who has a substance
14 abuse program and wants to participate in it.

15 QUESTION: May I just ask, the 16,800 is a large
16 number, but compared to how many people in prison?

17 MS. BRINKMANN: Approximately 130 to 140,000 --

18 QUESTION: About 10 percent, then.

19 MS. BRINKMANN: -- is the current population.

20 QUESTION: But how many are eligible as
21 nonviolent offenders, of that total number?

22 MS. BRINKMANN: Out of the 130 to 140 --

23 QUESTION: Yes. How many are there because of
24 nonviolent offenses and therefore eligible for this
25 program?

1 MS. BRINKMANN: I don't have that information.
2 that was not ascertainable, and I also must say, Your
3 Honor, out of that number you'd have to winnow it down to
4 the prisoners who are actually statutorily eligible under
5 (e)(1), which means a prisoner who has a documented
6 substance abuse program and who are willing to participate
7 in this very rigorous program.

8 QUESTION: Clarify one thing for me. You don't
9 have to be not -- nonviolent is only for eligibility for
10 the 1-year shortening of the sentence, but even a person
11 guilty of a violent offense is eligible for the program,
12 aren't they?

13 MS. BRINKMANN: That's correct, Your Honor.

14 QUESTION: Yes.

15 MS. BRINKMANN: And they're also eligible for
16 the other incentives that the Bureau of Prisons provides.

17 QUESTION: But to get either in the program or
18 the 1 year, you would have to have a history of drug
19 abuse, so I -- is that --

20 MS. BRINKMANN: Yes, to be able to get into the
21 program, that's correct.

22 QUESTION: So I guess if you were unfortunate
23 enough not to have a history of drug abuse, you can't get
24 that 1 year.

25 MS. BRINKMANN: That's true, Your Honor.

1 QUESTION: That's sort of tough, isn't it?

2 MS. BRINKMANN: That was Congress'

3 determination, because --

4 QUESTION: I guess a lot of prisoners are trying
5 to show they had a history of drug abuse, right?

6 (Laughter.)

7 MS. BRINKMANN: The bureau -- unfortunately,
8 there is a very high percentage of Federal prisoners that
9 do have problems, but again it goes back to the
10 determination that Congress wanted to provide the Bureau
11 of Prisons with this authority that it could grant this
12 early release. The Bureau of Prisons does not have any
13 authority or discretion without this statutory provision
14 to grant anyone early release.

15 If there's nothing further, Your Honor.

16 QUESTION: Thank you, Ms. Brinkmann.

17 Mr. Meierhenry, you have 4 minutes remaining.

18 REBUTTAL ARGUMENT OF MARK MEIERHENRY

19 ON BEHALF OF THE PETITIONER

20 MR. MEIERHENRY: Thank you, Mr. Chief Justice.

21 QUESTION: Counsel, I assume under your argument
22 that we would have to strike down subsection 4 of the
23 regulation, which applies to inmates who have a prior
24 felony or misdemeanor.

25 MR. MEIERHENRY: Yes, Your Honor, I think that's

1 correct.

2 To answer statistically, and my source is the
3 website of the Bureau of Prisons, there -- as of August of
4 2000 there were 63,621 inmates, or 56.9 percent of all the
5 inmates in Federal prison were there for drug-related
6 charges. The Bureau of Prisons also shows on their
7 website that 2,633 people in 1999 got the incentive.

8 QUESTION: Could I ask you about your response
9 to Justice Kennedy? I suppose you could have a theory
10 that the only thing that's explicitly excluded is an
11 additional disqualification based upon the offense for
12 which you're sentenced, because use of a gun involves the
13 very offense for which he's serving, right?

14 You don't have to carry the burden of saying
15 that recidivism or a prior violent crime can't be taken
16 into account, because that is not the condition that
17 Congress has set forth. The only condition Congress spoke
18 to was the very offense for which you're sentenced.

19 MR. MEIERHENRY: Correct, as a convicted person,
20 and maybe my definition isn't quite right, but I mean,
21 when you -- even when you get the chevron, the gap here,
22 there is no gap. Congress didn't create a gap.
23 Nonviolent, convicted person.

24 What they left the discretion to is the
25 treatment or the actions of the prisoners, and those

1 judgments within -- once he was prisoner. I mean, the
2 section where --

3 QUESTION: Well, but Justice Scalia's question
4 would push it further than that and say it also, as I
5 understood it, would leave discretion to acts committed
6 long before you were sentenced this time.

7 MR. MEIERHENRY: And I don't -- Congress did not
8 address that. Congress did not address that.

9 QUESTION: Well, even if --

10 QUESTION: Well, if Congress didn't address it,
11 why doesn't it fall within the -- I mean, it doesn't
12 really affect your case, it but affects the argument
13 perhaps. Why doesn't that thing fall within the bureau's
14 discretion?

15 MR. MEIERHENRY: Because Congress, in creating
16 the incentive --

17 QUESTION: Why do you want to hold that ground?

18 QUESTION: You should -- it seems to me your
19 position is, subparagraph (6) would have to go entirely,
20 not just (6)(b), but subparagraph (4) would not have to go
21 under that theory.

22 QUESTION: Right.

23 MR. MEIERHENRY: I think one of the questions
24 asked by one of the members of the bench in the
25 INS v. Yang that my colleague brought up, some 4 years

1 ago, she was asked about the authority of the Attorney
2 General, and the question was, it's a longer question, but
3 the last part was, would it be within her, the Attorney
4 General's discretion to say, I will never exercise my
5 discretion in favor of a waiver, and Ms. Brinkmann
6 answered, yes, Your Honor, we believe it would be.

7 In the opinion, joined by all of you, it said,
8 it could be argued that if the Attorney General determined
9 that any entry, fraud or misrepresentation, no matter how
10 minor, no matter what the attendant circumstances, would
11 cause her to withhold waiver, she would be exercising --
12 she would not be exercising the conferred discretion at
13 all, but would be making a nullity of the statute. That's
14 my argument. The BOP is making a nullity of the
15 incentive.

16 QUESTION: We didn't say that argument was
17 right.

18 MR. MEIERHENRY: I understand that --

19 QUESTION: We just said it could be argued,
20 right?

21 MR. MEIERHENRY: but I think it summarized --

22 QUESTION: And you're proving that it can be
23 argued.

24 (Laughter.)

25 MR. MEIERHENRY: Your Honors, we would ask the

1 Court to overrule the Eighth Circuit Court of Appeals and
2 find that the discretion that the BOP has is attendant to
3 within-the-prison and not preconviction activities.

4 Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you,
6 Mr. Meierhenry. The case is submitted.

7 (Whereupon, at 10:59 a.m., the case in the
8 above-entitled matter was submitted.)

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