

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner, v. RICHARD WILSON

CASE NO: 90-1745

PLACE: Washington, D.C.

DATE: Wednesday, January 15, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 90-1745

6 RICHARD WILSON :

7 - - - - -X  
8 Washington, D.C.

9 Wednesday, January 15, 1992

10 The above-mentioned matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 11:01 a.m.

13 APPEARANCES:

14 AMY L. WAX, ESQ., Assistant to the Solicitor General,  
15 Department of Justice, Washington, D.C.; on  
16 behalf of the Petitioner.

17 HENRY A. MARTIN, ESQ., Nashville, Tennessee; on behalf of  
18 the Respondent.

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1 PROCEEDINGS

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 90-1745, United States v. Richard Wilson.

5 You may proceed, Ms. Wax.

6 ORAL ARGUMENT OF AMY L. WAX

7 ON BEHALF OF THE PETITIONER

8 MS. WAX: Thank you, Mr. Chief Justice, and may  
9 it please the Court:

10 Under the sentencing credit statute codified at  
11 18 U.S.C. 3585, which Congress enacted as part of the  
12 Sentencing Reform Act, a defendant is entitled to credit  
13 against a Federal sentence for certain periods he has  
14 spent in official detention before he begins to serve his  
15 sentence. The question in this case is whether the task  
16 of determining the amount of credit that is due against a  
17 defendant's sentence, that is the technical calculation of  
18 the precise number of days the defendant has left to serve  
19 on his sentence, is to be performed by the district court  
20 at sentencing or by the Attorney General through the  
21 Bureau of Prisons once the sentence begins.

22 Here the district court refused to award  
23 respondent credit against his 8-year Federal sentence for  
24 approximately 14 months that he spent in State custody  
25 before his sentencing. The Sixth Circuit reversed that

1 decision, holding that the award of sentencing credit  
2 under the 1984 statute is the exclusive province of the  
3 sentencing court, which is to assign the credit at  
4 sentencing.

5 Although respondent received credit for  
6 virtually the same period against a subsequent State  
7 sentence after he was sentenced in Federal court, the  
8 court of appeals nonetheless directed the district court  
9 to give him credit for that period against his Federal  
10 sentence as well. In effect, the court ruled that not  
11 only must the sentencing court decide what sentence to  
12 give the offender, but it must also take on what is  
13 essentially an administrative ministerial function. That  
14 is the arithmetical task of figuring out the exact date an  
15 offender will finish serving his sentence.

16 In the Government's view, the Sixth Circuit was  
17 wrong to conclude that the statute makes this task part of  
18 sentencing, that is a function to be performed exclusively  
19 by the sentencing court. It is the Bureau of Prisons, and  
20 not the sentencing court, that has exclusive authority to  
21 calculate sentencing credit, a function that BOP has  
22 carried out for 25 years. There is no reason to believe  
23 that Congress decided to change the status quo and to  
24 discard the preexisting administrative framework in the  
25 Sentencing Reform Act.

1 QUESTION: It did change -- delete the language,  
2 saying that the Attorney General would determine the  
3 credit, though, didn't they?

4 MS. WAX: It did, Your Honor. And the reason  
5 why it did is something of a mystery. We think the common  
6 sense explanation is that the BOP's role in this regard  
7 was so well-entrenched, they'd been doing it for so long,  
8 that Congress did not advert to the question of who is to  
9 perform the function, they just assumed that BOP would.

10 QUESTION: Well, I think the most logical  
11 reading of a change in the statute like that, where it  
12 used to say the Attorney General will determine it and now  
13 it doesn't say that is that Congress no longer meant for  
14 the Attorney General to determine it. That's not to say  
15 it's the only reading, but certainly, that's the first  
16 inference one would draw.

17 MS. WAX: Your Honor, this Court has stated that  
18 a change in language is just some evidence of a change in  
19 meaning. It is not dispositive of an intent to change  
20 meaning. And this Court most recently noted in *McElroy v.*  
21 *United States*, where it found that a change in language  
22 did not betoken a change in meaning. It said the  
23 inference from a change in language to a change in intent  
24 is only a workable rule of construction. It is not an  
25 infallible guide to legislative intent, and it cannot

1 overcome more persuasive evidence. And the Government's  
2 point in this case is that there is more persuasive  
3 evidence. There is an abundance of evidence in the  
4 language, the history, the purposes of the sentencing  
5 credit provision.

6 In particular, in the Sentence Reform Act as a  
7 whole, the Congress did not intend to alter the status quo  
8 that it did not transfer authority from BOP to the  
9 sentencing court. And just to begin, there are three  
10 specific features of section 3585 itself that support our  
11 view. And just to summarize them, first of all, the  
12 statute uses the past tense in a way that indicates that  
13 the award of sentencing credit is to take place some time  
14 after sentencing.

15 The second aspect of the statute is --

16 QUESTION: Let me just pause you right there.

17 MS. WAX: Yes.

18 QUESTION: Isn't that always going to be the  
19 case, even if the judge does it? He's got to impose a  
20 sentence and then he's got to say, well, now we've got to  
21 figure out how much credit the man is entitled to?

22 MS. WAX: Yes, Your Honor, that's respondent's  
23 point. One second after the sentence the credit can be  
24 given, but -- yes?

25 QUESTION: You couldn't do it before.



1 MS. WAX: Well, theoretically you could do it  
2 before you pronounce sentence, but --

3 QUESTION: Well, if you did it before, you  
4 wouldn't know when the sentence was going to be imposed,  
5 so that there would be the same argument about not knowing  
6 when he is going to arrive at the jail, or the prison.

7 MS. WAX: Your Honor, we think that our view has  
8 support from the history of this statute. The predecessor  
9 provision, section 3568, that's where this language, this  
10 phrasing, is borrowed from. It's lifted right from 3568.

11 Now under 3568, that statute explicitly said  
12 that the Attorney General awards credit. And therefore,  
13 we take the parallel language to essentially have the same  
14 significance as it had under the predecessor, which is  
15 that there's sentencing, and then when the person begins  
16 to serve his sentence, there's an assignment of credit.  
17 We think the parallelism is what's appropriate.

18 QUESTION: But the difference is you don't  
19 identify the person in the present statute.

20 What's wrong with reading the statute this way?  
21 The statute requires that somebody make this calculation,  
22 that at the sentencing time, the judge just says, is there  
23 going to be any fight about the credit time. And if  
24 everybody says no, it's all, you've just got so much time  
25 in jail, then he could say to the attorney, well, you go

1 ahead and compute it, then, and we'll enter the sentence  
2 plus whatever time you -- couldn't he delegate that  
3 authority in cases when there's no dispute under your  
4 opponent's reading of the statute? And then just say, if  
5 there is a dispute, I ought to resolve it. It shouldn't  
6 be resolved -- while lawyers are here to write it out, it  
7 shouldn't be resolved in the prison setting.

8 What would be wrong with that reading?

9 MS. WAX: The problem with that, Your Honor, and  
10 this is really central to our argument, is that there are  
11 going to be periods of detention, periods of custody, that  
12 come after the imposition of sentence.

13 QUESTION: I understand that.

14 MS. WAX: And there is no -- the courts are  
15 not --

16 QUESTION: Well, why couldn't the judge simply  
17 say I want you to give credit for what's happened up to  
18 now, plus whatever time it takes to get him to prison.  
19 The exact number of days to be set by the Attorney General  
20 after everything has taken place. And so that all the  
21 issues are resolved in court.

22 MS. WAX: But all the issues can't be resolved  
23 in court. That's our point. Let me give an example to  
24 illustrate that. And I'm taking the example -- what I'm  
25 trying to say is that there are going to be questions

1 about interpreting the rules for giving sentencing credit  
2 that are going to need to be resolved after sentencing by  
3 someone -- an administrator, whoever. There's going to  
4 have to an application of specific facts to rules.

5 QUESTION: Are they going to be rules on which  
6 the Government's interest will be different from the  
7 defendant's interest?

8 MS. WAX: Yes, Your Honor.

9 QUESTION: And should they be therefore resolved  
10 by a neutral arbitrator or by the Attorney General?

11 MS. WAX: Well, the Attorney General resolves  
12 them by applying rules that he has formulated and that are  
13 open for scrutiny -- technical rules.

14 QUESTION: But if the prisoner disagrees with  
15 you, the burden would be with him after he's no longer got  
16 a lawyer, he's now in jail, to come in and make an  
17 appropriate motion.

18 MS. WAX: Well, the Government wouldn't oppose  
19 it in the way they would oppose it in front of a court.  
20 BOP would have a certain view of the way in which credit  
21 should or should not be given for certain --

22 QUESTION: Which would prevail unless he got to  
23 court.

24 MS. WAX: Right. But the point is that an  
25 individual can challenge the BOP's view through the

1 grievance procedure before the Bureau of Prisons up  
2 through three levels of review, and then they can take a  
3 2241 motion to the court. It's not as if they can't get  
4 to court on this.

5 QUESTION: Well, why isn't it better just to get  
6 it resolved right at the time of sentencing? Most of  
7 these issues, certainly, can be -- you can tell whether  
8 there's going to be a fight about it, can't you?

9 MS. WAX: As a numerical matter, yes, most of  
10 sentencing -- most, but not all.

11 QUESTION: In fact, isn't the controversy very  
12 rare?

13 MS. WAX: It's not very rare, Your Honor. Let  
14 me give the example I was going to give. There's an  
15 appeals court case we site in our reply brief, Blumgren v.  
16 Belasky. In that case, an individual was sentenced for a  
17 Federal violation. He was sent out on an appeal bond. He  
18 was arrested some time later by State authorities. His  
19 appeal bond was revoked, a detainer was filed by Federal  
20 authorities, but he remained in State custody. In fact,  
21 he remained and wasn't sent out on bail because there was  
22 a detainer, for a number of months -- I think 4 or  
23 5 months -- before the State charges were finally dropped  
24 and he was turned over to the Federal authorities, and his  
25 sentencing clock began to run.

1           Now under the statute, he would be entitled,  
2           under BOP's interpretation, to credit for the number of  
3           months that he spend in State custody. If he'd been  
4           convicted on the State charges, and the State had given  
5           him credit for that time, he wouldn't be.

6           So there are all sorts of eventualities --

7           QUESTION: In this case, did this all happen  
8           before or after the Federal sentencing?

9           MS. WAX: Well, actually this respondent was in  
10          State custody for 2 weeks --

11          QUESTION: No, I'm talking about your  
12          hypothetical example, or the one --

13          MS. WAX: My hypothetical -- all of this  
14          happened after Federal sentencing while the individual was  
15          on an appeal.

16          QUESTION: I see.

17          MS. WAX: And there are other scenarios where  
18          individuals can be borrowed from State custody for Federal  
19          sentencing on a writ of habeas corpus ad prosequendum, and  
20          then they have to be returned to the State, perhaps to  
21          stand trial or to serve a State sentence. Weeks, months,  
22          and even years can intervene between the imposition of  
23          sentence by Federal court, and the beginning of service of  
24          that sentence. Causey v. Civiletti, another appeals court  
25          case in our reply brief, illustrates that where an

1 individual served a State sentence before his Federal  
2 sentence. I mean, there are all kinds of situations.

3 QUESTION: But again, why wouldn't that case be  
4 taken care of by a sentencing order that said he's  
5 entitled to X days of credit up to now plus any additional  
6 credit that may accrue for the reasons such as you  
7 describe as to be computed in the first instance by the  
8 Attorney General? Couldn't the judge delegate to the  
9 Attorney General the authority to make calculations in  
10 those cases where they depend on subsequent events?

11 MS. WAX: Your Honor, we're not saying that  
12 Congress couldn't have created that system. We're only  
13 saying they didn't.

14 QUESTION: But I mean, why wouldn't that be  
15 consistent with the statute? And why -- and how would it  
16 hurt you?

17 MS. WAX: You're right that if that was the  
18 system, then it would be possible to take into account  
19 intervening detention, so to speak. But what we're doing  
20 here in this case is we're trying to divine congressional  
21 intent. The question we're trying to answer is what was  
22 the system Congress created, not what is the system  
23 Congress could have created.

24 Our argument -- what you're talking about here  
25 is essentially a system of shared jurisdiction over

1 sentencing, because in effect the court can calculate to a  
2 date certain the amount of credit due for anything that  
3 goes before sentencing, but it can't do anything like that  
4 for a period that comes after sentencing. In effect, it  
5 has to designate the Attorney General to do that for it.  
6 And so essentially you're saying that there's a kind of  
7 concurrent or shared jurisdiction.

8           The question is did Congress create a system of  
9 shared jurisdiction knowing that there was a perfectly  
10 workable, perfectly adequate, efficient, uncomplicated  
11 system that came before? Essentially what you're saying  
12 is they threw that all over. They completely restructured  
13 the system, and they didn't give us one iota of guidance  
14 as to how the system was actually going to work. For  
15 example, can BOP revise the determination that the court  
16 makes? What are -- how do we resolve some of the  
17 jurisdictional issues that come up when you have a shared  
18 system?

19           If you look at some of the State statutes,  
20 interestingly enough, and there are a number of States  
21 that do allocate responsibility for presentence time to  
22 the court, sentencing credit, and postsentence time to the  
23 correctional authorities. A lot -- this is spelled out in  
24 explicit detail. I mean this is -- it's nothing like this  
25 statute which just uses the passive voice, doesn't give us

1 a hint that there are to be two entities instead of one.  
2 And even respondent concedes that Congress did not intend  
3 to create this complicated, redundant, inefficient system  
4 when it already had a perfectly good and workable one.

5 QUESTION: Do you take the position, or would  
6 you take the position if we hold that the district judge  
7 must make the credit determination at the time of the  
8 sentence that you can revise an inaccurate determination?

9 MS. WAX: Yes, Your Honor, because of --

10 QUESTION: If that's so, are we really fighting  
11 about very much, then?

12 MS. WAX: Well, we're fighting --

13 QUESTION: Why not just let the district judge  
14 do whatever he wants and then you make a recalculation to  
15 make sure that it's correct?

16 MS. WAX: Well, we're fighting about what's  
17 going to happen in practice when the courts try to put  
18 into effect this system. Are some courts going to rule  
19 that the BOP can revise? Are other courts going to rule  
20 that they can't revise? Essentially, we're going from  
21 order to disorder, at least for a little while. And what  
22 we're saying is Congress did not want to go from order and  
23 uniformity to disorder. And that's the inference.

24 QUESTION: Well, let me put it this way.

25 Suppose there's an authoritative determination that you



1 can revise. I mean correct calculation by the district  
2 court. In effect, then, the Bureau of Prisons is doing  
3 everything, isn't it?

4 MS. WAX: It is.

5 QUESTION: And what the district court does is  
6 simply something that can be overridden?

7 QUESTION: You run into a problem, United States  
8 against Muskrat, where the district courts can't  
9 give -- can't do purely advisory work if it's to be  
10 reviewed by some nonjudicial authority.

11 MS. WAX: Exactly, Your Honor. Then it just  
12 becomes an empty gesture on the part of the court and we  
13 just don't see the point. And the legality of it would be  
14 in doubt as well. I mean that system, I don't think, is a  
15 workable one.

16 QUESTION: Well, is your -- do you rely chiefly  
17 for the practical difficulties on the fact that it's not  
18 easy for the district court to know what is going to  
19 happen after the sentence is handed down and before the  
20 incarceration actually begins?

21 MS. WAX: It's impossible for the district court  
22 to know about it at all.

23 QUESTION: The district court does have adequate  
24 knowledge of everything that happens up to the day of  
25 sentencing, I suppose, by virtue of the presentence

1 report, and one thing and another.

2 MS. WAX: It does, Your Honor. But the fact is  
3 that if the district courts are making a determination for  
4 matters that are within its knowledge, we will still see  
5 different district courts perhaps giving credit to  
6 similarly situated offenders in different ways.

7 Another of our arguments is that we do not think  
8 it's right to attribute to Congress the intent to go from  
9 a system of uniform national guidelines where BOP had  
10 worked out a set of rules for rather some complicated  
11 scenarios that can arise. To go from that system, which  
12 was working perfectly well, to one in which every court  
13 would reinvent the wheel on its own and have to decide how  
14 to deal with the problems that come up in sentencing  
15 credit -- and what that would do is it would subvert the  
16 purposes of sentencing reform generally, which is to have  
17 similarly situated offenders treated alike.

18 Now why would Congress want to go, as I said,  
19 from order to disorder, even if it's only temporary  
20 disorder?

21 QUESTION: Well, if you're correct, and the  
22 Bureau of the Prisons would still be calculating the  
23 credits, what's the mechanism for judicial review of that  
24 action in the event that a defendant says the Bureau of  
25 Prisons did it wrong?

1 MS. WAX: Initially the individual has to go  
2 through the Bureau of Prisons' grievance process, through  
3 three levels. And if he's dissatisfied with the result of  
4 that, then he can seek review or take a -- I think the  
5 commonest mechanism is to take a -- to make a motion under  
6 section 2241, a habeas motion, challenging the Bureau of  
7 Prisons' or the Attorney General's right to keep him in  
8 custody longer rather than less time, which is the time  
9 that he thinks that he should be in custody.

10 QUESTION: How about Rule 35? Would that be  
11 available?

12 MS. WAX: Rule 35 would only be available for an  
13 appeal of a sentence, a sentence as such. And  
14 our -- under our theory, if credit is given by Bureau of  
15 Prisons, it's not part of the sentence. And in fact, it  
16 isn't part of the sentence, of course, conceptually it's  
17 completely different from the sentence. The sentence is  
18 saying how long you're going to be in prison overall.

19 QUESTION: The sentence, to you, refers to a  
20 gross amount, not the net amount, so to speak?

21 MS. WAX: Right. It refers not to how many days  
22 you have to tick off in the future given what you've  
23 served in the past, but how much time you're going to be  
24 in prison overall. What the length of your prison term is  
25 going to be. That's what a court does. The court passes

1 sentence. It metes out punishment. And this is really a  
2 separate --

3 QUESTION: But doesn't the court also resolve  
4 disputes when there are -- there are legitimate disputes  
5 on occasion as to whether certain kinds of custody would  
6 count or not, aren't there?

7 MS. WAX: Oh, yes, there are disputes.

8 QUESTION: What's -- I still don't understand.  
9 If those disputes involve something that's already  
10 occurred, why wouldn't it be appropriate to have the judge  
11 resolve those disputes right then? And then just say any  
12 additional calculation, like telling the clerk to  
13 calculate costs, the judges can do all sorts of things on  
14 cost, but this isn't -- it seems to me that 99 percent of  
15 the time it would be a calculation about as difficult as  
16 costs in the normal case. And you just say costs to be  
17 calculated by the clerk, future credit to be calculated by  
18 the Attorney General. I just don't see anything wrong  
19 with that kind of a simple order.

20 MS. WAX: In the abstract, Your Honor, there's  
21 nothing wrong with it. The question -- and as I said,  
22 Congress could have made it that way. The question is did  
23 they?

24 QUESTION: Well, they're vague. They just said  
25 somebody's -- the statute is vague as to who does it. And

1 most things at the end of a trial, the judge says, are  
2 there any loose ends? What's left? Do I need to resolve  
3 any, you know, tag ends at the end? Decide it while the  
4 lawyers are still there.

5 The thing that troubles me about your view is  
6 there will be cases where there are legitimate arguments  
7 on both sides and the defendant no longer has his lawyer  
8 right at hand to get it straightened out at the time.

9 MS. WAX: That can be said about a lot of  
10 disputes. I mean, our point about this -- first of all,  
11 our main point, and I'll repeat it, is that what this  
12 Court is here to do is to conduct an exercise in divining  
13 congressional intent. And we have to do that from the  
14 clues that are at our disposal. And the clues at our  
15 disposal include the language and the structure of the  
16 statute and our assessment of how the statute is going to  
17 work in practice under various schemes that Congress could  
18 have created. And we have to assess those in light of  
19 what Congress is trying to do in the Sentencing Reform  
20 Act.

21 What Congress was trying to do was to bring  
22 rationality and uniformity and consistency to sentencing.  
23 And to make sure that similar offenders would get similar  
24 sentences and serve the same amount of time. And that the  
25 sentence that the court gives would be the one that was

1 served. And what we're saying is you can't look at those  
2 purposes and then infer that Congress wanted to create  
3 this elaborate system that in practice would subvert those  
4 purposes. It's more elaborate --

5 QUESTION: There's nothing elaborate about the  
6 system. Don't exaggerate.

7 MS. WAX: Well, what we're saying is, just to  
8 say it perhaps more modestly, is that Congress took a  
9 workable, well-oiled system, one that it had never  
10 complained about -- there's no grumbling in the Sentencing  
11 Reform Act legislative history about it. There's no hint  
12 that there was anything wrong with it, even though  
13 Congress complained about a lot of other things in  
14 sentencing when it enacted the Sentencing Reform Act. And  
15 they changed it. Now, what purpose would changing it  
16 serve? I can't think of a reason why Congress would want  
17 to just change it.

18 QUESTION: Well, I suggested one to you. One is  
19 that if there are disputes, let the judge resolve them.  
20 That seems to me a perfectly normal and rational answer to  
21 this.

22 MS. WAX: But the Bureau of Prisons was  
23 resolving them and resolving them in a way that afforded  
24 administrative -- that afforded judicial review that  
25 lifted from the courts the burden of essentially doing a

1 bean-counting operation, one that could get complicated  
2 perhaps, at times, and which might give rise to disputes,  
3 but really is just an administrative matter of applying  
4 rules to facts, finding out those facts, and ticking off  
5 days.

6 I mean, what you're saying is Congress took  
7 something that was being done perfectly well by an  
8 administrative agency and sent it back to the courts.

9 QUESTION: When did this particular language  
10 appear in the Sentencing Reform Act?

11 MS. WAX: The Attorney General language, Your  
12 Honor, or the absence of the Attorney General language?

13 QUESTION: The absence of it. Was it on the  
14 initial draft when it was first proposed? Do you know?

15 MS. WAX: Your Honor, I don't know the answer to  
16 that. There's no explanation for -- I don't know where  
17 it -- when it appeared, I must say.

18 QUESTION: Do you know if the -- I would think  
19 the Attorney General would have raised a big stink about  
20 this somewhere in the process.

21 MS. WAX: It appears to have been overlooked,  
22 Your Honor, unfortunately.

23 QUESTION: Especially by the Attorney General.

24 MS. WAX: Yes. Well, it is unfortunate because  
25 I'm sorry to say that we don't understand why the language

1 was deleted, but we would just speculate that it was an  
2 entrenched feature and nobody thought about it.

3 QUESTION: Well, the other side of the coin is,  
4 of course, that if Congress had intended to change it, it  
5 would have said something to that effect. And the  
6 legislative history, as I understand it, is almost silent.  
7 Is it not, Ms. Wax?

8 MS. WAX: It is, Your Honor. And whatever  
9 weight we give to the substance of legislative history,  
10 here we have no substance at all because nothing was said.  
11 But interestingly, the legislative history says a lot  
12 about section 3585 and the other changes that were  
13 introduced into section 3585. The change, for  
14 example -- the expansion of the scope of the custody for  
15 which credit was available, for example, that was remarked  
16 upon. The change in the day that the sentence commences,  
17 that was also spoken about. The fact that they added this  
18 double credit language which hadn't previously appeared.  
19 Congress commented on that, too.

20 And in the Sentencing Reform Act legislative  
21 history as a whole, Congress goes on and on about the  
22 shortcomings of the previous way of doing sentencing and  
23 all of the ways in which those shortcomings are to be  
24 remedied. And we have nothing about shortcomings at all  
25 here, no indication that there was a problem to be solved.



1           Now, respondent has several arguments against  
2 our position, and all of them are easily answered. The  
3 main thrust of his argument appears to be that in  
4 sentencing reform, Congress somehow wanted to place all  
5 decisions bearing on the length of the sentence, including  
6 the release date, in the hands of the court in order to  
7 achieve uniformity and consistency in sentencing. Now,  
8 the problem with this argument is that it confuses control  
9 over the total length of the sentence with control over  
10 the actual release date of an individual offender. That  
11 argument, it essentially confuses passing sentence with  
12 deciding how much of the sentence is left to serve.

13           It's important to realize that having the  
14 sentencing court fix the actual release date in fact  
15 subverts rather than serves the goals of uniformity and  
16 consistency in sentencing. Now the reason for that is  
17 that if the release date is fixed at sentencing, we  
18 necessarily have to ignore any periods of detention for  
19 which an individual would be eligible for credit under  
20 3585 that come after sentencing. Because if we take those  
21 periods into account, by definition we're going to be  
22 moving the release date.

23           Now if we don't take them into account, it means  
24 that similar offenders will in fact spend different  
25 periods of time in jail depending on whether their Federal

1 sentence starts right away or it starts after a period of  
2 detention or at some later time. And it means that the  
3 court will not be able to control the amount of time an  
4 individual spends behind bars for the very same reason.  
5 Some individuals will spend an intervening period of  
6 detention that won't have any effect on their release date  
7 and other individuals won't.

8 So the bottom line is that it's impossible for a  
9 court to fix both the duration of the sentence, if we take  
10 section 3585 and sentencing credit seriously, and the  
11 release date. Congress certainly, I think, from a reading  
12 of the legislative history, didn't care about the release  
13 date. It cared about how long an individual was going to  
14 be behind bars for that offense. And that means that we  
15 have to change the release date to account for intervening  
16 detention.

17 QUESTION: I think, Ms. Wax, that if at the time  
18 the Attorney General had noticed this thing, he would have  
19 objected to it.

20 MS. WAX: Your Honor, he's objecting to it now.

21 QUESTION: I know. That isn't what I said. If  
22 at the time, he had noticed it, he would have objected to  
23 it, I assume. Did he? Did he ever write a letter about  
24 this or not?

25 MS. WAX: If he did, Your Honor --

1 QUESTION: Do you know or not?

2 MS. WAX: I do not know, Your Honor.

3 QUESTION: Well, I would like to know because if  
4 he wrote a letter and called this to Congress' attention  
5 and objected to his being cut out, and Congress  
6 nevertheless left it this way, I think it would be  
7 relevant to the decision. Don't you?

8 MS. WAX: It might be. I'd be glad to try and  
9 find it out for you, Your Honor.

10 QUESTION: And if he didn't write one, I suppose  
11 we should assume that -- I mean if we have no evidence  
12 that he wrote one, then I guess we should assume that he  
13 didn't object?

14 MS. WAX: No, I think we should assume that he  
15 thought that the statute --

16 QUESTION: Well, you can't have it one  
17 way -- you can't use it if it's there and not use it if  
18 it's not there. I mean, if this is relevant stuff, we  
19 should be guided by it. Seeing no letter from the  
20 Attorney General, we assume that he had no objection to  
21 this.

22 MS. WAX: No, I think he thought that as it  
23 stood the statute continued to give him authority to make  
24 this determination. And that's our position now.

25 I'd like to reserve --

1 QUESTION: Well, he didn't notice the language.

2 MS. WAX: Your Honor, we don't know that. But I  
3 think if he did he would take the position he's taking  
4 now.

5 If there are no further questions, I'd like to  
6 reserve the rest of my time.

7 QUESTION: Thank you, Ms. Wax.

8 Mr. Martin, we'll hear from you.

9 ORAL ARGUMENT OF HENRY A. MARTIN

10 ON BEHALF OF THE RESPONDENT

11 MR. MARTIN: Mr. Chief Justice, and may it  
12 please the Court:

13 We do agree in this case as to what the issue  
14 is, and that is this Court should determine what Congress  
15 intended for the determination of entitlement of jail  
16 credits under the new act.

17 I will, before I begin my prepared remarks, try  
18 to answer Justice White's question. We reviewed the  
19 legislative history, at least, for all the prior versions  
20 of this particular statute once Congress began to consider  
21 sentencing reform. I can't say that I've reviewed each  
22 version of the statute, but each version of the  
23 legislative history for that statute is the same as the  
24 legislative history for the current statute. It would  
25 appear from that that probably prior versions of this

1 section of the Sentencing Reform Act were the same as the  
2 current section of the Sentencing Reform Act, which is now  
3 law.

4 QUESTION: Who -- as originally introduced, was  
5 the bill -- did the bill contain this language?

6 MR. MARTIN: I don't know that. The legislative  
7 history was the same for the original version, so I  
8 suspect that it was. I had not reviewed the prior  
9 versions except for the legislative history of the prior  
10 versions. And there's no mention in the legislative  
11 history on those prior versions of the Attorney General,  
12 so I'm assuming the prior versions of the statute were the  
13 same.

14 QUESTION: I guess we'll have to read the law.  
15 (Laughter.)

16 MR. MARTIN: I'm sure Ms. Wax and I both will be  
17 more than happy to provide supplemental briefs.

18 The -- our position, the position of the court  
19 of appeals was that Congress in reforming sentencing in  
20 Federal courts intended for the district courts to make a  
21 determination on jail credit for a sentenced individual.  
22 It's our position that that approach is not only more  
23 logical and workable than the approach presented by the  
24 Attorney General, but it is more consistent with  
25 congressional intent as expressed in the legislative

1 history and in the enactment of the Sentencing Reform Act.

2 I think in order to understand how it's more  
3 logical and sensical, it might be helpful if I can relay  
4 to the Court how I would envision this operating under our  
5 proposal and then how I would envision this operating  
6 under the Government's proposal. The process would start  
7 out the same in either event. An individual would commit  
8 an offense, there would be an arrest by somebody, either  
9 Federal or State. There would be a determination as to  
10 detention or release pretrial. At some point there would  
11 come a determination appeal to -- either by a guilty plea  
12 or by condition by at trial. And at that point the two  
13 systems would begin to diverge.

14 Under the proposal that we have, the next thing  
15 that would occur would be a presentence investigation and  
16 report prepared by a probation officer under the direction  
17 of the court with the assistance and involvement of both  
18 parties, both the defendant and the United States  
19 Attorney. That presentence report would include the prior  
20 record of the individual, including any pending charges,  
21 any pending sentences. It would include a report to the  
22 court as to any prior incarceration or confinement of the  
23 defendant, whether or not he was in custody for any or all  
24 the portion of the time of the charge until disposition of  
25 the case.

1           It would also include a calculation of the  
2 appropriate guideline sentence, a recommendation of what  
3 the guideline sentence should be, a recommendation as to  
4 whether or not there are any grounds for departure above  
5 or below the applicable guideline range. And under our  
6 proposal, the recommendation also as to what amount of  
7 jail credit the person is entitled to, and if there are  
8 other sentences pending or imposed unserved, a  
9 recommendation as to whether or not the current sentence  
10 should be concurrent or consecutive to any prior  
11 sentences.

12           At that point, then, this presentence report  
13 would be distributed to the parties. If there was any  
14 objection about any of those matters in the presentence  
15 report, both the attorney for the defendant and the  
16 attorney for the Government would have an opportunity to  
17 notify the court and each other of those objection. Any  
18 that remained contested at the time of the sentencing  
19 hearing would be subjected before the court to factfinding  
20 to the presentation of witnesses or documents, if  
21 necessary, by argument of counsel, and ultimately by  
22 determination by the court.

23           The court would then determine what the  
24 applicable guideline range is. Based upon that guideline  
25 range, whether or not a sentence of probation or

1 incarceration was appropriate, whether or not there were  
2 any circumstances indicated a departure above or below the  
3 guidelines was appropriate. It would then determine if  
4 there's going to be incarceration --

5 QUESTION: Well, Mr. Martin, the problem doesn't  
6 lie with all that. The problem lies with what happens  
7 after the sentence is handed down.

8 MR. MARTIN: Yes, ma'am.

9 QUESTION: Are you going to talk about that?

10 MR. MARTIN: Yes, ma'am. The next thing the  
11 court would do would then turn the sentence and make a  
12 decision, under our proposal, whether or not the defendant  
13 had any prior jail credit that should come off of that  
14 sentence and also decide whether it is concurrent or  
15 consecutive. That issue then, addressed by both parties,  
16 would be part of the case that could go up on appeal. So  
17 there would be a final determination at that time as to  
18 any contested issues, entitlement to jail credit. Once  
19 that matter was resolved once and for all, the person  
20 would go off and serve his sentence.

21 Under the Attorney General's proposal what would  
22 happen is the district court at the time of sentencing  
23 would determine all of these issues except for jail  
24 credit. There may be 5 days of jail credit at stake, or  
25 may, as in this case, be 429 days of jail credit at stake.



1 The district court under the Bureau of Prisons' approach,  
2 and the Government's approach would not make any  
3 determination officially as to what impact that jail  
4 credit would have. It would decide only what the length  
5 of the sentence would be.

6 The person would then go off to the Bureau of  
7 Prisons if it's an incarceration sentence for a  
8 determination at some point in time later by the Bureau of  
9 Prisons as to the entitlement to jail credit. And there  
10 are two or three things about the way that would happen  
11 that I think make it clear that Congress would not have  
12 wanted this to happen. It's going to occur at the first  
13 place, let's say, in some remote facility from the  
14 district of conviction.

15 In Mr. Wilson's case, he's incarcerated at  
16 Marianna Prison in Florida, which is a different district  
17 and different circuit from the district and circuit of  
18 conviction. It would also occur at a time -- at a  
19 place and in a point remote in time from the sentencing  
20 process. He would have gone -- when he arrived at Federal  
21 custody, he would have initially been held by the marshals  
22 for some period of time, awaiting transportation, would  
23 have then been in transit from anywhere from weeks to  
24 months before he arrived at the institution designated by  
25 the Bureau of Prisons.

1           At some point in time after his arrival there,  
2 he would have a meeting with a staff member of the prison  
3 who would make an initial informal decision. If he was  
4 unsatisfied with that, it would then go to -- he would  
5 then submit a written complaint, which would then be  
6 responded to by the warden of the prison. If he were  
7 unsatisfied with that determination, he would then go to  
8 the regional director of the Bureau of Prisons, in  
9 writing. He would get a response to that. If he were  
10 dissatisfied with that response, he would then go to the  
11 general counsel of the Bureau of Prisons, in writing, for  
12 a response. If he were dissatisfied at that point -- and  
13 by now we're probably months, if not a year from his  
14 arrival in Federal custody.

15           At that point, he would then initiate  
16 litigation. And I agree with Ms. Wax that the most likely  
17 form of that litigation would be an action under 2241, a  
18 habeas corpus action challenging the execution of his  
19 sentence.

20           QUESTION: Mr. Martin, I mean, it's interesting  
21 how that might work and whatnot, but can we look at the  
22 text of the statute since we don't have any legislative  
23 history.

24           It seems to me the Government uses the word was,  
25 and as Justice Stevens has pointed out, was would apply

1 even if the judge is doing the job. It isn't the word was  
2 that impresses me, it's the fact that it reads, that the  
3 defendant shall be given credit for any time he has spent  
4 in official detention prior to the date the sentence  
5 commences.

6 MR. MARTIN: Yes, sir.

7 QUESTION: For any time he has spent. That  
8 indicates to me that the credit is going to be given at  
9 the time the sentence commences. I don't see how a judge  
10 right now can give you credit for all the time you have  
11 spent prior to the time the sentence commences. It's only  
12 the Attorney General who could possibly do that.

13 MR. MARTIN: Justice Scalia, the reason that I  
14 think --

15 QUESTION: Why wouldn't it say for any time he  
16 will have spent? If they envisioned that most of this, 90  
17 percent of it, would be done by the trial judge, it seems  
18 to me it would have read, shall be given credit for any  
19 time he shall have spent in official detention prior to  
20 the date the sentence commences. It doesn't say that. It  
21 says any time he has spent.

22 MR. MARTIN: Yes, sir. The answer, I think, to  
23 that is that for one thing, in the vast, vast majority of  
24 cases before the district court, commencement and  
25 imposition are the same date. Commencement of the

1 sentence will begin for the vast majority people of  
2 sentenced in the Federal court at the time the judge bangs  
3 the gavel down because at that point he'll order the  
4 person into the custody of the Attorney General. And at  
5 that point, under the statute, in subsection A of the  
6 statute, the sentence commences.

7 QUESTION: But obviously, but they use the date  
8 the sentence commences because that will sometimes differ  
9 from the date of judgment. Otherwise they could just say,  
10 you know, from the time of the sentence.

11 MR. MARTIN: Yes, sir.

12 QUESTION: So we have to focus on that area  
13 where there is a difference.

14 MR. MARTIN: Yes, sir.

15 QUESTION: And where there is a difference, if  
16 they had meant the judge to impose the sentence, it seems  
17 to me they would have said, for any time you shall have  
18 spent.

19 MR. MARTIN: Yes, sir. I think that I would  
20 agree on that point with Ms. Wax, that Congress may have  
21 been a little inelegant. In the legislative history for  
22 that rather than referring to commencement, they referred  
23 to imposition of sentence, where any time accrued prior to  
24 imposition of sentence. Now I think Congress at that  
25 point was making no distinction between imposition of

1 sentence and commencement of sentence because, in fact, as  
2 I said before, the vast majority of cases, those are the  
3 same date.

4 For the few rare cases where those are not the  
5 same date, I think there are two reasons that our proposal  
6 is still the more workable. One is in those cases where  
7 the difference, the gap in those dates works to the  
8 potential detriment of a defendant who might accrue some  
9 additional entitlement to jail credit after imposition of  
10 sentence, 2255 is still available, or 2241, whichever is  
11 the appropriate remedy, to restore that credit to the  
12 individual.

13 QUESTION: Well, I would think that if you are  
14 right that the sentence -- you say sentence begins when  
15 the judge --

16 MR. MARTIN: Yes, sir, in most cases.

17 QUESTION: Is that general rule?

18 MR. MARTIN: Yes, sir. In most cases, because  
19 in the vast majority of cases coming before district  
20 court, the person is either going to be not in custody --

21 QUESTION: Is there some statutory provision  
22 that says the sentence begins when the judge's gavel comes  
23 down?

24 MR. MARTIN: No, sir, that was my colloquial  
25 approach.

1 QUESTION: I know. Is it the sentence begins  
2 the moment that he is sentenced?

3 MR. MARTIN: No, sir. 3585, the same statute  
4 we're dealing with here, subsection A, says the  
5 commencement is either the arrival at the institution or  
6 the arrival -- or in custody of United States Marshals for  
7 transportation to the institution.

8 QUESTION: Either one.

9 MR. MARTIN: Yes, sir, either one. In most  
10 cases, it's going to be the one where he's in custody of  
11 the marshal at the conclusion of the sentencing hearing  
12 when the judge says, Mr. Marshal, take this person into  
13 custody. For most people, that's going to be when their  
14 sentence commences. They're either already in Federal  
15 custody if they were detained prior to trial, as an  
16 increasing number of defendants are, or they are out of  
17 custody.

18 QUESTION: When would it never -- why would it  
19 ever be the case that it would begin only when he arrives  
20 at the penitentiary?

21 MR. MARTIN: If the person is not in custody and  
22 is allowed to self-report to the designated institution,  
23 which happens less and less often, then the sentence would  
24 commence at the time of the arrival at the institution.

25 QUESTION: Of course, if he's out, if he's out,

1 why he -- there wouldn't be any problem.

2 MR. MARTIN: Yes, sir.

3 QUESTION: Then the judge would know how much  
4 time, if any, he had ever spent before he sentenced.

5 MR. MARTIN: Yes, sir.

6 QUESTION: And he would also -- it would also  
7 commence later if he's released on a State detainer,  
8 wouldn't it?

9 MR. MARTIN: If he's in State custody and a  
10 Federal detainer? I'm sorry, I don't --

11 QUESTION: No, if he's in Federal custody, he's  
12 sentenced, there's a State detainer against him. They  
13 turn him over to the State for the State trial before his  
14 sentence begins. Isn't that sometimes done?

15 MR. MARTIN: That could happen, and what would  
16 probably happen under those circumstances, if he's in  
17 Federal custody, if he was released at some point to the  
18 State on a writ, it would be only for the purpose of  
19 judicial proceeding and he would be returned back to  
20 Federal custody to continue serving his sentence. And  
21 this would have happened after he had commenced his  
22 sentence in any event. This would not really deal with  
23 the custody.

24 QUESTION: But there could be cases in which  
25 immediately following the imposition of sentence, instead

1 of being turned over to the marshals for transportation to  
2 a Federal prison, he's turned over to State officials for  
3 transportation to some State courthouse for a trial. And  
4 in that case the sentence would not begin until the State  
5 trial was over and he either arrived at the Federal prison  
6 or was then turned over to the marshals. Isn't that  
7 right?

8 MR. MARTIN: That would more likely occur when  
9 he's already in State custody to begin with and he's been  
10 borrowed under writ for the Federal court. I think it's  
11 less likely that the Federal court, having custody of him,  
12 would release custody for anything other than just a  
13 temporary -- I'm not saying that it can't happen.

14 QUESTION: You're just saying it's unlikely. It  
15 could happen, but it's unlikely.

16 MR. MARTIN: It's extremely unlikely. What is a  
17 little more likely is what happened here, and that's where  
18 a person is in State custody, either serving a sentence or  
19 pending disposition of another case is borrowed by the  
20 Federal Government under a writ. There's some  
21 disposition, and then is returned to State custody. In  
22 those cases there's potential either way, either for the  
23 potential loss of otherwise entitled credit, or for what  
24 the Government refers to as double credit. I think that  
25 there are a number of things that keep those really from



1 being a concern that Congress would have had felt to  
2 justify, keeping this in the Bureau of Prisons as opposed  
3 to placing in the district court.

4 One thing, in both situations, where the person  
5 is in State custody where there are parallel prosecutions.  
6 If he's arrested by the State first, prosecuted there, not  
7 yet to disposition, also prosecuted in Federal  
8 court -- which we're seeing also in growing numbers in  
9 drug cases and sometimes in gun cases -- what happens in  
10 those situations most of the time is that the State  
11 parallel prosecution is dismissed. The person is turned  
12 over for Federal prosecution and usually for Federal  
13 custody after -- usually before disposition of the Federal  
14 case, and so at that point, the State case either has, (no)  
15 is about to be dismissed. So there's not going to be a  
16 question of credit attributed to another State sentence  
17 and the district court will be in a position, then to  
18 measure and evaluate any prior jail credit and award it or  
19 not award it.

20 There also are going to be cases where the  
21 person already adjudicated and serving a State sentence is  
22 borrowed under a writ by the Federal Government for the  
23 purpose of the prosecution of the Federal case. In those  
24 cases, under the statute he's not entitled to that credit  
25 because it's already been attributed to the State sentence

1 that he's now serving.

2 The much less frequent possibility is -- is  
3 actually what happened here. I mean, this is the only  
4 case that I can find in the cases since 3585 where this  
5 has actually occurred. And that is where the person is  
6 released by the State to the Federal Government -- both  
7 charges still pending -- is adjudicated first in Federal  
8 court, sentenced, then is sentenced by the State court  
9 after that. So at the point when Federal sentence is  
10 imposed, State sentence has not been imposed. There's no  
11 credit yet for the time in custody. But at some point in  
12 time after that there is adjudication in State court and  
13 credit is either awarded or denied.

14 So there's a potential under that scenario,  
15 under this scenario, for a double credit, which Congress  
16 did intend to avoid. However, there are adequate  
17 protections for that not to happen unless the State wants  
18 it to happen, which the State has a right for it to  
19 happen, that congressional intent will not be subverted by  
20 the district court making this determination for all the  
21 reasons that we think the district court should be making  
22 the determination anyway.

23 The State court at the time -- in this case, at  
24 the time Mr. Wilson came into the State court for  
25 adjudication and for sentencing, the State court knew what

1 the Federal sentence was. These were parallel and related  
2 prosecutions, joint investigations, mutual cooperation  
3 between the law enforcement authorities. The State court  
4 knew what the disposition of Mr. Wilson's sentence was.  
5 At that time what they knew was that the district court  
6 had denied credit. They awarded credit, they sentenced  
7 him to a sentence that would run concurrent with the  
8 Federal sentence, and that under State law would be  
9 consumed by the Federal sentence. So their intent as  
10 reflected in the sentence that was imposed on him in State  
11 court, was that he get double credit, not just for time in  
12 custody prior to trial, but for all purposes. In other  
13 words, by giving him a concurrent sentence --

14 QUESTION: Why doesn't their intent frustrate  
15 the Federal intent? The Federal intent only intends to  
16 credit something that has not been credited against  
17 another sentence.

18 MR. MARTIN: Yes, sir. There are two  
19 responses --

20 QUESTION: Are you saying the States have the  
21 power to frustrate the Federal intent?

22 MR. MARTIN: I wouldn't characterize it as  
23 frustration of Federal intent if it's a matter that's in  
24 the control of the State courts and is left within the  
25 control of the State courts by the Federal courts.



1           QUESTION: Well, it's only left within the  
2 control of the State courts if you interpret the statute  
3 the way you want to interpret it. Don't you think it's  
4 more reasonable to interpret the statute in such a fashion  
5 that you will be able to achieve what the statute says,  
6 and that is not to allow a credit that has been credited  
7 against another sentence.

8           MR. MARTIN: Yes, sir.

9           QUESTION: And that can be achieved by letting  
10 the Attorney General do it.

11          MR. MARTIN: Not necessarily. In fact, it's  
12 probably more likely it will -- that there will be  
13 situations where it will not be achieved under the Bureau  
14 of Prisons' approach, then under the approach with the  
15 district court makes that determination.

16          One such scenario would be a person who is  
17 arrested by State authorities after the commission of a  
18 Federal offense, spend some period of time, say 60 days in  
19 custody, then makes bond in State court, is released. And  
20 some period of time after that is sentenced in Federal  
21 court, receives a 6-month sentence, goes off to serve that  
22 sentence, State case still pending, unadjudicated. At the  
23 end of 4 months, he then says to the prison, look, I've  
24 already -- I've done 60 days of custody that's not been  
25 credited to another offense, to another conviction. I'm

1 entitled to be released. The Bureau of Prisons would have  
2 no option at that point but to release the person. The  
3 next day they may be adjudicated in State court, given  
4 credit for that 60 days.

5 And so even under that scenario -- neither --

6 QUESTION: That's a result that flows from the  
7 text of the Federal statute. It says that has not been  
8 credited. I mean, if he's finished his Federal sentence  
9 before the crediting by the State occurs, that's the way  
10 the statute reads.

11 MR. MARTIN: Yes, sir.

12 QUESTION: But the way you want to do it, there  
13 will be -- even though before his Federal sentence is  
14 completed it is credited in the State, the crediting will  
15 count. And that's contrary to the text of the statute.  
16 When you say it happens because of our Federal system  
17 that -- I mean my point is it doesn't have to happen. You  
18 can give force to what the Congress --

19 MR. MARTIN: I will concede that there can be  
20 scenarios under which the district court making the  
21 determination could result in the award of double credit.  
22 I think that those situations are so infrequent  
23 to -- unlikely to occur, so few in number, that Congress  
24 would not have intended to design a system just to account  
25 for those. That what Congress was trying to do was design

1 a system that was consistent with the rest of the  
2 Sentencing Reform Act that would efficiently and  
3 effectively and fairly handle the vast majority of cases  
4 where this statute would apply.

5 QUESTION: Is one of your concerns in this case  
6 that the district judge should have before it the credit  
7 and make the calculation of the credit so that the judge  
8 can take that into account in determining the base  
9 sentence?

10 MR. MARTIN: Yes, sir. The Government says  
11 that --

12 QUESTION: But then, defendants are being  
13 treated differently because if there is a credit that  
14 arises by reason of detentions that are after the  
15 imposition of the sentence but before it commences, the  
16 judge can't do that, so then you are imposing on us a  
17 regime where defendants are treated differently, which is  
18 precisely what the Congress did not want.

19 MR. MARTIN: I think, Justice Kennedy, that if  
20 you assume that Congress intended for this decision to be  
21 made at some point in time, at some precise point in time,  
22 either imposition of sentence or commencement of sentence,  
23 if those are different dates, that if the decision is made  
24 at a precise point in time, there are going to be people  
25 who for arbitrary reasons fall on one side or the other of

1 that line. And as a result only of that arbitrariness  
2 receive or don't receive credit.

3 For instance, if the line is to be drawn --

4 QUESTION: Well, it's not arbitrary if the  
5 Bureau of Prisons does it, because it's all after the  
6 fact, and under the Government's position, the judge would  
7 be encouraged to set the base decision without reference  
8 to the credit time, which it seems to me quite a logical  
9 design of the statute in any event. And under your  
10 system, that would not happen.

11 MR. MARTIN: There are two possible -- and these  
12 are not articulated in the Government's brief -- there are  
13 two possible alternatives the Bureau of Prisons make in  
14 this determination. One would be that they make it as of  
15 the facts existing at the time of the commencement of the  
16 sentence with no change after that.

17 The other scenario would be the Bureau of  
18 Prisons making the decision and reevaluating or changing  
19 the decision at any time during the service of the prison  
20 sentence. That scenario is the one that they articulate  
21 in their brief, and that's the only scenario that I think  
22 would avoid any possibility of an aberration of what  
23 Congress intended under 3585, because otherwise if you say  
24 it can't happen after commencement of sentence, then the  
25 person who is sentenced in State court after that or



1 before that, you have this disparity only because of that  
2 date.

3 If this Court were to find that the Bureau of  
4 Prisons should make this determination and that the  
5 determination is subject to revision throughout the course  
6 of the person's incarceration, then that's a result, I  
7 think, that just goes directly in the face of everything  
8 Congress was saying about certainty of sentencing and  
9 certainty of release date. I think that all of the  
10 language talking about parole, about good-time credits,  
11 where Congress says that these result in a prisoner not  
12 knowing until the date that he or she is released what  
13 that release date is going to be is contrary to the  
14 purposes of sentencing as we see them. That it's  
15 important for the prisoner and for everyone to know at the  
16 date of sentencing what that release date's going to be  
17 subject only to reduction by good time.

18 So that the only absolute way to insure that  
19 there's no aberrational application of this statute is one  
20 that would allow its revision up through the very release  
21 of the prisoner from the institution. That, however, I  
22 find is so contrary to what Congress was trying to do,  
23 that I don't think Congress could have planned to do that.

24 Sentencing credit, jail credit for an individual  
25 is not just some technical manipulation of a sentence, as

1 the Government would have this Court believe. In this  
2 case and in most cases where there is prior credit, it's  
3 going to have a significant impact on when that prisoner's  
4 released from the institution. And while the Government  
5 may say there's a distinction between determining duration  
6 of sentence and determining release date, the number one  
7 thing on the mind of the individual in the institution is  
8 when do I get out of here.

9 QUESTION: You don't suggest, do you, Mr.  
10 Martin, that there's discretion confided to whoever  
11 determines sentencing credit?

12 MR. MARTIN: No, sir. Congress, in addition to  
13 deleting the Attorney General from this process, narrowed  
14 substantially the discretion. What it left basically was  
15 there are about two or three factors to be resolved, and  
16 based on what those factors are, you either get the credit  
17 or you don't get the credit.

18 QUESTION: So while it's obviously important to  
19 the defendant, it does not depend on any peculiar merit of  
20 his.

21 MR. MARTIN: Oh, no, sir. No, sir. It depends  
22 on the facts in his case and the nature of his  
23 confinement, if any, prior to trial and the nature, if  
24 any, of the prosecution.

25 QUESTION: I'm still not entirely clear, because

1 I think sometimes you didn't quite complete your answers  
2 before, but how do you handle the case in which after the  
3 trial judge imposes the sentence, there's an appeal and  
4 the defendant is out on bond. And say a year or so goes  
5 by. And during that year, the question arises to whether  
6 some jail time should be credited or not. How do you  
7 handle that case?

8 MR. MARTIN: There are two ways. For one thing,  
9 if it's on appeal and it comes back for resentencing, then  
10 it can be accounted for at the resentencing, if whatever  
11 is going to happen has happened during that period.

12 QUESTION: Well, let's say it doesn't. There's  
13 no order to resentence, they just affirm.

14 MR. MARTIN: A couple of different ways. If it  
15 turns out that during that period of time the person  
16 accrues additional time of official detention, which is  
17 what the statute now says, that's not attributed to  
18 another conviction, that can be remedied under 2255. And  
19 I think at that point it would be 2255 rather than 2241  
20 because under my theory this determination is part of the  
21 imposition of sentence. And so we come back to the  
22 district of sentencing under 2255.

23 QUESTION: All right. That takes care of the  
24 case where he gets additional credit.

25 MR. MARTIN: Yes, sir.

1           QUESTION: What if the event that transpires in  
2 the interval is one that makes it clear that he is not  
3 entitled to a credit that he might have been entitled to?  
4 In other words, say that you don't know whether the State  
5 was going give him credit for some time in custody, but  
6 you find out during this interim. What do you do about  
7 that case?

8           MR. MARTIN: I think that in that case that the  
9 concern then is that he not receive double credit.

10          QUESTION: Correct.

11          MR. MARTIN: Now I think that that concern is  
12 going to be resolved basically by the State court. And  
13 that there will not be double credit of the kind that  
14 Congress sought to avoid --

15          QUESTION: Now you don't have a Federal answer  
16 to that question under your approach?

17          MR. MARTIN: No, sir, not effectively. And I  
18 think the circumstances where the State can't prevent  
19 double crediting are going to be so unique and so  
20 remote -- and I'm not even sure that it would occur. I  
21 can't say that they absolutely wouldn't. In this case in  
22 particular, if the State had not wanted Mr. Wilson to have  
23 double credit, they could have either made it run  
24 consecutive, they could have increased the amount of time  
25 that he was going to receive in his State time, they could

1 have not released him on parole, they could have made up  
2 that 429 days, even though the Federal court had given him  
3 credit for that.

4 I think in the -- in the end analysis for the  
5 vast majority of cases that will come before a court, the  
6 resolution of this issue by the factfinding and legal  
7 determination process of the court at the sentencing  
8 hearing is a much more workable process.

9 QUESTION: Let me ask you one other question.  
10 Under your reading of the statute, would it be error for  
11 the judge to say as of today it appears that this is the  
12 credit that's warranted. But there is an issue that can't  
13 be resolved until after the appeal process transpires. I  
14 therefore order the Attorney General at the end of the  
15 proceeding to make the appropriate disposition at that  
16 time. In other words, could he delegate -- could the  
17 judge delegate the decisionmaking authority for these  
18 small category of cases to the Attorney General to be  
19 decided on the basis of the intervening events?

20 Would that be inconsistent with the statute in  
21 any way?

22 MR. MARTIN: It could result in an inconsistent  
23 outcome. If that were to result in that happening in a  
24 number of cases, and the Bureau of Prisons handling that  
25 question like they handle it now, where it takes months

1 and months and winds up having to come back to court  
2 anyway, I don't think Congress would have intended that.  
3 I think Congress would have preferred the decision is made  
4 now based on the facts known to the court.

5 That kind of shared jurisdiction, I think  
6 Congress probably actually didn't have in mind. Just  
7 actually counting up days, you know, once the court  
8 determines what the timing is, I think the Bureau of  
9 Prisons will do that and Congress had anticipated that  
10 they would.

11 One last point I would like to make. Of the  
12 cases that have interpreted 3585 since its enactment, the  
13 vast majority of the issues involved in those were  
14 questions that were based on facts known at the time of  
15 sentencing that were justiciable questions that the court  
16 could and should have resolved. The questions of the  
17 nature of the detention, whether or not that equates with  
18 official detention and custody, questions of entitlement.  
19 And questions that could and should be resolved by the  
20 District court at that time. And if done so, would be  
21 much more consistent with purposes of the Sentencing  
22 Reform Act.

23 QUESTION: Thank you, Mr. Martin.

24 Ms. Wax, you have 2 minutes remaining.

25 REBUTTAL ARGUMENT BY MS. WAX

1 ON BEHALF OF PETITIONER

2 MS. WAX: Just a couple of quick points. First  
3 of all, it's very important to realize that the sentence  
4 does not begin in the Federal system at sentencing and a  
5 delay between sentencing and the advent of sentence is  
6 very, very common. Individuals are given time to put  
7 their affairs in order, or they're put out on appeal  
8 bonds. They're on a State detainer. They were in State  
9 custody before they went over to the Federal side, as this  
10 respondent was. Delays are common and detention can  
11 occur.

12 QUESTION: But most of the time those delays  
13 won't result in any additional credit.

14 MS. WAX: They sometimes will, Your Honor.

15 QUESTION: They sometimes would, I understand.  
16 But most the time they wouldn't. Would that be right?

17 MR. MARTIN: As a numerical matter, yes, most  
18 sentencing credit issues are routine issues involving  
19 presentencing credit. But the number of instances in  
20 which there is postsentencing detention for which an  
21 individual could get credit, those instances are  
22 considerable. Sometimes individuals are held on the State  
23 side, the charges are dropped, the individual's given  
24 probation, so his State presentence time doesn't count  
25 towards anything. His State conviction is overturned.

1 All of these scenarios can happen.

2 QUESTION: And even in those cases where it  
3 doesn't make any difference in the sentencing, it at least  
4 explains -- it leaves unexplained why the phraseology is  
5 for any time he has spent in official detention prior to  
6 the date the sentence commences.

7 MS. WAX: Exactly, Your Honor. My second --

8 QUESTION: It's an unnatural way to put it if  
9 this kind of a situation is common.

10 MS. WAX: It certainly doesn't fit with the  
11 language and it doesn't fit with the reality, either.

12 My second point, of course, is that respondent  
13 does concede that some double credit awards simply will  
14 not be corrected. There will be windfalls. Individuals,  
15 who through an accident of timing, get a second award of  
16 credit by the State after sentencing will get to keep it.  
17 The individuals who get the award against a State sentence  
18 before their Federal sentencing will not get to have a  
19 second award. That's a completely arbitrary result.  
20 Congress could not have intended that result, which goes  
21 against all of the goals of the Sentencing Reform Act.

22 And my third point is respondent makes a lot out  
23 of the possibility of putting all the information bearing  
24 on sentencing credit in the presentence report. If you  
25 read the sections of the Sentencing Reform Act that govern



1 what goes into a presentencing report, Rule 32 section  
2 3552, not a word is said about you need to find these  
3 facts and put in this information so that the court can  
4 make a credit determination. Not a word is said.

5 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Wax.  
6 You time has expired.

7 The case is submitted.

8 (Whereupon, at 12:00 p.m., the case in the  
9 above-entitled matter was submitted.)

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## **CERTIFICATION**

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: NO. 90-1745 UNITED STATES, Petitioner, v.*

**RICHARD WILSON**

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

**BY** Michelle Sanders

**(REPORTER)**