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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

**NORA LUZ SERRATO,**

**CV No. 05-481-HU**

**Petitioner,**

**MEMORANDUM IN SUPPORT OF  
PETITION FOR WRIT OF MANDAMUS  
AND FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**vs.**

**FEDERAL BUREAU OF PRISONS,  
HARRY LAPPIN, in his official capacity  
as Director of Bureau of Prisons, and  
ALBERTO GONZALES, in his official  
capacity as United States Attorney  
General,**

**Respondents.**

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## TABLE OF CONTENTS

	Page
Table of Authorities .....	
Factual Background .....	1
Argument .....	4
A.    Because The BOP Termination Of The Boot Camp Program Is Unlawful, The Court Should Grant The Writ Of Mandamus And Order Declaratory And Injunctive Relief Compelling The BOP To Continue The Boot Camp Program To Enable Ms. Serrato, Who Has Been Determined To Be An Eligible Prisoner, To Receive The Benefits From The Program .....	4
1.    Unilateral Executive Branch Termination Of The Boot Camp Program Violates Article I, § 7, Of The Constitution, Which Vests Congress With The Exclusive Authority To Repeal A Duly Enacted Statute .....	4
2.    The BOP Lacks Statutory Authority To Abolish The Boot Camp Program .....	6
3.    The BOP’s Summary Action Terminating The Boot Camp Program Is Invalid And Cannot Be Applied To Ms. Serrato Because It Constitutes A Legislative Rule Promulgated In Violation Of The Notice-And-Comment Provisions Of The Administrative Procedure Act .....	11
4.    Even If The BOP Had Authority To Terminate The Program, The Decision Is Invalid As Unreasonable, Arbitrary, And Capricious Under <u>Chevron</u> .....	14
5.    Even If The BOP Had Constitutional And Statutory Authority To Terminate Boot Camp, And Even If The Rule Change Were Proper In Content And Manner Of Promulgation, The Change Could Not Be Retrospectively Applied Against Ms. Serrato .....	17
a.    Retrospective Application Of The Boot Camp Termination Would Violate The Doctrine Against Retroactivity .....	18

b. Retrospective Application Of The Boot Camp Termination  
Would Violate The Ex Post Facto Clause ..... 19

B. This Court Has The Authority To Order The BOP To Rescind Its  
Termination Of The Boot Camp Program ..... 21

Conclusion ..... 23

Certificate of Service

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Bohner v. Daniels*,  
243 F. Supp. 2d 1171 (D. Or. 2003) ..... 13, 14

*Bowen v. Georgetown University Hospital*,  
488 U.S. 204 (1988) ..... 18, 19

*Bowen v. Hood*,  
202 F.3d 1211 (9th Cir. 2000) ..... 17, 18, 19

*Buschmann v. Schweiker*,  
676 F.2d 352 (9th Cir.1982) ..... 12, 13

*Byrd v. Moore*,  
252 F. Supp. 2d 293 (W.D.N.C. 2003) ..... 22

*In re Cervantes*,  
219 F.3d 955 (9th Cir. 2000) ..... 8

*Chevron USA v. Natural Resources Defense Council*,  
467 U.S. 837 (1984) ..... 4, 7, 9, 14, 15

*Christensen v. Harris County*,  
529 U.S. 576 (2000) ..... 11

*Chrysler Corp. v. Brown*,  
441 U.S. 281 (1979) ..... 11

*Clinton v. City of New York*,  
524 U.S. 417 (1998) ..... 5, 6, 7

*Colton v. Ashcroft*,  
299 F. Supp. 2d 681 (E.D. Ky. 2004) ..... 22

*Connecticut National Bank v. Germain*,  
503 U.S. 249 (1992) ..... 8

*Cort v. Crabtree*,  
113 F.3d 1081 (9th Cir. 1997) ..... 8, 18, 19

<i>Crowley v. Federal Bureau of Prisons,</i> 312 F. Supp. 2d 453 (S.D.N.Y. 2004) .....	14
<i>Davis v. Crabtree,</i> 109 F.3d 566 (9th Cir. 1997) .....	8
<i>Docken v. Chase,</i> 393 F.3d 1024 (9th Cir. 2004) .....	21
<i>Downey v. Crabtree,</i> 100 F.3d 662 (9th Cir. 1996) .....	8
<i>Elwood v. Jeter,</i> 386 F.3d 842 (8th Cir.2004) .....	9
<i>Goldings v. Winn,</i> 383 F.3d 17 (1st Cir. 2004) .....	9, 22
<i>Griffin v. Oceanic Contractors, Inc.,</i> 458 U.S. 564 (1982) .....	8
<i>Gunderson v. Hood,</i> 268 F.3d 1142 (9th Cir. 2001) .....	11, 12
<i>INS v. Chadha,</i> 462 U.S. 919 (1983) .....	6
<i>Iacoboni v. United States,</i> 251 F. Supp. 2d 1015 (D. Mass. 2003) .....	22
<i>Kelly v. United States Department of the Interior,</i> 339 F. Supp. 1095 (E.D. Cal.1972) .....	13
<i>Kokkonen v. Guardian Life Insurance,</i> 511 U.S. 375 (1994) .....	21
<i>Landgraf v. USI Film Products,</i> 511 U.S. 244 (1994) .....	18
<i>Leocal v. Ashcroft,</i> 125 S. Ct. 377 (2004) .....	6

<i>Lopez v. Davis</i> , 531 U.S. 230 (2001) .....	8, 14
<i>Lynce v. Mathis</i> , 519 U.S. 433 (1997) .....	18, 19, 20, 21
<i>Monahan v. Winn</i> , 276 F. Supp. 2d 96 (D. Mass. 2003) .....	22
<i>National Tour Brokers' Association v. United States</i> , 591 F.2d 896 (D.C. Cir.1978) .....	12
<i>NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co.</i> , 513 U.S. 251 (1995) .....	14
<i>Shalala v. Guernsey Memorial Hospital</i> , 514 U.S. 87 (1995) .....	11
<i>Tipton v. Federal Bureau of Prisons</i> , 262 F. Supp. 2d 633 (D. Mass. 2003) .....	22
<i>United States v. Booker</i> , 125 S. Ct. 738 (2005) .....	6
<i>United States v. LaBonte</i> , 520 U.S. 751 (1997) .....	8, 9
<i>United States v. Mead</i> , 533 U.S. 218 (2001) .....	14, 15
<i>W.C. v. Bowen</i> , 807 F.2d 1502 (9th Cir.1987) .....	13
<i>Weaver v. Graham</i> , 450 U.S. 24 (1981) .....	19, 20
<i>Wilkinson v. Dotson</i> , 125 S. Ct. 1242 (2005) .....	21

**STATE CASES**

<i>Carson v. Hood</i> , 2000 WL 122421 (D. Or. Feb. 1, 2000) .....	14
---	----

<i>Pinto v. Menifee</i> , 2004 WL 3019760 (S.D.N.Y. 2004) .....	22
--	----

**FEDERAL STATUTES**

5 U.S.C. § 551(4) .....	11
5 U.S.C. § 553(b) .....	12, 13
5 U.S.C. § 702 .....	22
18 U.S.C. § 3231 .....	21
18 U.S.C. § 3553(a)(2) .....	2, 6
18 U.S.C. §§ 3582(a) .....	6
18 U.S.C. § 3621(b) .....	9
18 U.S.C. § 3624(c) .....	9
18 U.S.C. § 4046 .....	1, 6, 7, 8, 10
28 U.S.C. § 994(p) .....	1
28 U.S.C. § 1361 .....	22
28 U.S.C. § 2202 .....	22
28 U.S.C. § 2243 .....	21
28 U.S.C. § 2255 .....	21
1990 U.S.C.C.A.N. 6472 .....	1, 10
61 Fed. Reg. 18658 (Apr. 26, 1996); .....	1, 13

**MISCELLANEOUS**

Testimony of Michael Quinlan, Dir., Federal Bureau of Prisons, Hearing Before Committee on the Judiciary, U.S. House of Rep. on H.R. 2985 .....	10
--	----

**UNITED STATES CONSTITUTION**

Article I, § 7 ..... 1, 5, 6  
Article II, § 3 ..... 5

**UNITED STATES SENTENCING GUIDELINES**

U.S.S.G. § 5F1.7 ..... 1, 6, 8

## Factual Background

On November 29, 1990, Congress created the Shock Incarceration Program, also known as boot camp, and authorized for each fiscal year “such sums as may be necessary to carry out the shock incarceration program. . . .” 18 U.S.C. § 4046; 1990 U.S.C.C.A.N. 6472, 6557. On November 1, 1991, after the statutory notice period under 28 U.S.C. § 994(p), the Sentencing Commission promulgated, and Congress acquiesced to, the Shock Incarceration Program guideline, which gives the sentencing court discretion to recommend that the BOP place a defendant in boot camp pursuant to the statutes authorizing judicial recommendations. U.S.S.G. § 5F1.7. As noted in the guideline commentary, BOP rules elaborate on the determination of eligibility for the program and provide for substantial reductions of actual incarceration for those who successfully complete the program.<sup>1</sup>

The sentence reduction, authorized by § 4046(c), can be up to six months:

An eligible inmate with a sentence of not more than thirty months who successfully complete the institution-based program, who maintains successful participation in a community-based program, and who has supervised release to follow is eligible for up to a six month reduction in sentence. The length of the reduction is proportional to the amount of time remaining to be served. Authority for a reduction in sentence for such inmates is contained in 18 U.S.C. 4046.

Ex. D (61 Fed. Reg. 18658 (Apr. 26, 1996)); *accord* Ex. E at 9 (Program Statement 5390.08 (Nov. 4, 1999)). For a prisoner like Ms. Serrato, with a 30-month sentence, the sentence reduction is up to six months, with extended home confinement for about one year of the term of imprisonment. Ex. E at 13 (Program Statement 5390.08 (Nov. 4, 1999)). With direct commitment to boot camp, the cumulative effect limits actual incarceration to the six months in the institution-based program.

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<sup>1</sup> The statute is attached as Exhibit A, the guideline is Exhibit B, the relevant section of the Code of Federal Regulations is Exhibit C, the Federal Register entry is Exhibit D, and the program statement is Exhibit E.

On May 5, 2003, Nora Serrato, a 21-year-old first offender, entered a guilty plea for possessing methamphetamine with the intent to distribute on November 17, 2001. Defense counsel requested that the Court make Ms. Serrato eligible for the boot camp program to provide needed treatment under 18 U.S.C. § 3553(a)(2)(D). On October 17, 2003, this Court sentenced Ms. Serrato to a 37-month sentence with the recommendation that the BOP designate her to the Intensive Corrections Center.

On November 17, 2003, Robert Haro, Regional Director for the BOP, informed the Court that, due to the length of her sentence, Ms. Serrato would be designated to FCI Dublin and considered for transfer to boot camp when she was 24 months from release (Exhibit G). Because she had been on pretrial release and approved for voluntary surrender, if Ms. Serrato had received a 30-month sentence, she could report directly to the program and become eligible after six months for halfway house placement, followed by a period of home detention and early commencement of supervised release (Exhibit E at 6, 9).

On September 10, 2004, this Court amended its judgment and resented Ms. Serrato to 30 months imprisonment (Exhibit H). The 30-month sentence made Ms. Serrato eligible for direct commitment to boot camp (Exhibit E at 4). The program consists of three phases -- six months in a military-style institution; six months in community corrections confinement; and then a period of home confinement. At the end of all three phases, a prisoner is released from BOP custody to commence supervised release up to six months early, reflecting a significant reduction in sentence (Exhibit E at 9).

Despite Ms. Serrato's eligibility for direct commitment, the BOP designated her to FCI Dublin for service of her sentence. She voluntarily surrendered there on November 5, 2004. When

she asked about transfer to the boot camp, her counselor at Dublin told her that she was boot camp eligible and would be transferred to the boot camp program at FPC Bryan, Texas, in time to join the January 2005 class. Before the transfer was effectuated, the BOP summarily cancelled the program.

In a message to all staff dated January 5, 2005, Director Lappin abruptly and unilaterally announced that the boot camp program would be terminated because the programs are “exceedingly costly to maintain and a substantial body of research indicates that they have no impact on reducing recidivism” (Exhibit I). The termination of the program was officially announced on January 14, 2005, in a memorandum to federal judges, probation officers, United States attorneys, and Federal Public Defenders (Exhibit J).

The memorandum stated that the BOP’s unpublished research confirmed the conclusions of two studies that boot camp programs reduce neither costs nor recidivism. As discussed below, the two studies do not support the BOP’s claims. Further, the existence of the supposed independent research on the efficacy of the program is questionable. In a memorandum providing “revised talking points” for senior BOP staff, the BOP expressed concerns that “a relevant Congressional committee could require a substantial delay in our proceeding with the ICC initiative so that a formal review of our plan could be done” (Exhibit K). The document suggests the absence of hard data that could readily support the BOP’s “initiative” to terminate the program.

Ms. Serrato is currently serving her sentence at FCI Dublin and has a projected release date of January 7, 2007 (Exhibit L). Because she could have received direct commitment to boot camp, and because any delay in entering boot camp retards the commencement of community based programming and the sentence reduction, she suffers irreparable harm from the BOP’s termination of the program with every passing day.

## ARGUMENT

**A. Because The BOP Termination Of The Boot Camp Program Is Unlawful, The Court Should Grant The Writ Of Mandamus And Order Declaratory And Injunctive Relief Compelling The BOP To Continue The Boot Camp Program To Enable Ms. Serrato, Who Has Been Determined To Be An Eligible Prisoner, To Receive The Benefits From The Program.**

The BOP's unilateral termination of a congressionally created sentencing option is unlawful. First, the Constitution places sole authority to repeal a statute with the Legislative Branch, rendering the Executive Branch's unilateral termination of the program an unconstitutional line-item veto. Second, the BOP action violates the statute creating the Shock Incarceration Program, which conferred on the BOP only the discretion to determine eligibility and the manner of carrying out the program, not authority to terminate it. Third, the BOP's termination of the program constitutes a legislative rule that is invalid because the BOP promulgated the rule without complying with the notice-and-comment provisions of the Administrative Procedure Act. Fourth, even if termination were statutorily permitted, the articulated reasons for the termination cannot be substantiated: the BOP's position is impermissibly unreasonable under the *Chevron* doctrine.<sup>2</sup> Fifth, even if it were valid, the new rule cannot be applied retroactively to Ms. Serrato under the retroactivity doctrine and the Ex Post Facto Clause.

1. *Unilateral Executive Branch Termination Of The Boot Camp Program Violates Article I, § 7, Of The Constitution, Which Vests Congress With The Exclusive Authority To Repeal A Duly Enacted Statute.*

The BOP's unilateral termination of the boot camp program effectively repealed the acts of Congress creating the boot camp program and providing for judicial recommendations regarding that

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<sup>2</sup>*Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

sentencing option. Article I of the Constitution vests the power to repeal a statute exclusively in Congress. *Clinton v. City of New York* 524 U.S. 417, 427 (1998).

In *Clinton*, the Supreme Court held the Line Item Veto Act unconstitutional: “There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.” 524 U.S. at 438. Although the Executive Branch, through the President’s presentment responsibilities and veto authority (Article I, § 7, Article II, § 3), is a critical and necessary participant in the lawmaking process, that role is extinguished once a bill becomes law. *Clinton*, 524 U.S. at 438-39. In his concurrence, Justice Kennedy articulated the separation of powers rationale that places the relevant authority squarely in the hands of the Legislative Branch:

To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution’s structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.” The Federalist No. 47, p. 301 (C. Rossiter ed. 1961).

*Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) (citations omitted). The Supreme Court rejected the government’s arguments that the cancellation of statutes through a line-item veto were exercises of congressionally granted discretion and the power to decline to spend. 524 U.S. at 444.

The Executive Branch is not authorized to annul a duly enacted statute, either as an act of discretion or an exercise of the power of the purse. Allowing the BOP to nullify the statute would substitute the agency’s policy judgment for Congress’s, improperly bypassing the “finely wrought

and exhaustively considered [legislative] procedure” required by Article I, § 7. *Clinton*, 524 U.S. at 440-41 (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)). Just as the President, even with Congress’s explicit blessing, cannot annul a statute through the line-item veto, the BOP cannot unilaterally repeal the statutorily-mandated boot camp program. Here, as in *Clinton*, the BOP may not substitute its judgment for Congress’s. *Clinton*, 524 U.S. at 444-47.

The BOP has no constitutional authority to unilaterally terminate the boot camp program. The BOP’s action effectively repeals 18 U.S.C. § 4046, repeals U.S.S.G. § 5F1.7, and partially repeals the judicial recommendation provisions of 18 U.S.C. §§ 3582(a) and 3621(b)(4), which are incorporated by the guideline. Further, the unilateral BOP action unconstitutionally alters the sentencing factors found in Section 3553(a) -- specifically the treatment and rehabilitation considerations of Section 3553(a)(2)(D) -- that the advisory guidelines, under *United States v. Booker*, 125 S. Ct. 738, 764-65 (2005), require courts to consider in imposing sentence. The BOP simply does not have the constitutional authority to repeal, to amend, and to rewrite the sentencing statutes and guidelines.

2. *The BOP Lacks Statutory Authority To Abolish The Boot Camp Program.*

Even if there were no constitutional prohibition, the BOP lacks statutory authority to terminate the program. The plain words of the statute, and the funding authorization, assume the existence of the program. The BOP’s discretion is limited to whom it may place in the program and how it is implemented.

The first step in statutory construction is the text of the statute. *Leocal v. Ashcroft*, 125 S. Ct. 377, 382 (2004). “If the intent of Congress is clear, that is the end of the matter; for the court as

well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. The text of Section 4046 assumes the existence of the boot camp program and provides the BOP with no authority to terminate it:

(a) The Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of imprisonment of more than 12, but not more than 30, months, if such person consents to that placement.

(b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed 6 months, an inmate in the shock incarceration program shall be required to --

(1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and

(2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.

(c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate.

18 U.S.C. § 4046. By its plain terms, the statute does not condition the existence or continuation of the program upon a reduction in recidivism or a cost-savings in comparison to ordinary incarceration.<sup>3</sup> The statute is unambiguous: the program must exist and the BOP has no authority to terminate the program.

Congress conferred upon the BOP limited discretion to determine which prisoners meet the statutory criteria and how to implement the program. The statute’s discretionary language -- “may

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<sup>3</sup>Unlike the tariff and import statutes at issue in *Clinton*, which authorized the suspension of programs when certain conditions were present, this statute has no provisions authorizing the BOP to even suspend the boot camp program. 524 U.S. at 444-45.

place in a shock incarceration program any person who [meets certain criteria]" -- does not confer any authority to terminate the program or to make eligibility criteria such that no person is eligible. As the Ninth Circuit repeatedly found in the context of the residential drug treatment program, authority to manage the program does not extend to construing the authorizing statute in a manner inconsistent with its plain meaning. *Davis v. Crabtree*, 109 F.3d 566, 568-69 (9th Cir. 1997) (categorical exclusion of prisoners from the class of prisoners who "may" receive sentence reduction subject to judicial review of statutory meaning of "nonviolent offense"); *Downey v. Crabtree*, 100 F.3d 662, 666-71 (9th Cir. 1996) (same). "A prisoner's right to *consideration* for early release is a valuable one that we have not hesitated to protect." *Cort v. Crabtree*, 113 F.3d 1081, 1085 (9th Cir. 1997) (emphasis in original).

The specific directives of Congress limit an agency's discretion. *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Here, Congress gave the BOP a specific directive to establish a boot camp program. While permissive language in the statute gives the BOP broad discretion to administer the program, as in *Lopez v. Davis*, 531 U.S. 230 (2001), that discretion is limited by the statutory directive to provide boot camp as an alternative form of imprisonment. The BOP may determine eligibility criteria, establish program components, and determine whether an inmate has successfully completed the program, but the BOP cannot terminate the program.<sup>4</sup>

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<sup>4</sup>Reading Section 4046 to authorize unilateral cancellation of the boot camp program contravenes well-settled canons of statutory construction that "courts should disfavor interpretations of statutes that render language superfluous," or that "would produce an absurd and unjust result which Congress could not have intended." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). The courts have consistently rejected statutory interpretations that would render a statutory provision surplusage or a nullity. *In re Cervantes*, 219 F.3d 955, 961 (9th Cir. 2000) (citing cases). Here, an interpretation authorizing the termination of the boot camp program not only nullifies 18 U.S.C. § 4046, it renders U.S.S.G. § 5F1.7 meaningless.

In a similar instance, the BOP acted unilaterally to terminate a halfway house program, which courts have declared a violation of the relevant statutes. In *Goldings v. Winn*, 383 F.3d 17, 23 (1st Cir. 2004), the First Circuit held that the plain language of 18 U.S.C. § 3624(c) rendered unlawful the BOP's categorical refusal to consider community placement. This statute imposed on the BOP an affirmative obligation to facilitate a smooth re-entry for prisoners into the outside world. The BOP's restriction of pre-release placements to the last ten percent of the sentence frustrated the intent of the statute. The BOP's reading of the statute conflicted with the discretion provided in 18 U.S.C. § 3621(b) to place prisoners in community corrections centers at any time during a sentence. *Goldings*, 383 F.3d at 23. The Eighth Circuit reached the same conclusion in *Elwood v. Jeter*, 386 F.3d 842, 847 (8th Cir.2004):

We emphasize, like the First Circuit, that 18 U.S.C. § 3624(c) does not require placement in a CCC. It only obligates the BOP to facilitate the prisoner's transition from the prison system.

In the present case, the agency's decision to unilaterally terminate the program is inconsistent with the authorizing statute. *LaBonte*, 520 U.S. at 762 n.6; *Chevron*, 467 U.S. at 842-43. The statutes do not authorize the BOP to terminate the program it is entrusted to administer.

Resort to the legislative history is unnecessary in light of the plain language and context of the statutes and guidelines on boot camp and judicial recommendations. However, Congress expressly anticipated the existence of the programs. Congress authorized annual appropriations for the boot camp program. H.R. Rep. 101-681(I), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6557 ("Section 1602 authorizes the appropriation of such sums as are necessary to carry out the [shock incarceration program] for fiscal year 1990 and thereafter") (Exhibit M). The enactment of and authorization for appropriation requires the BOP to obligate funding toward the operation of the

program.

Congress intended the establishment of a boot camp program and its continuity. *See* Ex. M (H.R. Rep. 101-681(I), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6557 (“The purpose of Title XVI is to enable the Federal Government to operate a shock incarceration (boot camp prison) program.”)). Congress’s expectations of the programs efficacy were realistic, not subject to agency second-guessing, especially based on questionable data:

A Federal shock incarceration program will not be a cure-all or panacea for overcrowding in Federal prisons, and should not be expected to perform miracles in reducing the crime rate. The program authorized by Title XVI will give the Federal Government the capability to provide appropriate punishment to convicted defendants at a lower cost and with the probability that a greater percentage of people will not return to a life of crime.

(Ex. M) (1990 U.S.C.C.A.N. at 6559).<sup>5</sup> The House Report noted that, during congressional hearings on the efficacy of establishing a federal boot camp program, the director of the BOP expressed “concern that there may not be a sufficient number of Federal prisoners who would be eligible for the program to justify setting up a Federal boot camp prison.” (Ex. M) (1990 U.S.C.C.A.N. at 6558 n.6). Rather than authorizing the BOP to decide whether to abandon the program, Congress authorized the BOP to “contract with States that operate shock incarceration programs to place eligible Federal prisoners in State boot camp prisons.” (Ex. M) (1990 U.S.C.C.A.N. at 6558 n. 6).

The short answer to the BOP’s claims that the program should be abandoned because it is expensive and does not rehabilitate prisoners is to convince Congress. In the absence of that fundamental (and transparent) step, the BOP has no authority under the statute to negate the

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<sup>5</sup>Congress enacted § 4046 despite the BOP’s reservations regarding efficacy and costs of the program (Testimony of Michael Quinlan, Dir., Federal Bureau of Prisons, Hearing Before Committee on the Judiciary, U.S. House of Rep. on H.R. 2985, Sentencing Option Act of 1989, Sept. 14, 1989) (Exhibit N).

legislative will.

3. *The BOP's Summary Action Terminating The Boot Camp Program Is Invalid And Cannot Be Applied To Ms. Serrato Because It Constitutes A Legislative Rule Promulgated In Violation Of The Notice-And-Comment Provisions Of The Administrative Procedure Act.*

The BOP's termination of the boot camp program is a legislative or substantive rule that is invalid because it was promulgated without notice-and-comment. Because the BOP must adhere to the APA in promulgating such rules, the change in policy is invalid and cannot be implemented to Ms. Serrato's detriment.

The APA defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or proscribe law or policy." 5 U.S.C. § 551(4). The procedure necessary for the promulgation of rules differs depending on whether a rule is a legislative or interpretive rule. *Gunderson v. Hood*, 268 F.3d 1142, 1153-54 (9th Cir. 2001). A legislative (or substantive) rule affects individual rights and obligations, especially in the context of categorical exercise of agency discretion, and has the force and effect of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979); *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995).

The pronouncement of the policy change by memorandum does not alter its character as a legislative rule. The Ninth Circuit has made clear that it is the effect, not the form, that determines whether a rule is substantive: "The label an agency attaches to its pronouncements is clearly not dispositive." *Gunderson*, 268 F.3d 1154 n. 27. *See also Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (refusing to consider an opinion letter as the interpretation of an unambiguous regulation because "To defer to the agency's position would permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). The method used to implement a

rule or a rule change does not affect whether it is subject to notice and comment.

The administrative decision to categorically eliminate the boot camp option for all classes of prisoners is a classic legislative or substantive rule. In *Gunderson*, the court found that the BOP's Residential Drug Abuse Program (DAP) rule eliminating a class of prisoners from eligibility for a sentence reduction was substantive. 268 F.3d at 1158 ("There is no question that the 1997 *regulation* is substantive. It clearly 'affect[ed] a change in existing law or policy' by listing categories of inmates who would not be eligible for the early release program."). The termination of the boot camp program is a substantive rule because it has the force of law, it categorically exercises power in a manner injurious to a class, and it affects a change in existing law or policy.

The BOP must comply with the APA's mandate that general notice of proposed rulemaking shall be published in the Federal Register. 5 U.S.C. § 553(b). Section 553(b)'s general notice-and-comment requirement serves important policy goals:

The purpose [of Section 553(b)] is both (1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of "final" rules.

*National Tour Brokers' Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir.1978). In *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir.1982), the Court observed that the notice-and-comment procedures protect "the right of the people to present their views to the government agencies which increasingly permeate their lives" and that "the interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people." In the present case, the opportunity to demonstrate the unreliability of the premises for the change, as well as the constitutional and statutory bars to the

action, may well have forestalled the ill-begotten change.

Section 553(b) of the APA provides only two exceptions to its general notice requirement of proposed rulemaking:

Except when notice or hearing is required by statute, the subsection does not apply-- (A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(3). Subsection (A) does not apply because the BOP already acknowledged that rulemaking is necessary for administration of the program as evidenced by the prior invocation of the rulemaking process (Ex. D) (61 Fed. Reg. 18658 (Apr. 26, 1996)). The “good cause exception” in Section 553(b)(3)(B) also does not apply.

To invoke the good cause exception, an agency must determine that compliance with notice-and-comment requirements is “impracticable, unnecessary or contrary to the public interest. The agency must then include this finding and a short statement of reasons with the new regulations.” *Buschmann*, 676 F.2d at 356 (quoting *Kelly v. United States Dep't of the Interior*, 339 F.Supp. 1095, 1101 (E.D. Cal.1972)). Here, not only did the BOP fail to publish the rule change in the Federal Register as required, it did not explain why notice-and-comment procedure was impracticable, unnecessary, or contrary to the public interest (Ex. J).

The failure to comply with the APA rulemaking procedures invalidates the rule. *Buschmann*, 676 F.2d at 356; *see also W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir.1987) (stating that an “agency rule which violates the APA is void,” and that “[a]gency action taken under a void rule has no legal effect”). In *Bohner v. Daniels*, 243 F.Supp.2d 1171, 1177 (D. Or. 2003), the court reviewed

BOP rules that terminated eligibility for DAP sentence reductions. Finding the rules had substantive effect, and lacked compliance with notice-and-comment, the court held that the rules were invalid when applied to prisoners disqualified pursuant to the unlawfully promulgated rules. *Bohner*, 243 F.Supp.2d at 1174-80.<sup>6</sup> *Accord Crowley v. Federal Bureau of Prisons*, 312 F.Supp.2d 453, 458 (S.D.N.Y. 2004); *Carson v. Hood*, 2000 WL 122421, \*2 (D. Or. Feb. 1, 2000). For the same reasons, the substantive rule eliminating all eligibility for boot camp is invalid and ineffective against Ms. Serrato.

4. *Even If The BOP Had Authority To Terminate The Program, The Decision Is Invalid As Unreasonable, Arbitrary, And Capricious Under Chevron.*

Even if the BOP were authorized to terminate the boot camp program, the reasons given for this drastic step do not meet even minimal reasonableness. If Congress had left a gap for the agency to fill regarding the efficacy of maintaining boot camp programs, the agency's rule is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44; *Lopez v. Davis*, 531 U.S. 230, 242 (2001) ("[W]here Congress has enacted a law that does not answer 'the precise question at issue,' all we must decide is whether the Bureau, the agency empowered to administer the early release program, has filled the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'" (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995))). The appropriate degree of deference a court should give to an agency's construction is "a respect proportional to its power to persuade." *United States v. Mead*, 533 U.S. 218, 235 (2001).

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<sup>6</sup>The BOP appealed *Bohner* regarding mootness, jurisdiction, and the availability of a remedy. The briefs are attached as Exhibits O, P, and Q. The case is scheduled for oral argument in the Ninth Circuit on April 11, 2005.

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.

*Mead*, 533 U.S. at 228 (citations omitted).

Here, the BOP's decision to summarily abolish the boot camp program is entitled to no deference under *Chevron* because both reasons the BOP proffers to justify its decision are fundamentally flawed. In its January 14, 2005, memorandum announcing its decision to abolish the boot camp program, the BOP claims that "research has found no significant difference in recidivism rates between inmates who complete boot camp programs and similar offenders who serve their sentences in traditional institutions" (Ex. J). In support, the BOP refers to two studies. Neither study supports the BOP's conclusions.

The first study, *Correctional Boot Camps: Lessons From A Decade of Research*, surveys the conclusions of prior studies of state boot camp programs completed in the mid-1990s (Ex. R). The study does not mention the federal program, which has eligibility requirements, incentives, and post-boot camp supervision that are absent from state programs. Although the paper concludes that state boot camps have had difficulty reducing recidivism and lowering costs, these conclusions are qualified. Where there is a sentence reduction incentive, a therapeutic component, and community transition services -- attributes present in the BOP program -- the study concludes "boot camps can achieve small relative reductions in prison populations and modest reductions in correctional costs" (Ex. R at 1).

These positive conclusions were gleaned from the second of the studies cited by the BOP: *The Multisite Evaluation of Shock Incarceration* (Ex. S at 7). Significantly, the *Multisite* evaluation

was also cited in a BOP evaluation of the boot camp program administered by the BOP at Lewisburg (Ex. T), a study the BOP omits from its termination memorandum. The Lewisburg study, although noting similarities with conventional imprisonment, found favorable results, much more so than state programs.

The Lewisburg evaluation found both significant differences between state and federal recidivism rates as well as cost savings, comparing federal boot camp prisoners and those in minimum security facilities. The evaluation noted that the 13% rearrest rate over two years for Lewisburg graduates was substantially lower than for graduates of similar state run programs (Ex. T at 6). Although the per-day cost for a boot camp participant is greater than for a minimum security inmate, the Lewisburg evaluation found that the estimated cost savings for prisoner with a year and a day sentence who participated in boot camp, as compared to a minimum security inmate, was \$2,519.66 based on savings from the community placement phases. The costs savings for a 30-month sentence was \$9,330.58, when compared to a minimum security inmate, due in large measure to the sentence reductions (Ex. T at Table 2). The evaluation also noted other savings to the public fisc generated by the boot camp program: reducing public assistance to inmate families and offenders becoming tax payers (Ex. T at 2). The Lewisburg evaluation recommended expansion of the boot camp programs “[g]iven the ICC’s demonstrated success.” (Ex. T at 7).

The BOP’s own internal studies carefully distinguished between state and federal programs. The federal evaluation demonstrates both efficacy and savings of boot camp. Reliance on the evaluations of the state boot camp programs to justify cancellation of the federal program is

unreasonable.<sup>7</sup>

5. *Even If The BOP Had Constitutional And Statutory Authority To Terminate Boot Camp, And Even If The Rule Change Were Proper In Content And Manner Of Promulgation, The Change Could Not Be Retrospectively Applied Against Ms. Serrato.*

Both the retroactivity doctrine and the Ex Post Facto Clause protect citizens against retrospective application of changes in the law to the detriment of the individual. In the prison setting, the courts have rigorously protected prisoners against changed rules that can increase their time in custody. As the Ninth Circuit stated in refusing to apply retroactively a disqualification from the DAP incentive, the administration of prison programs requires the fairness and consistency that is achieved by applying detrimental changes only prospectively:

[T]his is not a game of Lucy and the football from the world of Charles Schulz. Rather, it is a serious administrative agency program to be administered in a consistent, coherent matter. An agency cannot provide participants with a determination of eligibility based on the purported examination of objective criteria, then subsequently deny them eligibility by exercise of whim. If we expect inmates to observe the rule of law, we must adhere to it ourselves.

*Bowen*, 202 F.3d at 1222. To the same extent, the BOP is not free to terminate a congressionally mandated program when the program was statutorily available at the time of the offense, the trial court included a statutorily authorized recommendation for the program, and the BOP advised the prisoner that she was eligible to participate in the program.

Changes in prison policy, such as the BOP's termination of the boot camp program, presumptively operate only prospectively based on the policies against retroactive rule-making and

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<sup>7</sup>The unreasonableness of terminating the ICC is further demonstrated by the Department of Justice's 1994 study concluding that "at least for the low level defendants, a short prison sentence is just as likely to deter them from further offending as a long prison sentence." United States Department of Justice, *An Analysis On Non-Violent Drug Offenders With Minimal Criminal Histories* (Feb. 4, 1994) at 5.

the constitutional prohibition on ex post facto application of penal laws. *Lynce v. Mathis*, 519 U.S. 433, 446 (1997); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Cort v. Crabtree*, 113 F.3d 1081, 1086 (9th Cir. 1997). The presumption against the retroactive application of new laws is “an essential thread in the mantle of protection that the law affords the individual citizen. That presumption is ‘deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.’” *Lynce*, 519 U.S. at 439 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)).

a. Retrospective Application Of The Boot Camp Termination  
Would Violate The Doctrine Against Retroactivity.

The doctrine against retroactivity prohibits the retrospective application of the BOP’s termination of the program to Ms. Serrato. *Bowen v. Hood*, 202 F.3d 1211, 1220-22 (9th Cir. 2000); *Cort v. Crabtree*, 113 F.3d 1081, 1085 (9th Cir. 1997). As a general matter, statutory grants of rule-making authority will not encompass the power to promulgate retroactive rules unless that power is express. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), the Supreme Court squarely held that an administrative agency cannot promulgate retroactive rules unless Congress has expressly authorized the agency to engage in retroactive rulemaking. *Bowen*, 488 U.S. at 208.

*Bowen* involved a Medicare reimbursement limit promulgated by the Secretary of Health and Human Services that expressly provided for retroactive application. Although the governing statute generally authorized the Secretary to promulgate reimbursement rules, the statute did not specifically authorize the Secretary to give them retroactive effect. In the absence of such explicit authorization, the Court held that the Secretary exceeded his statutory authority in giving the reimbursement limit retroactive effect and declared the rule invalid. *Bowen*, 488 U.S. at 209-216. Because

“[r]etroactivity is not favored in the law,” the Court held that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Id.* at 208.

In *Cort*, the Ninth Circuit applied *Bowen* to a new BOP program statement that disqualified previously eligible bank robbers from the incentive program for successful completion of residential drug treatment program. 113 F.3d at 1086. The court held that the new rule could not be applied retroactively to inmates who already were in the program and had been told they would be eligible for the sentence reduction. “Before an agency may disrupt ‘settled expectations’ in such a manner, [citing *Landgraf v. USI Film Products*, 511 U.S. 1483, 1497 (1997)], the language of the relevant regulation must compel such a result.” *Cort*, 113 F.3d at 1086.

The Ninth Circuit reaffirmed *Cort* in *Bowen v. Hood*, 202 F.3d 1211,1222 (9th Cir. 2000). The *Bowen* court refused to allow retroactive denial of early release eligibility based on changes “implemented after the inmates had already been notified that they were eligible for early release.” 202 F.3d at 1220. To the same extent, the retroactivity doctrine bars the BOP from applying the termination of the boot camp program retrospectively to Ms. Serrato.

b. Retrospective Application Of The Boot Camp Termination  
Would Violate The Ex Post Facto Clause.

The specific prohibition on ex post facto laws is one aspect of the “broader constitutional protection against arbitrary changes in the law.” *Lynce*, 519 U.S. at 440. To fall within the ex post facto prohibition, a law must be “retrospective -- that is, ‘it must apply to events occurring before its enactment’ -- and it ‘must disadvantage the offender affected by it.’” *Id.* at 441 (quoting *Weaver*

*v. Graham*, 450 U.S. 24, 29 (1981)).

In *Lynce*, the Supreme Court unanimously concluded that the retroactive cancellation of “early release credits” awarded to alleviate prison overcrowding violated the Ex Post Facto Clause. In so doing, the Court rejected the government's argument that the new law was constitutional because the change in early release credits was not related to the original penalty assigned to the crime.

Relying on its prior ruling in *Weaver*, the Court reasoned that “retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are ‘one determinant of petitioner’s prison term . . . and . . . [the petitioner’s] effective sentence is altered once this determinant is changed.’” 519 U.S. at 445 (quoting *Weaver*, 450 U.S. at 32). The reason “removal of such provisions can constitute an increase in punishment” is that “a ‘prisoner’s *eligibility* for reduced imprisonment is a significant factor entering into both the defendant’s decision to plea bargain and the judge's calculation of the sentence to be imposed.” 519 U.S. at 445-46 (emphasis added) (quoting *Weaver*, 450 U.S. at 32). *Lynce* makes clear that it is the lost opportunity for early release, not just the revocation of awarded credits, that triggers the Ex Post Facto Clause.

The effective repeal of the boot camp program is indistinguishable from the repeal of the early release program at issue in *Lynce* and the good time credits in *Weaver*. Each eliminates an opportunity for earlier release; each operates retrospectively. Ms. Serrato’s decision to plead guilty was based on the belief that boot camp was available; her attorney requested and received a judicial recommendation for boot camp, and oversaw the designation of the boot camp. The BOP’s rules expressly provided for sentence reduction of up to six months, as well as extensive home

confinement in place of incarceration (Ex. E at 13). The BOP has violated the Ex Post Facto Clause because Ms. Serrato was “unquestionably disadvantaged” by the new law, which “made ineligible for early release a class of prisoners who were previously eligible.” *Lynce*, 519 U.S. at 446.

The disadvantage is especially cruel because, if Ms. Serrato had received a direct commitment based on a 30-month sentence at her initial sentencing, she would have completed the prison part of the program before the BOP terminated it, with only six months prison, six months of halfway house, followed by community confinement. With her present surrender date in November, she would have been scheduled to start the community-based portion of the program within the next 60 days.

**B. This Court Has The Authority To Order The BOP To Rescind Its Termination Of The Boot Camp Program.**

The violation of federal law -- constitutional, statutory, and administrative -- is remediable by this Court. Under this Court’s habeas corpus authority, and pursuant to its ancillary jurisdiction, the Court is empowered to enforce its judgment and to provide equitable relief. 18 U.S.C. § 3231; 28 U.S.C. §§ 2243, 2255; *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 379-80 (1994) (the Judiciary bears the responsibility “to manage its proceedings, vindicate its authority, and effectuate its decrees.”). The Court also has authority to grant injunctive and declaratory relief to end the violation of federal law in which the BOP is now engaged. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1248 (2005) (§ 1983 and equitable relief both available); *Docken v. Chase*, 393 F.3d 1024, 1031-32 (9th Cir. 2004) (habeas and equitable relief both available).

Declaratory and injunctive relief are both appropriate. Recently, the BOP abruptly eliminated the long-standing policy of directly committing defendants to community corrections upon the

recommendation of the sentencing court. In response, many courts enjoined the BOP from effectuating the policy change. For example, in *Iacoboni v. United States*, 251 F.Supp.2d 1015, 1044-1045 (D. Mass. 2003), in an action brought under § 2255, the court permanently enjoined the BOP from transferring two of the petitioners out of community confinement based upon the new, invalid rule, and ordered the BOP to designate a place of imprisonment for the third petitioner without taking into consideration, in any way, the new and invalid rule. In ordering injunctive relief, the court noted that “the court has the power to remedy any abuse of discretion of this sort.” *Id.*<sup>8</sup> As in *Iacoboni*, this Court should order that the BOP effectuate its original decision to designate Ms. Serrato to boot camp, including the restoration of the opportunity for earlier release.

The Court is also empowered to grant injunctive and declaratory relief under the APA, the Mandamus Act, and the Declaratory Judgment Act. Under the APA, the Court may enter a judgment or device against the United States provided that “any mandatory or injunctive decree shall specify the Federal officer . . . personally responsible for compliance.” 5 U.S.C. § 702. Under Section 706, the Court may order the BOP to fulfill its statutory duty to administer the boot camp program, or enjoin it from acting beyond its statutory authority, or if its actions are arbitrary and capricious. Similarly, under 28 U.S.C. § 1361, the Court may compel the BOP to perform its duty to administer the ICC program. Additionally, the Declaratory Judgment Act provides broad authority to fashion an appropriate remedy: “Further necessary or proper relief based on a declaratory judgment or decree may be granted.” 28 U.S.C. § 2202; *see also Colton v. Ashcroft*, 299 F.Supp.2d 681 (E.D.

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<sup>8</sup>*Accord Monahan v. Winn*, 276 F.Supp.2d 96 (D. Mass. 2003); *Pinto v. Meniffee*, 2004 WL 3019760 (S.D.N.Y. 2004); *Tipton v. Federal Bureau of Prisons*, 262 F.Supp.2d 633 (D. Mass. 2003); *Byrd v. Moore*, 252 F.Supp.2d 293 (W.D.N.C. 2003); *see also Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004) (remanding for grant of relief).

Ky. 2004) (granting declaratory and injunctive relief against the BOP's cancellation of halfway house program).

Expedited disposition is requested because Ms. Serrato has already served four months and is being irreparably harmed with each passing day. Moreover, the BOP intends to close the boot camp facilities in June 2005. Relief should be granted to continue the program because maintaining the *status quo* is far less burdensome to all than re-instituting the program.

### **Conclusion**

For the foregoing reasons, this Court should enter an order granting the writ, declaring the BOP's termination of the boot camp program unlawful, enjoining termination of the program, and directing the BOP to place Ms. Serrato in the program forthwith. In the alternative, the Court should vacate the sentence in this case and order a resentencing hearing.

RESPECTFULLY SUBMITTED this April 7, 2005.

/s/ Stephen R. Sady  
Stephen R. Sady  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS on Assistant United States Attorneys James Maher and Barry Sheldahl on April 7, 2005, by electronic filing.

/s/ Christine Moore

Christine Moore

CERTIFICATE OF SERVICE