

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

CAPTION: JANET RENO, ATTORNEY GENERAL, ET AL.,

Petitioner v. ZIYA K. KORAY

CASE NO: No. 94-790

PLACE: Washington, D.C.

DATE: Monday, April 24, 1995

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3       JANET RENO, ATTORNEY GENERAL,       :

4       ET AL.,                               :

5                   Petitioners               :

6       v.                                       :   No. 94-790

7       ZIYA K. KORAY                        :

8                   - - - - -X

9   Washington, D.C.

10    Monday, April 24, 1995

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:02 a.m.

14   APPEARANCES:

15   MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor

16                   General, Department of Justice, Washington, D.C.; on  
17                   behalf of the Petitioners.

18   IRWIN ROCHMAN, ESQ., New York, New York; on behalf of the  
19   Respondent.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 74 -- correction, 94-790, Janet Reno v.  
5 Ziya Koray.

6 Mr. Estrada.

7 ORAL ARGUMENT OF MIGUEL A. ESTRADA

8 ON BEHALF OF THE PETITIONERS

9 MR. ESTRADA: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 Section 3585 of title 18 instructs the Bureau of  
12 Prisons to calculate a defendant's sentence of  
13 imprisonment in two related steps. Under subsection (a),  
14 the Bureau must first determine when the sentence began,  
15 which usually is when the defendant is received for  
16 transportation to the facility where he is to serve it.

17 Subsection (b) of the statute deals with the  
18 issue of credit for prior custody before the sentence  
19 began, and it generally requires that a defendant receive  
20 credit for any time he has spent "in official detention."

21 The issue in this case is whether the Bureau is  
22 correct in denying sentence credit under subsection (b) to  
23 defendants who are released on bail within the meaning of  
24 the Bail Reform Act of 1984.

25 QUESTION: Mr. Estrada, where is the respondent



1     presently?

2             MR. ESTRADA:  I am told, though I don't think it  
3     is in the record, that he is --

4             QUESTION:  Is he in custody?

5             MR. ESTRADA:  He is on bail in -- living in the  
6     State of New York, I believe, Justice O'Connor.

7             QUESTION:  Some kind of supervised release  
8     status?

9             MR. ESTRADA:  Bail status.  After the judgment  
10    of the court of appeals, the judgment I think in the last  
11    footnote of the court's opinion instructed the district  
12    court to grant bail to the defendant pending any hearing  
13    on the remand on just how jail-like the conditions of  
14    incarceration or of bail were.

15            QUESTION:  What would be the effect of our  
16    ruling if it were in your favor?

17            MR. ESTRADA:  He would --

18            QUESTION:  Would he have more time to serve?

19            MR. ESTRADA:  Yes, he would.  Yes, he would.  
20    The supposition of the court of appeals is that because  
21    the sentence that remained was so short, and practically  
22    most of it was subject to the dispute of credit, that in  
23    order not to render the case moot pending the hearing that  
24    the court ordered, the defendant should be granted bail,  
25    and that's what the district court did on remand, and if

1 we manage to persuade the Court to our view of the statute  
2 in this case, the result will be that he will have to  
3 surrender for custody and serve the remainder of the  
4 sentence.

5 The Third Circuit in this case rejected the  
6 Bureau's interpretation and held that the words "official  
7 detention" must be read more broadly than the Bureau does  
8 in order to include a court order that releases a  
9 defendant in bail but subject to a condition that he  
10 remains in a privately run halfway house under the  
11 conditions that the court termed "jail-like," and our  
12 argument in this Court has three principal points as to  
13 why the court of appeals was wrong.

14 First, that the context of the statutory  
15 language indicates that Congress used the word "detention"  
16 as an antonym of "bail," so that a defendant who receives  
17 bail under any conditions should not be eligible for  
18 credit under subsection (b).

19 The second point that I'd like to make today is  
20 that Congress used the words "official detention" in the  
21 statute for the first time in 1984, and that it was by  
22 then settled in the courts of appeals under the antecedent  
23 statute that dealt with credit that somebody who was  
24 released on bail would not be eligible for credit toward a  
25 sentence of imprisonment, and the third point is that

1 if -- even if the court of appeals is right that it is  
2 possible to read the statute more broadly, the agency was  
3 not required to do so, and its view is reasonable, so it  
4 is entitled to deference.

5 QUESTION: Did the Bureau of Prisons have a  
6 different interpretation under its 1979 program statement?

7 MR. ESTRADA: The contention is that it did.  
8 Our view is they did not -- that it did not.

9 There was a general rule that would have denied  
10 a defendant in the position of respondent credit even  
11 under the old policy statement, and in fact that general  
12 rule was cited by the warden when it turned down the first  
13 request by the inmate in this case.

14 There was an exception that came out of a case  
15 called Waldorf, as we discuss in our brief, that was  
16 basically to the effect that if the defendant was ordered  
17 to actually be in a jail as a condition of bail under the  
18 custody of prison officials, credit would be granted in  
19 these circumstances.

20 QUESTION: If it was jail-like conditions of  
21 bail. Is that --

22 MR. ESTRADA: Well, the use -- the policy  
23 actually used not the word "conditions" but "jail-like  
24 facilities," and I am told by the Bureau that it was never  
25 interpreted in the way that the Third Circuit thought it

1 might be interpreted.

2 I haven't heard respondent offer an example as  
3 to any other time in which it was interpreted that broadly  
4 and, in fact, if it were, it would be inconsistent with  
5 the general thrust of the general rule, because if it were  
6 as broad as the court of appeals thought, it would swallow  
7 the entire rule that said that this class of people didn't  
8 get credit, and --

9 QUESTION: Mr. -- in that case, Mr. Estrada, was  
10 it -- it was in a jail. Was it daily, or was it just a  
11 weekend --

12 MR. ESTRADA: The facts that gave rise to the  
13 narrow exception, Justice Ginsburg, were that he was  
14 required to go back to the jail during the nights and  
15 weekends, I believe.

16 QUESTION: But was out during the day.

17 MR. ESTRADA: That's correct.

18 QUESTION: One other question I had about the  
19 background of this. Between the time that the sentence  
20 was received and the time he was sent to the Allen -- was  
21 it Allenwood Penitentiary?

22 MR. ESTRADA: Yes, Justice Ginsburg.

23 QUESTION: Did he get -- he remained in the  
24 halfway house at that time. Did he get credit for those?

25 MR. ESTRADA: No.

1 QUESTION: That 4 weeks, too, didn't count?

2 MR. ESTRADA: No.

3 QUESTION: Even though it was postsentence.

4 MR. ESTRADA: That's right, because the statute  
5 splits up the world into not the -- based on the time when  
6 the sentence starts, not when the sentence is imposed, and  
7 under subsection (a), the sentence starts when usually he  
8 shows up at the jail where he is to serve that sentence.

9 QUESTION: Is the claim here being made for  
10 those 4 weeks as well as --

11 MR. ESTRADA: That's correct. That's correct,  
12 and --

13 QUESTION: So --

14 MR. ESTRADA: And under our view, none of that  
15 is warranting of credit under the statute.

16 If I could go back to make one final point in  
17 response to Justice O'Connor's question, the 1979 program  
18 statement that does contain the exception was republished  
19 in 1993 virtually in identical form, except that the 1993  
20 version does not state that exception.

21 QUESTION: Was there any statutory basis for  
22 that change, or was it just a decision of the Bureau of  
23 Prisons to change the language?

24 MR. ESTRADA: There is no record as to why, when  
25 the Bureau republished the 1993 version, it took out the



1 old Waldorf exception.

2 QUESTION: Does the Bureau of Prisons have  
3 rulemaking authority?

4 MR. ESTRADA: Not as to these matters.

5 QUESTION: Then what deference do we owe to the  
6 Bureau of Prison's interpretation, do you think?

7 MR. ESTRADA: Well, the same deference that you  
8 would owe to any other agency's reasonable interpretation  
9 of a statute that you have found it is charged with  
10 administering. Once you have held under Wilson, in our  
11 view, that this statute was something that Congress  
12 envisioned would be administered by the Bureau within the  
13 narrow confines of what it is, they would get, in effect,  
14 the delegated implicit authority to fill out the details  
15 as to how better to make the statute work.

16 It is obviously a basic premise of that argument  
17 that the court in Wilson found that Congress had an intent  
18 to delegate to the Bureau these sorts of computations.  
19 Obviously, if this were a statute the administration of  
20 which is confined solely to the courts like any other  
21 criminal statute, that is not an argument that we would be  
22 making here, but once the court ruled in Wilson that there  
23 was to some extent at least an implicit delegation to the  
24 Bureau to administer this statute, in our view they're  
25 entitled to deference on their reasonable views as to what

1 the statutory terms mean.

2 Of course, that is our fallback argument. We  
3 think that the statute is best read in the way that we  
4 have argued. That is to say that the words "official  
5 detention" in the context in which they are used in this  
6 statute connote the imprisonment that follows the -- a  
7 defendant's inability to secure bail, and that is the use  
8 that the word "detention" has been given in bail laws even  
9 before the 1984 act.

10 In the case of Block v. Rutherford, for example,  
11 which is cited in our reply brief, the Court dealt with  
12 the constitutional requirements that apply to a State's  
13 holding pre-trial detainees, and the Court said that  
14 detainees, by definition, are people who have not made  
15 bail.

16 QUESTION: I can understand -- the part that --  
17 I understand your fallback argument, because I can  
18 understand saying the States have so many different  
19 varying programs and these may or may not resemble each  
20 other, and it would be a total nightmare to find an  
21 absolute rule. That's basically your fallback argument, I  
22 think.

23 MR. ESTRADA: That's correct, Justice Breyer.

24 QUESTION: Yes, all right. Then -- but I don't  
25 understand the basic argument as well, because what do you

1 do? Does it turn on the magic word "bail"? I mean, how  
2 do we know that the States will always use the magic word  
3 "bail"? Perhaps what they'll do is they'll just say, we  
4 have a person in front of us, trial is 4 weeks from today,  
5 until trial, what you will do is you will report nights  
6 and weekends to the house on 14th and 95th Streets, and  
7 there's a house there, and the person gets in the house,  
8 and he comes in at night, he comes in on the weekend, he  
9 goes off during work during the day, work of different  
10 kinds -- I mean, there are a thousand variations on that  
11 theme.

12 So I understand the rule that the circuit has.  
13 You look to jail-type conditions. I understand the  
14 possibility of saying it's all up to the Bureau of  
15 Prisons, but I don't understand this third possibility.  
16 What is the actual rule that we're supposed to interpret  
17 this statute to say?

18 MR. ESTRADA: Well --

19 QUESTION: If they use the word "bail," then it  
20 isn't, even if you put them in, like, Marion, during --

21 MR. ESTRADA: No --

22 QUESTION: -- or if you do use the word "bail"  
23 and you don't use -- how does that work, that third one?

24 MR. ESTRADA: Our basic contention here, Justice  
25 Breyer, is that the word "detention," when used in the

1 context of a statute of this type, has a plain meaning,  
2 that the Bail Reform Act of 1984 is evidence of what is  
3 usually understood --

4 QUESTION: My problem is, suppose the State  
5 doesn't use the word "bail"?

6 MR. ESTRADA: Well, the point I was going to  
7 make is that the plain meaning of the word looks to the  
8 consequences of the bail decision, not to the label that  
9 the State attaches to it, which is to say --

10 QUESTION: So then, what is the result in the  
11 example I gave?

12 MR. ESTRADA: The result is that if you are in  
13 the custody of State prison officials, you're entitled to  
14 credit, and --

15 QUESTION: Fine. What it is, is it's exactly  
16 the circumstance of this person here.

17 MR. ESTRADA: No, it is not.

18 QUESTION: No, I'm imagining a case. I'm  
19 imagining the State having done to a different prisoner  
20 precisely what's true here. Nights and weekends in a  
21 house made of concrete, and during the day the person goes  
22 off with a marshall close behind but not always present.  
23 I mean, they never use the word "bail."

24 MR. ESTRADA: That's correct, Justice Breyer.

25 QUESTION: Now, what is the result?

1 MR. ESTRADA: The result is that person gets no  
2 credit, because if the person is not in that house, as I  
3 understand your hypothetical, under the custody and under  
4 the control of State prison officials who may take him out  
5 without going to the court to ask for authority, and who  
6 may do to him many of the things that are done to both  
7 convicted prisoners and --

8 QUESTION: And then if the judge happens to say,  
9 I'm not giving you bail, I'm keeping you confined. You're  
10 going to go to the house on 14th and 95th Streets, and  
11 that exactly happens, just what I said.

12 MR. ESTRADA: I think I understand your  
13 hypothetical, Justice Breyer, and the answer is that under  
14 our view of the statute the word "detention" connotes --  
15 the word "detention" as used in the credit statute  
16 connotes custody by State prison authorities, the old bars  
17 example, and it doesn't matter what the State court calls  
18 it, it doesn't matter what the prisoner calls it. If he  
19 was --

20 QUESTION: Does it matter, Mr. Estrada, whether  
21 the prisoner has any notice of the difference? As I  
22 recall these facts, this man was detained in jail for the  
23 first 2 months, so he got credit for that. Then he asked  
24 to be released on bail, and he got this confining bail.

25 Did he know that there was this change when he



1 got those rather restrictive bail conditions and -- yes,  
2 well, tell me if he knew first, and then I would like to  
3 ask if he didn't know, wasn't he entitled to notice?

4 MR. ESTRADA: Let me take that in two answers.  
5 As to the first point, the answer is, we don't know,  
6 because all of the records from the original case in  
7 Baltimore are sealed, so what was actually placed on the  
8 record is not in front of the Court, and it is not in the  
9 record in front of the Court.

10 Nonetheless, my answer to that is that by the  
11 time this happened the issue of whether somebody could get  
12 credit for time spent in a halfway house had been  
13 litigated in the circuits, the Bureau had a policy, both  
14 of those things had clear rules, and certainly that gives  
15 better notice to a person who thinks that he should be  
16 entitled to it than the rule that the Third Circuit came  
17 up in this case, which basically says that if it later  
18 should turn out that the person was held under jail-type  
19 conditions, then maybe, depending on the outcome of a  
20 hearing, he'll get credit.

21 QUESTION: Mr. Estrada, this is my concern. You  
22 say that the Bureau had a policy, and there's a statute  
23 that could be interpreted in one way or another, but the  
24 rules are so careful, Rule 11, to say when somebody makes  
25 a plea, that the judge with meticulous care had to tell

1 all the consequences of that.

2 Now here, if a man is in a jail and then gets  
3 transferred to this halfway house where he's allowed out  
4 only once in 150 days, the notion that he would appreciate  
5 that that is not the kind of detention for which he'll get  
6 credit, there's this tremendous change, maybe he would  
7 have said if that's the deal, I want to stay in jail.

8 MR. ESTRADA: Well, maybe yes and maybe no. I  
9 rather suspect that the county jail, where he was in the  
10 first place, was sufficiently unpleasant that wouldn't  
11 have been --

12 QUESTION: Well, I was going to ask,  
13 Mr. Estrada, under at least the Federal system, is it open  
14 to the prisoner to say that he wants to start serving his  
15 time immediately in a detention facility?

16 MR. ESTRADA: It is open to the prisoner to  
17 waive his right to bail, and the court of appeals in  
18 making the notice argument that Justice Ginsburg was just  
19 referring to in effect said that.

20 QUESTION: Well, suppose the court said, we  
21 don't have room for you in the jail, we're going to put  
22 you in a concrete house at 14th Street, where you're not  
23 under the supervision of correctional officials, until we  
24 have room for you. Could he --

25 MR. ESTRADA: Well --

1 QUESTION: Could he object to that?

2 MR. ESTRADA: As with all -- well, let me take  
3 the question in two parts. As with all waivers and most  
4 rights, the court doesn't have to take it if there's a  
5 public policy reason why it should not. As to all matters  
6 that bear on what may later follow from the bail  
7 determination, it is important to emphasize that under the  
8 bail statute there is a right to appellate review, and if  
9 someone is dissatisfied with the conditions under which he  
10 has placed, he can take them up and say that, for example,  
11 they are too restrictive. I --

12 QUESTION: Well, do you think in a case, I  
13 assume it would be where there's a short sentence, that if  
14 the prisoner wants to get it over with, he can tell the  
15 judge, I want to begin serving my time now, and the judge  
16 is bound by that?

17 MR. ESTRADA: No. In most cases I think the  
18 judge will give him his way. I don't think he has a  
19 legally enforceable right to do so, and if, as with many  
20 other things where people would like to do something that  
21 is not quite compelled by law, we will try to accommodate  
22 him, but I don't think there's any legal rule, if there  
23 are good reasons to the contrary, why he must have his way  
24 in that respect.

25 If I could go back to the --

1           QUESTION: Could I ask you, before you go back  
2 to that, Mr. Estrada, I want to follow up on Justice  
3 Breyer's question.

4           Having the facts of this case in mind,  
5 supposing -- I've got two alternatives. Supposing the  
6 defendant asks for bail, and in one case the judge says,  
7 bail is granted on the conditions set forth here; in the  
8 second case, the judge says bail is denied, and until --  
9 for the present you will be confined in exactly the same  
10 way, have the rest of the order be exactly the same, would  
11 they require different results?

12           MR. ESTRADA: Yes, but let me explain that as to  
13 the second hypothetical, the legal consequence under the  
14 bail statute of the court saying bail is denied is that he  
15 must be confined into the custody of the Attorney General,  
16 so therefore the Court doesn't really have the authority  
17 under the bail statute, I don't think, to sort of say,  
18 bail is denied, and I'm going --

19           QUESTION: Well, say he does it --

20           MR. ESTRADA: -- to confine you --

21           QUESTION: -- confined to the custody of the  
22 Attorney General, and that custody shall be carried out in  
23 the following manner. You don't think he could do that.

24           MR. ESTRADA: No, I don't think he can do that.

25           QUESTION: But what if the Attorney General then

1 followed up by doing exactly what this judge ordered?

2 MR. ESTRADA: That would be a --

3 QUESTION: Then he'd get credit.

4 MR. ESTRADA: That's right, Justice Stevens, and  
5 it is not our view that the statute would --

6 QUESTION: I gather, then, in both cases there's  
7 detention that's only official detention if the Attorney  
8 General makes the decision. It's not official detention  
9 if the court makes the decision.

10 MR. ESTRADA: In both cases there is detention  
11 in some sense of the English word, "detention." Only in  
12 the latter case is there official detention within the  
13 meaning of the statute.

14 QUESTION: It's official if the Attorney General  
15 orders it; it's not if the court orders it.

16 MR. ESTRADA: Well, in essence, yes, but let me  
17 make two points in response to that, Justice Stevens,  
18 because I agree with you that it is a troubling  
19 hypothetical.

20 The first one is that Congress passes a statute  
21 like the credit statute with reference to classes of  
22 people. It is not a question as to how Congress would  
23 really think of a case that comes close to a line in some  
24 sense, but that wasn't the class that Congress didn't  
25 think of favoring when it conceived of the broad class at



1 the outset.

2 The second point is that, as we point out in our  
3 reply brief, being in the custody of the Attorney General,  
4 even if she chooses to put you in a halfway house for some  
5 period of time, is quite different from being in the  
6 custody of a private person. It has many legal  
7 consequences, including what the Attorney General --

8 QUESTION: I suppose there would be credit even  
9 if the Attorney General decided to let the person be free  
10 on his or her own recognizance, too. That would still be  
11 official detention.

12 MR. ESTRADA: Yes. I don't -- it seems to me  
13 that if the Court found that the defendant should be  
14 detained, which is a finding that under the bail law may  
15 only be made after finding that the person is a risk of  
16 flight or a danger to the community, it would be fairly  
17 irresponsible for the Attorney General or anyone acting  
18 for her --

19 QUESTION: The Attorney General might be curious  
20 to find out what surveillance, what a person would do if  
21 he was out on his own. There are situations in which you  
22 might want the person to wander around.

23 MR. ESTRADA: Maybe. I think that in most cases  
24 of the type that you hypothesize, Justice Stevens, it  
25 would be fairly irresponsible for the Attorney General to

1 take somebody who has been found to be a danger to the  
2 community and put him or her in any place other than a  
3 secure environment. But even as to cases that can be  
4 hypothesized, our basic point continues to be the same,  
5 that the statute deals with categories of what readily  
6 came to Congress' mind as the classes most likely to be  
7 implicated by rulings of this type.

8 QUESTION: Well, what language of the statute do  
9 you rely on in giving credit for time spent in State  
10 custody? There's no reference there to the Attorney  
11 General.

12 MR. ESTRADA: Once again, let me make the first  
13 answer to that question by emphasizing the answer that I  
14 gave to Justice Breyer, which is that it is not our  
15 contention that the credit statute incorporates in high  
16 verba the definitions of the Bail Reform Act. It is that  
17 in the context of a statute of this type, the word  
18 "detention" has a plain meaning that connotes a denial of  
19 bail, and that an example of that is the Bail Reform Act.

20 Even if it were our contention that the statute  
21 simply incorporates the related statutes so that we were  
22 faced with the notion of this being limited only to the  
23 Attorney General, the Bureau has taken the view that it  
24 can extend that a little bit based on the legislative  
25 history of the '66 act which we mentioned in our reply

1 brief, and on the settled practice, before the statute  
2 took its current form in 1984, which Congress chose not to  
3 disturb.

4 Now, I understand that if one gets to that level  
5 of the analysis, it is possible to quibble with whether  
6 the Bureau is right in taking those two matters to in  
7 effect impeach the plain meaning of the statute, but I  
8 would argue to you, Justice O'Connor, that if that's true,  
9 the remedy is to tell us, do not give credit to State  
10 prisoners, not to say that everything else goes, and we  
11 think that within all of the normal tools of statutory  
12 construction, we have a fairly coherent view of the  
13 statute that accounts for the fairly unique nature of  
14 giving credit toward a sentence of imprisonment that the  
15 other side simply does not have.

16 QUESTION: May I ask one other question?  
17 What -- where do you place category -- the cases in which  
18 the defendant is granted bail but doesn't have the money  
19 to put up a bond?

20 MR. ESTRADA: We place those in the category of  
21 detention, Justice Stevens, and the reason for that is  
22 that the Bail Reform Act uses the word "detention" not  
23 only to refer to the type of --

24 QUESTION: Well, that category of cases, then,  
25 the Attorney General would not necessarily be

1 irresponsible to let a person who cannot afford bail free  
2 on his own recognizance, would he?

3 MR. ESTRADA: I'm sorry, Justice Stevens.

4 QUESTION: You suggested earlier that it would  
5 be irresponsible for a judge to let a person who is  
6 remanded to the custody of the Attorney General free on  
7 his or her recognizance, because there would necessarily  
8 have been a finding of danger to the community or risk of  
9 flight.

10 MR. ESTRADA: That's right.

11 QUESTION: But supposing a person could not make  
12 bail and there was no such finding.

13 MR. ESTRADA: Well --

14 QUESTION: Then it would not be irresponsible to  
15 turn him loose, would it?

16 MR. ESTRADA: That is not right, Justice  
17 Stevens, for the following reason. The judgment to set  
18 bail under that condition is a judgment that the safety of  
19 the community and the defendant showing up will not be  
20 assured unless the bail condition is met.

21 If he cannot meet the condition, the Attorney  
22 General's judgment would in effect put us in the same  
23 place as the earlier hypothetical, which is, the judge has  
24 found that this will not be assured in the absence of the  
25 condition, and the Attorney General is nonetheless

1 disregarding that judgment and setting the person free  
2 anywhere.

3 Mr. Chief Justice, if I may, I would like --

4 QUESTION: Can I --

5 MR. ESTRADA: -- to reserve the remainder of my  
6 time.

7 QUESTION: I want to see if I can get one  
8 additional. I'm going back to the same question, but it  
9 is what's bothering me. You can make your clear meaning  
10 of the statute work in the Federal system, I think, all  
11 right, but to focus on what I think is bothering several  
12 people, I once saw a film that showed what the systems are  
13 in Alabama called intermediate punishments. Now, I don't  
14 know if you've seen that or not, but you can get the idea.

15 MR. ESTRADA: I haven't, Justice Breyer.

16 QUESTION: Well, but there are a whole range of  
17 things called intermediate punishments, and so it's easy  
18 for me to think of this wide range of different degrees of  
19 confinement, et cetera, and to ask how your clear  
20 statement meaning works in that context.

21 One way to make it work is to say, jail or not  
22 jail. That's what the circuit did.

23 Another way to make it work is to say, did they  
24 use the magic word "bail"? But they may not have used  
25 that word in this State. I don't know if they did or not.



1           A third way is to say, look to see if they're in  
2     the custody of the State Attorney General. States may not  
3     use that kind of concept.

4           So how does your absolute system work in the  
5     world of intermediate punishments which could also be  
6     imposed as conditions of bail without using the word bail?

7           MR. ESTRADA: Our system is based on the notion  
8     that most of the States have an authority that puts people  
9     in jail and keeps them there, and therefore that is the  
10    authority who, if they had custody legally over the  
11    defendant, they get the defendant credit, and if that does  
12    not happen, then the defendant does not get credit.

13           Mr. Chief Justice, if I could reserve --

14           QUESTION: Yes, very well, Mr. Estrada.

15           Mr. Rochman, we'll hear from you.

16                    ORAL ARGUMENT OF IRWIN ROCHMAN

17                    ON BEHALF OF THE RESPONDENT

18           MR. ROCHMAN: Mr. Chief Justice, and may it  
19    please the Court:

20                    I'd like to begin by following up on Justice  
21    Stevens' hypothetical and asking the Court to imagine the  
22    following.

23                    Let us assume that on the same date that the  
24    court ordered Mr. Koray confined to the premises of the  
25    halfway house under a release on conditions order, which

1 commits him to the custody of pretrial services, that  
2 there was a codefendant, and that on that same day the  
3 court ordered that codefendant detained under a detention  
4 order, but the court also recommended to the Attorney  
5 General that that codefendant be placed in a community  
6 based program or residence, which the Bureau of Prisons in  
7 its own program statement suggests the court may do.

8 I'm looking particularly at the petition for  
9 cert, the appendix, at page 46a. It's the very top of the  
10 page.

11 Let us assume the Bureau of Prisons takes that  
12 recommendation in this hypothetical and confines the  
13 codefendant to the same halfway house that Mr. Koray was  
14 confined to, and let us assume that both men, they may be  
15 dorm mates, they may be roommates, but for those same 150  
16 days they are subject to the same, as Mr. Koray alleges,  
17 jail-type rules that prevail in that halfway house.

18 According to the interpretation of the Bureau of  
19 Prisons of the meaning of the words "official detention"  
20 this anomalous result occurs.

21 QUESTION: Could Mr. Koray have said, when he  
22 was acquainted with the terms of his bail, if that's bail,  
23 I don't want it? Could he have said that and withdraw --  
24 he requested bail. He was in jail and he requested bail.  
25 Could he --

1 MR. ROCHMAN: That's not -- I'm sorry, Justice  
2 Ginsburg.

3 QUESTION: Could he have withdrawn the request  
4 once he heard the terms of the bail?

5 MR. ROCHMAN: I think he could have withdrawn  
6 the request. Respectfully, the record is not clear that  
7 the request was made by him, and I would suggest to Your  
8 Honor that, given the chronology of this case, that is not  
9 at all clear.

10 Mr. Koray was detained under a detention order  
11 from the time of his arrest until 1 week after he had  
12 entered a plea of guilty. At the time the order confining  
13 him to the premises of the halfway house was entered, he  
14 had already entered a plea of guilty. Under the  
15 sentencing guidelines there was then a certainty of a jail  
16 sentence.

17 It seems to me highly unlikely, given the  
18 realities of the situation, that a defendant simply coming  
19 forward and asking for some kind of bail release, that  
20 would have been granted. What seems to me at least  
21 equally plausible and more likely is that the court may,  
22 for its own reasons, have wanted to place him in a halfway  
23 house.

24 As I think Justice Kennedy indicated, there may  
25 have been overcrowding at the regular detention facility,

1 and the court may have decided to place him in the halfway  
2 house to relieve that overcrowding.

3 QUESTION: So there's no showing -- you say that  
4 he even requested a change from his jail confinement to  
5 his --

6 MR. ROCHMAN: That is -- the record is not  
7 clear, and I'm suggesting to the Court that a chronology  
8 of events makes it unlikely that he requested it or that  
9 if he requested it he got what he wanted.

10 Your Honor asked earlier about whether or not  
11 Mr. Koray was informed as to the consequences of his being  
12 confined at the halfway house as opposed to his earlier  
13 confinement under a detention order, and I think that  
14 Judge Sloviter in her opinion indicated a concern about  
15 the unfairness of now not crediting a defendant with this  
16 time if the defendant had not been advised at the time of  
17 the order.

18 QUESTION: But you just suggested he wouldn't  
19 have had a choice anyway --

20 MR. ROCHMAN: It's --

21 QUESTION: -- that he may not have even asked  
22 for bail.

23 MR. ROCHMAN: It's possible. If the judge  
24 decided to change his status from that of being under a  
25 detention order to a release on conditions order, I don't

1 know that he had a choice.

2 The only argument that he does is that a release  
3 on conditions order, what is contained in the appendix  
4 here, requires, or at least has a -- there is a place for  
5 the defendant to sign indicating his consent to the  
6 conditions that the order imposes, and in fairness, Koray  
7 did -- his signature does appear.

8 QUESTION: Mr. Rochman, I'm concerned that our  
9 recording is not going to be able to get what you're  
10 saying --

11 MR. ROCHMAN: Thank you, sir.

12 QUESTION: -- if you don't stand near the  
13 microphone.

14 MR. ROCHMAN: To continue --

15 QUESTION: It's not a walk-around mike.

16 MR. ROCHMAN: I hope I've answered your  
17 question, Justice Ginsburg.

18 QUESTION: Yes.

19 MR. ROCHMAN: To continue with my hypothetical,  
20 the anomalous result that would occur --

21 QUESTION: Tell us again, what was it that Mr.  
22 Koray had signed?

23 MR. ROCHMAN: He signed -- there is a portion of  
24 the release on conditions order which specifies the  
25 conditions of the release. In this case, the significant



1 condition of release was that Mr. Koray was "confined to  
2 the premises of the Volunteers of America," which ran a  
3 halfway house in Baltimore, Maryland, "and may not leave  
4 unless accompanied by special agent Dennis Bass." Those  
5 are the exact words of the order.

6 QUESTION: And that is jail-like.

7 MR. ROCHMAN: It's hard to imagine it's anything  
8 but, sir.

9 QUESTION: Okay. Now, we were speculating  
10 earlier in accordance with Justice Breyer's questioning  
11 about what would satisfy the Government's theory. What  
12 would satisfy your theory of the case? Suppose someone  
13 has to -- he's remanded to the custody of his parents, and  
14 has to be home evenings and weekends. Is that jail-like?

15 MR. ROCHMAN: That is not jail type confinement.

16 QUESTION: That is not jail-like. His  
17 grandparents. That's still not jail-like. An unrelated  
18 private party.

19 MR. ROCHMAN: It is not jail-type confinement,  
20 sir, because the language of the statute now is "official  
21 detention." The language of the statute, it's the  
22 predecessor statute which was in effect from 1960 to 1987,  
23 was "in custody."

24 QUESTION: I don't see what this has to do with  
25 what's jail-like. I want to know what is jail-like.

1 MR. ROCHMAN: I -- I'm sorry. The answer to  
2 your question is no, that would not be jail-like, as I  
3 said.

4 QUESTION: When does it become jail-like?

5 MR. ROCHMAN: It becomes --

6 QUESTION: A private party, so long as you're  
7 remanded to the custody of a private party, related or  
8 unrelated, it doesn't matter, right?

9 MR. ROCHMAN: Correct.

10 QUESTION: Even if this private -- you have to  
11 report evenings, you have to stay there at night, and if  
12 you don't, we'll send a marshall out to bring you back.

13 MR. ROCHMAN: The reason I was beginning to  
14 discuss the language of the statute and its history was in  
15 an attempt to be responsive to your question. The answer  
16 is that jail-type confinement means equivalent to  
17 incarceration. That is the way the courts have  
18 interpreted the word --

19 QUESTION: It doesn't help me. I mean,  
20 incarceration is just a fancy word for jail.

21 MR. ROCHMAN: Sorry?

22 QUESTION: So -- I mean, if that makes it  
23 easier, let's say, when does it become equivalent to  
24 incarceration?

25 MR. ROCHMAN: When the person is totally

1 confined, or where there are serious restrictions on the  
2 person's liberty and the facility --

3 QUESTION: And being at a particular house every  
4 night and weekends is not a serious restriction on a  
5 person's liberty?

6 MR. ROCHMAN: It could be, but it is not  
7 incarceration.

8 QUESTION: It is not incarceration. I don't --

9 What about being there all the time? You cannot  
10 go out of this house at all, all week long.

11 MR. ROCHMAN: The standard of the criterion that  
12 we're looking for is one of jail-type confinement.

13 QUESTION: If it's in a private house it's not a  
14 jail, and that's okay, then?

15 MR. ROCHMAN: I'm attempting to answer. If  
16 there is a confinement to a private home, certainly that's  
17 a serious restriction on liberty, a complete confinement  
18 to the home, but it doesn't meet the other part of the  
19 test of jail-type confinement. It is not at a facility  
20 which has jail-type rules. It is a combination of things.  
21 It has to be a serious restriction on liberty in a  
22 facility which has jail-type rules.

23 QUESTION: What are jail-type rules? Would the  
24 fact that it's very constant confinement with just getting  
25 out very rarely, that by itself does not mean jail-type

1 rules?

2 MR. ROCHMAN: Mr. Chief Justice, jail-type rules  
3 I think are best exemplified by the allegations Mr. Koray  
4 made as to the rules that prevailed at the halfway house  
5 that he was at.

6 He was subject to five security checks a day.  
7 He was subject to random breath and urine tests. There  
8 were severe limitations on his visitation rights, both in  
9 time and manner with respect to friends or counsel. He  
10 was afforded significantly less in the way of vocational  
11 and educational and recreational facilities than would  
12 have been available to him at another Federal facility.

13 QUESTION: Well, I know some cases are easy.  
14 I'm not worried about the easy cases. I'm worried about  
15 where -- you know, how we're supposed to administer this  
16 line in the future.

17 There are some problems that have been brought  
18 out about administering the Government's line. I'm not  
19 sure that yours is any easier. You can give me an  
20 easier -- easy case. You say that your client's case is  
21 an easy one using this -- you know, incarceration-like  
22 test, but I can think of a lot of very difficult cases,  
23 and I don't know what your criterion is, except "jail-  
24 like rules," or actually you should say incarceration-  
25 like rules.

1 MR. ROCHMAN: Well, if Your Honor would be kind  
2 enough to give me an example. What I'm suggesting to you  
3 is that the standard is a meaningful one and one that can  
4 be applied. It is neither amorphous nor illusive.

5 If there is a serious restriction on liberty in  
6 a facility at which there are -- which jail-type rules  
7 prevail -- let me bring it back to the reality of the  
8 way -- what conditions are actually imposed by district  
9 courts and magistrates. Most of the -- the most common  
10 conditions are home confinement, under this test clearly  
11 not -- clearly not -- incarceration.

12 The referral to a drug facility or an alcohol  
13 facility. Again, the -- that, I think, gets a little  
14 closer, but again it is not incarceration, as Judge  
15 Sloviter pointed out in her --

16 QUESTION: Why not? Even if they give you  
17 random urinalysis to see if you're following their regime?

18 MR. ROCHMAN: The reason, I think, that  
19 incarceration is something that merits sentence credit, or  
20 confinement that's equivalent to incarceration is  
21 something that merits sentence credit and home confinement  
22 and residing in a halfway house but being permitted to go  
23 on work release and being referred to a drug treatment  
24 facility are not the basis for sentence credit -- this is  
25 in essence a kind of fairness argument.



1 Judge Sloviter pointed out first that with  
2 respect to Mr. Koray, most of the benefits, if not all of  
3 the benefits, went to the Government. It assured his  
4 presence in court. It kept him off the street. It got  
5 the benefit of the lower cost, because it is significantly  
6 cheaper to house someone in a halfway house than it is in  
7 an ordinary Federal prison, and it got -- the space was  
8 saved for more dangerous prisoners.

9 Judge Sloviter pointed out it seemed unfair,  
10 with the Government getting all of those benefits and  
11 Koray getting almost none, if any, not to give him  
12 sentence credit.

13 All of the other things, Justice Scalia, that  
14 you have mentioned are forms of a sentence of  
15 imprisonment. Home confinement, residing in a halfway  
16 house, for instance, may be a condition of a sentence of  
17 probation.

18 QUESTION: But what about the drug treatment  
19 center, where it seems to me, as Justice Scalia suggested,  
20 you could be subject to what you have previously called  
21 jail --

22 MR. ROCHMAN: Yes.

23 QUESTION: Wait till I finish my question --

24 MR. ROCHMAN: I'm sorry. I'm sorry, sir.

25 QUESTION: -- if you please.

1 MR. ROCHMAN: I'm sorry, sir.

2 QUESTION: You could be subjected to jail -- the  
3 sort of jail-like conditions you previously mentioned,  
4 urine tests, monitoring several times a day, so how do you  
5 distinguish that from what you would call incarceration?

6 MR. ROCHMAN: Forgive me for interrupting you,  
7 sir. I thought you had finished. I'm sorry.

8 The answer, I believe, is that being confined  
9 in, or being ordered to remain in a drug treatment  
10 facility, is one of the discretionary conditions of a  
11 probationary sentence under section 3563. It is not part  
12 of a sentence of incarceration. That is the view of  
13 Congress.

14 In other words, one of the conditions a court  
15 may impose as part of a sentence of probation is that the  
16 person remain at a facility for drug or alcohol treatment,  
17 and what that statute, 3563, provides is that that is only  
18 a permissible condition of probation.

19 QUESTION: Well then --

20 MR. ROCHMAN: If the person is there -- I'm  
21 sorry.

22 QUESTION: -- this is an exception, then, to  
23 your more general rule that if you have jail-like  
24 conditions it is incarceration, but it's not if it comes  
25 under this other section?

1 MR. ROCHMAN: I don't think, Mr. Chief Justice,  
2 that I'm suggesting it's an exception. I'm saying that it  
3 is not a form -- it is not a -- it's not within the  
4 traditional view of incarceration.

5 QUESTION: Well, is that still another  
6 qualification, then? Even though you have all these jail-  
7 like terms of confinement, if it's not within the, what  
8 you call the traditional concept of incarceration, it  
9 still isn't incarceration?

10 MR. ROCHMAN: I have been arguing basically what  
11 Judge Sloviter suggested would not be considered  
12 incarceration, and I think she is correct simply because,  
13 as I said, the statute, 3563, indicates that that kind of  
14 confine -- if you want to call it -- I don't call it  
15 confinement. That kind of referral to a drug or alcohol  
16 treatment facility is not considered a sentence of  
17 imprisonment. It is simply considered a sentence of  
18 probation.

19 QUESTION: Well then, why don't we let the  
20 statute be the criterion across the board, and Mr. Estrada  
21 says the easiest way to do that is to identify the State  
22 official who customarily has the legal custody of those  
23 who are committed to jails and prisons, and if, during the  
24 time in question, the individual is committed to that  
25 official's custody, it's detention, if not to that

1 custody, it's not detention.

2 If the statutory reference is good for the  
3 argument or the answer that you're making to the Chief,  
4 why isn't it equally good as a general criteria?

5 MR. ROCHMAN: Because the statute, sir, that we  
6 are interpreting, unlike 3563, is not clear, and although  
7 we say it has a clear -- there's a plain meaning to be  
8 found, but the words "official detention" --

9 QUESTION: Well, if you construe it the way  
10 Mr. Estrada argues, it probably is pretty clear. There  
11 are going to be close cases on either side of the line in  
12 which one could argue it doesn't seem quite fair to treat  
13 this person with -- give this person credit and that  
14 person not, but it's clear.

15 MR. ROCHMAN: It's certainly true that the one  
16 virtue that the Bureau of Prisons' position has is that it  
17 offers a bright line test, but what we respectfully submit  
18 is that the test that can also be proposed, although it  
19 may not be a bright line test, still has considerable  
20 wattage, and that is simply that the notion of  
21 incarceration, defined, again -- I don't want to repeat --  
22 defined as I have defined it provides a clear standard for  
23 courts.

24 All that has to be done is to look at the  
25 release on conditions order to determine, in the first

1 instance, what the conditions of confinement, if any, are,  
2 and the release on conditions order under section 3142, I  
3 believe it's (h), the Bail Reform Act, the court is  
4 required to set out in writing the specific conditions of  
5 the confinement.

6 QUESTION: How does this play out if it were in  
7 a State -- wholly in a State system? Justice Breyer asked  
8 you about the person who was in - was being held in a  
9 State system, then he's transferred to Federal authority,  
10 but suppose we were entirely within a State system, New  
11 York or New Jersey, is it any different?

12 MR. ROCHMAN: When Your Honor asks, is it any  
13 different, the 3585(b)(2) has language broad enough to  
14 permit credit, sentence credit for presentence custody by  
15 State courts, or in State facilities.

16 QUESTION: I'm just asking if you had this kind  
17 of case wholly within the State court --

18 MR. ROCHMAN: Yes.

19 QUESTION: -- where the State court judge had  
20 said, release on bail under these conditions, would that  
21 or would that not count against -- for credit against  
22 sentence?

23 MR. ROCHMAN: Under our interpretation?

24 QUESTION: No. I just would -- if there -- if  
25 it's just as unclear, just as debatable under State law, I



1 was just wondering whether the State systems are similar  
2 to the Federal system. Has this question come up?

3 MR. ROCHMAN: Not that I'm aware. Not all  
4 States have the same dichotomy that the Bail Reform Act  
5 has between detained versus released. Some States still  
6 use bail and don't have -- they use the old-fashioned  
7 notion of remand as opposed to detain. There are just  
8 simply varying systems in the States, as I understand it,  
9 but I don't believe I've fully answered your question.

10 The problem with the Solicitor General's  
11 rationale -- I should say, the Bureau of Prisons  
12 rationale, what they argue is that the touchstone, or the  
13 relevant condition is custody by the Attorney General, and  
14 in the hypothetical that I attempted to suggest to the  
15 Court earlier, it is the application of what they say the  
16 meaning of official detention is that results in that  
17 absurd, unreasonable, and glaringly unjust result.

18 Because the application of that principle,  
19 making the touchstone custody of the Attorney General,  
20 results in the codefendant confined in exactly the same  
21 conditions, in exactly the same place by a judicial order,  
22 although not called a detention order, but certainly as  
23 official as a detention order --

24 QUESTION: But do you -- I was actually not -- I  
25 was being slightly dim, because you think, too, they have

1 a clear, bright line test. But what is their clear,  
2 bright line test? That's what I'm having a hard time  
3 figuring that out, when it's the State -- I understand in  
4 the --

5 MR. ROCHMAN: That's what --

6 QUESTION: Because the words in the Federal  
7 order say custody by the Attorney General. That's normal.  
8 But if you -- you practice, probably, in the State  
9 systems, too.

10 MR. ROCHMAN: As well as the Federal, yes.

11 QUESTION: Right, so is there, if you try -- you  
12 have to apply this to the States. How does their -- is  
13 there a clear bright line you can similarly apply to the  
14 States?

15 MR. ROCHMAN: I think the answer is no, and the  
16 fact that that test doesn't work for State custody it  
17 seems to me is yet an additional argument that it is an  
18 unreasonable reading of the statute.

19 QUESTION: Why doesn't it work for State  
20 custody? States don't have Bureaus of Prisons? They do  
21 not have an officer who is in charge of prisoners who have  
22 been convicted of crimes?

23 MR. ROCHMAN: They may --

24 QUESTION: I thought every State had somebody  
25 like that.

1 MR. ROCHMAN: They may well have, Justice  
2 Scalia, but that is not the Solicitor's test. The  
3 Solicitor's test is, and the Bureau of Prisons' position  
4 is, it's custody by the Attorney General.

5 QUESTION: No, I thought --

6 QUESTION: No.

7 QUESTION: I thought it was broader. I thought  
8 it was custody by the officer responsible.

9 MR. ROCHMAN: Well --

10 QUESTION: Mr. Estrada I thought answered the  
11 question saying each State identifies some official as the  
12 one to have custody of those who are denied bail.

13 MR. ROCHMAN: Well, that may be what Mr. Estrada  
14 said today, but that may fall into the category of a post  
15 hoc rationalization of a Government lawyer for a position  
16 that's not the actual position --

17 QUESTION: Well, let's assume that we want to  
18 consider that position. Why would that be difficult to  
19 apply?

20 MR. ROCHMAN: I don't think it would be  
21 necessarily difficult to apply, because again, there is  
22 probably some officer within the State, but I think it  
23 would do violence to the language of the statute based on  
24 the Government's interpretation. The Government wants to  
25 limit --

1                   QUESTION: Well, but you're rejecting the  
2   hypoth -- I mean, you're rejecting the position. You're  
3   saying, well, the Government used to say it had to be the  
4   Attorney General, and now he's saying it could be a State  
5   official. You're saying there's an inconsistency there.  
6   I'm not sure that I think there is, but let's assume the  
7   Government's position is that when we are talking about an  
8   issue of State "custody" the official we look to is the  
9   State official.

10                  As long as we can identify that official as the  
11   one customarily with custody of those who are denied bail  
12   under the State system, why is that difficult to  
13   administer, and I think your answer is, it really isn't.

14                  MR. ROCHMAN: It may well be, but it can result  
15   in the same anomalous harsh --

16                  QUESTION: It can result in a situation in which  
17   there are going to be two cases in which the conditions  
18   seem to be about the same but one is on one side of the  
19   line and one is on the other. That's your argument, and I  
20   agree with you; that's a problem.

21                  MR. ROCHMAN: And I think that that potential  
22   for resulting unfairness is particularly significant in  
23   construing this statute. This is a statute whose  
24   purpose -- whose purpose is to assure fairness in  
25   sentencing by crediting presentence confinement --

1 QUESTION: Well --

2 MR. ROCHMAN: -- against the sentence.

3 QUESTION: But don't we also have to accept the  
4 fact that even under your own argument, and under any  
5 argument I can imagine you making, there isn't going to be  
6 complete fairness in sentencing.

7 You may very well have a halfway house  
8 confinement or halfway house assignment, I guess I will  
9 say, before sentencing which isn't going to give you any  
10 credit, and yet at the end of a sentence being served,  
11 there may very well be assignment to a halfway house  
12 during a work release period, credit is going to be  
13 granted.

14 There's -- you know, that's unfair, too.  
15 There's some unfairness, I suppose, no matter how we try  
16 to make it --

17 MR. ROCHMAN: I think that -- I'm not so sure  
18 that I agree, sir, that that is an unfairness. I  
19 understand why you think I might think that.

20 QUESTION: But I mean, the actual conditions are  
21 exactly the same in each case.

22 MR. ROCHMAN: Well, they are except that when a  
23 sentenced prisoner is given home confinement, or is  
24 given --

25 QUESTION: Halfway house --



1 MR. ROCHMAN: Halfway house confinement, but  
2 it's not confinement. They're told -- they reside at  
3 halfway houses and they go on work release. That's  
4 something they have earned, and it makes sense to count  
5 that as part of their sentence.

6 QUESTION: Well, now, we're not talking about  
7 fairness here, we're talking about the word, the phrase,  
8 "official detention."

9 I mean, if you're talking about fairness, even  
10 if nobody thinks it's official detention -- the Government  
11 doesn't, you don't, nonetheless, if you have to be home 5  
12 nights a week, let's say custody of your parents 5 nights  
13 a week and all weekends, shouldn't you be given at least  
14 1/100th of that time as credit against your sentence?  
15 It's not being in jail, but it's a pain in the neck, and  
16 if you want to be perfectly fair you should get some  
17 degree of credit for it, shouldn't you?

18 Well, it's not a perfect world. We're dealing  
19 with a statute that took a rough cut at eliminating some  
20 of the inequities, and the phrase it used is "official  
21 detention," so let's work with that.

22 MR. ROCHMAN: But I think in order to work with  
23 the phrase, "initial detention," one has to consider where  
24 the phrase came from, and that brings us to the  
25 legislative history of the statute.

1           "Official detention" was first used by the  
2 Congress in a proposed revision of the statute in 1973.  
3 Over the course of the years, the bail reform statute --  
4 pardon me, the sentence credit statute was enacted in  
5 1960. It has the word -- it was in section 3568, and it  
6 had the words "in custody" in it.

7           Because the Congress in, or various Congresses  
8 in various purported attempted revisions of the statute  
9 used the phrases "official detention," "official custody,"  
10 "custody," and "confinement" interchangeably, every court  
11 of appeals that has addressed the question, and the  
12 Solicitor General agrees, has determined that no change in  
13 the meaning of the statute was intended by the change of  
14 words from "in custody" to "official detention."

15           If "official detention" and "in custody" mean  
16 the same thing, as that legislative history and the  
17 court's opinion say they do, then there are -- then court  
18 opinions which interpreted the words "in custody" should  
19 have direct bearing on the meaning of the words in the  
20 statute, and the courts have interpreted the word -- the  
21 courts interpreted the word "in custody," or "custody," to  
22 mean total incarceration.

23           I understand that there is an argument,  
24 certainly, for crediting parts of residing at a halfway  
25 house, or crediting the one-fifth of the 1 day or the

1 1 night, but the word that was used, the words that were  
2 used, "official detention," don't -- didn't emerge full-  
3 blown. They come with a history, and that history says  
4 that "official detention" means the same thing as  
5 "custody," and that courts have interpreted "custody" to  
6 mean total incarceration.

7 QUESTION: Does that mean, just so I have your  
8 position clear, that if in this very facility the order  
9 had provided that the inmate, if you want to call him  
10 that, could have gone out during the day and attended to  
11 his work but had to spend the nights and weekends in the  
12 facility, that would not be total confinement?

13 MR. ROCHMAN: I think that's clear from Judge  
14 Sloviter's opinion, and that would not be -- that would  
15 not be total incarceration and therefore would not be  
16 official detention.

17 QUESTION: Mr. Rochman, why do you say official  
18 detention means custody? What's your basis for --

19 MR. ROCHMAN: Again, sir -- I'm sorry. I say  
20 that because the original statute, the predecessor  
21 statute, used the phrase "custody."

22 QUESTION: But this was before the Bail Reform  
23 Act. Isn't it conceivable that this new terminology was  
24 adopted in connection with the Bail Reform Act, and that  
25 the best way to decide what it means is to read it in

1 conjunction with the Bail Reform Act?

2 MR. ROCHMAN: That -- pardon me, sir. That  
3 would be correct, Justice Scalia, if the appearance of the  
4 phrase "official detention," if that was its first  
5 appearance in 1984 when this statute was enacted, and in  
6 1987 when it went into effect, but as I tried to make  
7 clear earlier, the words "official detention," the phrase  
8 "official detention" goes back to 1973, well before the  
9 Bail Reform Act, well before the creation of the detention  
10 order.

11 They're not fraternal twins, and that is why I  
12 say that the court -- every court of appeals that has  
13 considered the question, the Solicitor General concedes  
14 and agrees that this is so, that the use of the words  
15 "official detention" connotes no change in the meaning of  
16 the statute from the previous language, which was  
17 "custody," and "custody," according -- in the unanimous  
18 interpretation of the courts, "custody" means total  
19 incarceration.

20 And that is why I believe in her well-reasoned  
21 opinion Judge Sloviter limited the sentence credit that  
22 she permitted to situations involving total confinement or  
23 incarceration, and had to reject, and as she pointed out,  
24 reject things like residing in a halfway house but being  
25 permitted to go on work release, or home confinement.

1           The -- there are other arguments here, but I see  
2   the light.

3           QUESTION: Excuse me, I thought the predecessor  
4   statute didn't use the term "official detention" but it  
5   used the term "custody."

6           MR. ROCHMAN: Yes, sir. That's what I said.

7           QUESTION: I thought you were saying that the  
8   predecessor -- I thought you said that the phrase  
9   "official detention" did not come full-blown at the time  
10   that the Bail Reform Act was enacted, but that it had a  
11   long history.

12          MR. ROCHMAN: Yes.

13          QUESTION: What had a long history is a statute  
14   with the word "custody" in it.

15          MR. ROCHMAN: Yes, sir, but in --

16          QUESTION: Not a statute with the word "official  
17   detention" in it.

18          MR. ROCHMAN: That is correct, but what I said  
19   was that in the legislative history, starting in 1973,  
20   there were various attempts to amend or revise the  
21   statute, and in those suggested revisions of the statute  
22   over the years, from 1973 up until 1984, the various  
23   Congresses used interchangeably the phrases "custody,"  
24   "official custody," "detention," and "official detention."

25          QUESTION: Thank you, Mr. Rochman.



1 MR. ROCHMAN: Thank you, sir.

2 QUESTION: Mr. Estrada, you have 2 minutes  
3 remaining.

4 REBUTTAL ARGUMENT OF MIGUEL A. ESTRADA

5 ON BEHALF OF THE PETITIONER

6 MR. ESTRADA: Thank you, Mr. Chief Justice.

7 I would just like to emphasize that the standard  
8 that was adopted by the court of appeals and is being  
9 urged by respondent is unworkable.

10 What respondent has done in effect is to ask the  
11 Court to come up with a set of essentially legislative  
12 classifications based in part on what would be considered  
13 probation under 3563.

14 In that connection, I would like to highlight,  
15 as we did in our reply brief, that if you took all of the  
16 conditions that respondent had in this case and asked what  
17 those would be called if it were a sentence under the  
18 Federal system, the answer would be that it is a sentence  
19 of probation, not a sentence of imprisonment, and I would  
20 refer the Court to section 3563(b)(12), which identifies  
21 what happened here as a permissible condition of  
22 probation.

23 QUESTION: But you don't care about that.  
24 That's just in case we don't accept your rationale of the  
25 case.

1 MR. ESTRADA: Well --

2 QUESTION: You're saying even if we accept the  
3 incarceration rationale, you'd say this still wouldn't be  
4 incarceration.

5 MR. ESTRADA: Well, it shows as one of our  
6 statutory arguments, Justice Scalia, that what Congress  
7 was trying to do here was to provide credit for only one  
8 type of Federal sentence.

9 This is a statute that deals with credit only  
10 for one of the many possible Federal sentences that may be  
11 imposed, and the fact that if we took everything that  
12 happened here and asked what it would be called if it were  
13 a sentence, and the answer is not what the statute gives  
14 credit for, we think it's a very powerful textual  
15 indication that this is not the type of case for which  
16 credit was contemplated.

17 On the issue of lack of notice, I would like to  
18 refer the Court to 18 U.S.C. 3142(h), which is part of the  
19 bail statute, and has a specific list of matters that the  
20 defendant must be advised of when he is granted bail,  
21 including his duties under their bail bond and the absence  
22 or any consequence as to credit is not one of them.

23 Thank you.

24 QUESTION: But, is not one of them, so you --

25 MR. ESTRADA: Is not one of them.

1 CHIEF JUSTICE REHNQUIST: Thank you,  
2 Mr. Estrada.

3 The case is submitted.

4 (Whereupon, at 11:01 a.m., the case in the  
5 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:*

JANET RENO, ATTORNEY GENERAL, ET AL., Petitioner v.  
ZIYA K. KORAY

CASE NO.: 94-771

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

BY Don Mari Federico

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