

Watching Ghosts: Supervised Release of Deportable Defendants

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Federal criminal sentences do not end when a convict walks out of prison. Beyond a term of imprisonment, most people convicted of a federal crime also receive a term of supervised release: a period of “community supervision” that helps convicts adjust to life outside of prison. Supervised release is governed by an elaborate interplay of federal statutes, and its implementation is further complicated when a defendant is not a United States citizen.

I will examine these complications by first giving an overview of how supervised release functions and then detailing how deportation and immigration detention affect it. My goal is to expose the one-sided interaction between supervised release and immigration law and show how immigration law steamrolls the nuances of the supervised release statutory scheme.

I. WHAT SUPERVISED RELEASE IS, AND WHAT IT TRIES TO DO

A. *Supervised Release’s Basic Operations*

A judge imposes a term of supervised release at sentencing.¹ Supervised release is considered “a separate part of the defendant’s sentence, rather than being the end of the term of imprisonment.”² A sentencing judge may include a term of supervised release for any felony and most misdemeanors³ and must include it when imposing a term of imprisonment longer than a year.⁴ The length of a term of supervised release depends on the type of conviction underlying it,⁵ but terms typically range from one to five years.⁶ In serious

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1. 18 U.S.C. § 3583(a) (2008).

2. S. REP. NO. 98-225, at 123 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3306.

3. 18 U.S.C. § 3583(a).

4. U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(a) (2007).

5. *See* 18 U.S.C. § 3583(b).

6. *See* 18 U.S.C. § 3583(b).

cases involving drugs, terrorism, or minor victims the term of supervised release may be for life.⁷

Every term of supervised release contains the same mandatory conditions.⁸ These conditions are not excessively burdensome:⁹ a supervisee must not commit any crimes while supervised,¹⁰ must not possess any drugs,¹¹ and must give a DNA sample,¹² pay any fines,¹³ and submit to drug testing soon after being released from imprisonment.¹⁴ The sentencing judge can waive this last requirement.¹⁵ Supervised release in this barebones form does little more than remind a defendant that criminal laws should not be violated, and, if they are, that he or she will pay an additional cost.¹⁶

But most terms of supervised release include more than these basic conditions. Though the mandatory provisions of supervised release may not require regular reporting to a probation officer,¹⁷ the Office of Probation and Pretrial Services recommends several additional “standard conditions” that require such contact.¹⁸ These standard conditions include submitting a written monthly report and notifying the probation officer of changes in residence and employment.¹⁹ They forbid leaving a judicial district without permission, require regular employment, and permit a probation officer to visit a defendant’s home at any time.²⁰

The sentencing judge is also free to attach more conditions, so long as they are consistent with the purposes of federal sentencing²¹ and “involve[] no greater deprivation of liberty than is reasonably necessary.”²² These additional conditions range from wearing an ankle bracelet or avoiding criminal groups²³

7. See 18 U.S.C. §§ 3583(j), (k) (referencing code sections that, if violated, justify a term of supervised release up to life); see also *United States v. Moriarty*, 429 F.3d 1012, 1023-25 (11th Cir. 2005) (per curiam) (life term of supervised release does not violate Eighth Amendment).

8. 18 U.S.C. § 3583(d).

9. Domestic violence offenders have other mandatory requirements. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 18 U.S.C. § 3624(e) (2008).

14. 18 U.S.C. § 3583(d).

15. Harold Baer, Jr., *The Alpha and Omega of Supervised Release*, 60 ALB. L. REV. 267, 276 (1996); Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts, Monograph 109, *The Supervision of Federal Offenders II-3* (Mar. 2007), available at http://www.fd.org/pdf_lib/Monograph%20109.pdf [hereinafter Monograph 109].

16. This cost comes not just in a sentence for the new crime, but also in adding two criminal history points to the new sentence for committing the crime while on supervised release. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d); see also *United States v. Akinyemi*, 108 F.3d 777, 778 (7th Cir. 1997).

17. Baer, *supra* note 15, at 270.

18. Monograph 109, *supra* note 15, at II-4 to II-6.

19. *Id.* at II-5.

20. *Id.*

21. 18 U.S.C. § 3583 (d)(1) and (3).

22. 18 U.S.C. § 3583(d)(2).

23. See Monograph 109, *supra* note 15, at II-7.

to being forced to wear a sandwich board outside a post office proclaiming, “I stole mail. This is my punishment.”²⁴

Supervised release begins “on the day the person is released from imprisonment.”²⁵ A defendant has seventy-two hours to report to a probation officer and begin fulfilling the conditions of his supervised release term.²⁶ Codifying the common law rule that supervision would not run when the defendant was unavailable because of his own bad acts,²⁷ the law tolls terms of supervised release during periods of imprisonment by state or federal authorities of thirty days or more²⁸ or while a defendant is a fugitive.²⁹

If a defendant violates the conditions of his supervised release, the sentencing court may revoke the term and incarcerate the defendant for all or part of the term of supervised release.³⁰ If the term has expired, a court retains jurisdiction to hold a revocation hearing so long as a warrant alleging the violation of supervised release issued before the term of supervised release expired.³¹ A court also retains the discretion to modify a term of supervised release once it begins running³² and may terminate it after one year.³³

B. The Policy Goals of Supervised Release

Passed as part of the Sentencing Reform Act of 1984, supervised release replaced federal parole.³⁴ The Sentencing Reform Act’s legislative history reveals that the particular needs of the person on supervised release should drive the length and conditions of supervision, and that supervised release should not be automatically included in every sentence.³⁵ Instead, “probation officers [should] only . . . supervis[e] those releasees from prison who actually need supervision, and every releasee who does need supervision [should]

24. United States v. Gementera, 379 F.3d 596, 598 (9th Cir. 2004).

25. 18 U.S.C. § 3624(e).

26. Monograph 109, *supra* note 15, at II-4.

27. Catherine M. Goodwin, *Looking at the Law, Legal Developments in the Imposition, Tolling, and Revocation of Supervision*, 61 FED. PROBATION 76, 77 (1997).

28. 18 U.S.C. § 3624(e); *see also* United States v. Jackson, 26 F.3d 301, 301-02 (5th Cir. 2005) (holding that even an unlawful imprisonment tolls the term of supervised release).

29. *See, e.g.*, United States v. Delamora, 451 F.3d 977 (9th Cir. 2006). *But see* Monograph 109, *supra* note 15, at V-21 (cautioning that “no statutes or recent case law clearly indicat[e] whether absconding tolls a term of probation or supervised release.”)

30. 18 U.S.C. § 3583(e)(3).

31. 18 U.S.C. § 3583(i).

32. 18 U.S.C. § 3583(e)(2).

33. 18 U.S.C. § 3583(e)(1).

34. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3673 (1984) and 28 U.S.C. §§ 991-998 (1984)); *see also* Barbara Meierhoefer Vincent, *Supervised Release: Looking for a Place in a Determinate Sentencing System*, 6 FED. SENT’G. REP. 4, 187 (Jan./Feb. 1994) (describing how federal parole functioned and noting that “openness and honesty in the sentencing process, and fairness in the resulting sentences” were goals of the legislation creating supervised release).

35. S. REP. NO. 98-225, at 124, *reprinted in* 1984 U.S.C.C.A.N. at 3306.

receive it.”³⁶

Further, a term of supervised release “may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment.”³⁷ Instead, the “primary goal” of supervised release is “to ease the defendant’s transition into the community after the service of a long prison term for a particularly serious offense,” with other goals including “to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.”³⁸

In addition to these explicitly stated legislative objectives, a sentencing judge must further other general goals of federal sentencing.³⁹ These include “afford[ing] adequate deterrence to criminal conduct,”⁴⁰ “protect[ing] the public from further crimes of the defendant,”⁴¹ and “provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment.”⁴² Supervised release did not originally include deterrence or protection of the public among its goals,⁴³ and it still excludes the only remaining penological goal of § 3553, “provid[ing] just punishment for the offense.”⁴⁴ This exclusion is consistent with the legislative history, which positioned supervised release as a non-punitive tool.

The Office of Probation and Pretrial Services has released exhaustive documentation of its views on supervised release in a document known as Monograph 109.⁴⁵ The Probation Office notes that supervised release fulfills a number of different goals, including “protection of the community by reducing risk and recurrence of crime and maximizing offender success during the period of supervision and beyond.”⁴⁶ In particular, “offender success” means securing employment, addressing drug addiction, and establishing healthy personal relationships.⁴⁷ The Probation Office’s formulation of its goals naturally informs its supervision tactics, which, at their best, are “an evolving, individualized outcome-based plan of action [that] monitor[s] compliance” and does not shy from “interven[tion] as necessary to address any identified

36. *Id.* at 125

37. *Id.*

38. *Id.* at 124.

39. 18 U.S.C. § 3583(d)(1) (requiring that additional conditions of supervised release be “reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D).”)

40. 18 USC § 3553(a)(2)(B).

41. 18 USC § 3553(a)(2)(C).

42. 18 USC § 3553(a)(2)(D).

43. Vincent, *supra* note 34, at 187; *see also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7108, 102 Stat. 4181, 4418 (1988) (adding protection of the public as a purpose to be served by supervised release).

44. 18 USC § 3553(a)(2)(A).

45. Monograph 109, *supra* note 15.

46. *Id.* at I-2.

47. *Id.*

risks.”⁴⁸ Supervision plans, therefore, should be “dynamic,” and probation officers must “keep informed” so they can “respond to any emerging risk indicators.”⁴⁹

The Supreme Court has privileged one of these several statements of supervised release’s goals above all others: integrating offenders back into society. In *United States v. Johnson*,⁵⁰ the Court outlined supervised release’s goals and emphasized that “Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”⁵¹ The Court cited only 18 U.S.C. § 3553(a)(2)(D), which does contain a statement about rehabilitation, but is not an exhaustive list of all the purposes that supervised release serves.⁵² The Court’s sole focus on the rehabilitative goals of supervised release indicates that other concerns are secondary when considering supervision’s goals.

However, as shown below, the interaction of supervised release and immigration law not only short circuits the goals highlighted by the Supreme Court, but also frustrates the legislature’s promise that “every releasee who does need supervision will receive it” and the Probation Office’s vision of a responsive, individualized system.

II. HOW IMMIGRATION LAW OVERRIDES SUPERVISED RELEASE

In at least two circumstances, the needs of immigration law override the policy goals of supervised release. The federal courts of appeal agree, first of all, that supervised release is unaffected by a defendant’s deportation. And supervised release, secondly, is not tolled during a period of immigration detention.

A. *No Extinguishment or Tolling During Deportation*

1. *Deportation Does Not Extinguish a Term of Supervised Release*

Beginning in 1995, federal appellate courts began holding that a term of supervised release is unaffected by deportation. The first wave of these opinions held that supervised release was not terminated by deportation.⁵³ The

48. *Id.* at III-1.

49. *Id.*

50. 529 U.S. 53, 59 (2000).

51. *Id.*

52. *Id.*

53. *United States v. Williams*, 369 F.3d 250 (3d Cir. 2004); *United States v. Ramirez-Sanchez*, 338 F.3d 977 (9th Cir. 2003); *United States v. Velasquez-Perez*, No. 02-5397, 53 Fed.App’x 735, 737 (6th Cir. 2002); *United States v. Cuero Flores*, 276 F.3d 113 (2d Cir. 2002); *United States v. Akinyemi*, 108 F.3d 777 (7th Cir. 1997); *United States v. Brown*, 54 F.3d 234 (5th Cir. 1995). Logically, we can also include those circuits that do not toll supervised release during deportation with those that have explicitly held that deportation does not extinguish a term

defendants in those cases argued that because they were not actually supervised while deported, their terms of supervised release self-destructed as soon as they were excluded from the United States. Therefore, when they later entered the country, they could not be found in violation of the terms of supervised release for any of their actions, such as the unauthorized reentry.

The circuit courts have all followed the same reasoning in holding against such arguments.⁵⁴ First, a term of supervised release may expressly include as one of its conditions that a defendant “be deported and remain outside the United States.”⁵⁵ Next, Congress has provided that deportation shall not take place while an alien is serving a term of imprisonment but that “supervised release . . . shall not be ground for deferral of deportation.”⁵⁶

Reading these statutory sections together, the courts concluded that “Congress was aware that some defendants sentenced to supervised release would be deported [as shown in 8 U.S.C. § 1252(h)] yet chose not to provide for automatic termination of supervised release when the defendant was deported.”⁵⁷ “Otherwise, Congress would not require that a defendant be deported despite a term of supervised release [by 8 U.S.C. § 1252(h)] and at the same time allow for supervised release to be conditioned on the defendant not reentering the United States illegally [in 18 U.S.C. § 3583(d)].”⁵⁸ The interplay of these two laws served as decisive proof of Congress’s intent to allow terms of supervised release to run during deportation.

Following this statutory exegesis, courts typically catalog cases that assumed without deciding that deportation did not terminate a term of supervised release.⁵⁹ Some courts also cite the Probation Manual, which implicitly endorses continuing supervised release during deportation by advising that deported supervisees “should be supervised” if they “reenter[] the country prior to expiration of supervision.”⁶⁰ Because all of these authorities point to supervised release continuing despite deportation, it was “doubtful that Congress intended for [the executive branch] to extinguish a lawfully imposed sentence of [the judicial branch] without specifically so providing.”⁶¹

of supervised release. *United States v. Okoko*, 365 F.3d 962 (11th Cir. 2004); *United States v. Juan-Manuel*, 222 F.3d 480 (8th Cir. 2000).

54. This analysis most closely follows the structure of *Brown*, 54 F.3d at 237-39.

55. 18 U.S.C. § 3583(d) (2008).

56. 8 U.S.C. § 1252(h) (2005). This code section no longer exists, but 8 U.S.C. § 1231(a)(4)(A) (2006) provides a similar prioritization: “the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.”

57. *Williams*, 369 F.3d at 252.

58. *Brown*, 54 F.3d at 238.

59. *Id.* at 238-39.

60. *Id.* at 239 (citing X PROBATION MANUAL, GUIDE TO JUDICIARY POLICIES AND PROCEDURES IV, § 18).

61. *Id.*; see also *Velasquez-Perez*, No. 02-5397, 53 Fed.App’x at 737 (noting that 8 U.S.C. § 1326(c), which forbids reducing a sentence for illegal entry by any time served on supervised

These courts responded to defendants' arguments that no actual supervision was taking place by noting that if the defendant reentered the country illegally, revocation of the term of supervised release would be available to increase the crime of reentering illegally.⁶² The Third Circuit also noted that one of the mandatory conditions of every supervised release term—that the defendant not commit another crime in the United States—would not require monitoring in a foreign country, so allowing a term of supervised release to continue during deportation was sound.⁶³

2. *Deportation May Not Toll a Term of Supervised Release*

Having established that deportation does not terminate a term of supervised release, the courts of appeal began holding that deportation also does not toll a term of supervised release.⁶⁴ Like the termination decisions, the tolling decisions rest exclusively on the text of the supervised release statutory scheme, which does not mention tolling during deportation.

Sentencing judges attempted to toll terms of supervised release during deportation by including a tolling provision as a special condition of supervised release.⁶⁵ These conditions have been uniformly rejected. Appellate courts have explained that the special conditions allowed as part of supervised release are “requirements with which a defendant is himself ordered to comply.”⁶⁶ Circuit courts essentially use a syntactic test to determine whether a proposed condition is allowed or not: if the condition can be put in the blank in a sentence that reads “the defendant shall _____,” the condition is probably acceptable.⁶⁷ Any special condition about the timing of the term of supervised release is “not itself an order that the defendant do or refrain from doing something” and so therefore cannot be imposed as a condition of supervised release.⁶⁸

release, also “expressly demonstrates the intention of Congress that a term of imprisonment or supervised release continues to run despite an alien’s deportation absent an express declaration by the sentencing authority.”)

62. *Akinyemi*, 108 F.3d at 780 (opining that “to reenter is a crime in itself, but that crime will be subject to enhancement if it occurs during the period of supervised release.”)

63. *Williams*, 369 F.3d at 252.

64. *United States v. Ossa-Gallegos*, 491 F.3d 537 (6th Cir. 2007); *United States v. Okoko*, 365 F.3d 962 (11th Cir. 2004); *United States v. Juan-Manuel*, 222 F.3d 480 (8th Cir. 2000); *United States v. Balogun*, 146 F.3d 141 (2d Cir. 1998).

65. *Balogun*, 146 F.3d at 142.

66. *Id.* at 145.

67. *Id.* (listing acceptable conditions such as: not committing another Federal, State, or local crime during the term of supervision; not unlawfully possessing a controlled substance; supporting his dependents and meeting other family responsibilities; working conscientiously at suitable employment; refraining from frequenting specified kinds of places; remaining within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer; answering inquiries by a probation officer; permitting a probation officer to visit him at his home or elsewhere as specified by the court).

68. *Id.* at 146; *see also* *United States v. Tinoso*, 327 F.3d 864, 865 (9th Cir. 2003) (holding

Courts confirmed that these tolling conditions were inappropriate by examining the rest of the supervised release statutory term.⁶⁹ The scheme presumes that a term of supervised release runs continuously once it commences and tolls supervised release in exactly one circumstance: during a period of imprisonment of thirty days or more.⁷⁰ Following a canon of statutory interpretation that only those exceptions explicitly stated by the statute are allowed, courts reasoned that tolling occurs during imprisonment and in no other circumstance. Since deportation is not imprisonment, the term cannot be tolled.⁷¹

The statutory text requiring a defendant to comply with the laws of the United States, including the order excluding him from the country, also precludes tolling during deportation.⁷² The Eighth Circuit has noted that “a supervised release order cannot simultaneously be suspended and actively in effect.”⁷³ That is, if the term of supervised release were tolled during deportation, the supervised release order requiring the defendant to stay out of the country would no longer be in effect—“Congress could not have intended to allow a defendant to be excluded from the United State as a *condition* of supervised release while, at the same time, allow all conditions of supervised release to be suspended for the duration of that exclusion.”⁷⁴

Such textual interpretation is the core of the appellate decisions, but courts also noted that tolling supervised release during deportation would be antagonistic to supervision’s policy goals. The Second Circuit focused on two of these goals: to “eas[e] the defendant’s transition from prison life to community life” and to efficiently use probation office resource[s] to avoid “wast[ing]” them “on . . . releasees who do not need them.”⁷⁵ For someone who is deported, any transition to community life from prison would have happened overseas, so using probation office resources to keep these cases

that courts do not have authority to order “immediate and automatic deportation” as a condition of supervised release).

69. See, e.g., *id.* at 146-47.

70. 18 U.S.C. § 3624(e) (2008).

71. At least one court, *Okoko*, 365 F.3d at 964, and advocate, *Juan-Manuel*, 222 F.3d at 486, have incorrectly identified another tolling provision in 18 U.S.C. § 3583(i). This statutory subsection allows a sentencing court to hold a supervised release revocation hearing beyond the term’s expiration if it issued a subpoena alleging violations of the supervised release before the term expired. This does not actually toll the running of the term of supervised release. Instead, it provides a method for the sentencing court to preserve jurisdiction to hold a revocation hearing: only the “power of the court to revoke a term of supervised release”—not the conditions of the terms of supervised release—is “extend[ed] beyond the expiration of the term of supervised release.” 18 U.S.C. § 3583(i).

72. 18 U.S.C. § 3583(d).

73. *Juan-Manuel*, 222 F.3d at 487.

74. *Id.* (citing *United States v. Isong*, 111 F.3d 428, 431-33 (6th Cir. 1997) (Moore, J., dissenting)).

75. *Balogun*, 146 F.3d at 146-147 (citing S. REP. NO. 98-225, at 57 (1984), reprinted in 1984 U.S.C.C.A.N. at 3240).

open until they return to the United States does nothing to advance these goals.⁷⁶

Finally, courts noted that Congress's law enforcement policies of quickly removing certain offenders contemplate removing aliens with unexpired terms of supervised release.⁷⁷ Federal law "assure[s] expeditious removal following the end of the alien's incarceration for the underlying sentence,"⁷⁸ and, as noted above, "supervised release . . . is not a reason to defer removal."⁷⁹

These different spheres of congressional action have led courts to conclude that a term of supervised release cannot be tolled during deportation. As in the extinguishment context, this result raises the concern that defendants may not be able to comply with supervised release conditions that require checking in with a probation officer, so a defendant may face a revocation hearing for "something which is outside his or her control."⁸⁰ The response to this concern was similar to responses when the issue was raised in the termination context: the mandatory conditions of supervised release do not require active supervision or presence in the United States.⁸¹

The Office of Probation and Pretrial Services agrees with this result for admittedly self-interested reasons. Tolling terms of supervised release whenever someone is deported would create an administrative nightmare: determining when the term began running again after an illegal entry would be a difficult problem, and terms may need to be suspended indefinitely if the defendants never return to the United States.⁸² However, none of the appellate decisions take note of these concerns.

Taken together, the extinguishment and tolling decisions favor neither the government nor defendants. Defendants would prefer their terms of supervised release to be terminated by deportation so that they do not expose themselves to additional penalties for violating the terms of their supervised release if they reenter the United States. The government may prefer that deportation toll a term of supervised release so that when a defendant illegally reenters the country he or she would face the additional penalties for the violation of supervised release in addition to the reentry crime. If the term of supervised release were tolled completely during deportation, these increased penalties

76. *Id.*; *Okoko*, 365 F.3d at 967.

77. *Balogun*, 146 F.3d at 147.

78. 8 U.S.C. § 1228(a)(1) (2006).

79. *Balogun*, 146 F.3d at 147 (citing 8 U.S.C. § 1231(a)(4)(A)).

80. *Ossa-Gallegos*, 491 F.3d at 542.

81. *Id.*

82. Monograph 109, *supra* note 15, at V-21 (noting that allowing terms of supervised release to run during deportation "avoids backlogged inactive cases and provides clear jurisdiction for revocation if the offender illegally re-enters the country during the term of supervision."); see also David N. Adair, Jr., *Looking at the Law, Recent Decisions on Supervision*, 61 FED. PROBATION 74, 77 (1997) (arguing that continuing supervised release during deportation "will permit supervised release terms to run out so that districts will not have large numbers of supervised release terms in suspension that may never be reactivated").

would be available in perpetuity and would provide additional discouragement to deported individuals considering returning to the United States.

The ambiguity of the statutory scheme invited litigation around these issues. Congress went to the very edge of explicitly authorizing terms of supervised release to continue during deportation by noting that defendants may “be deported” and ordered “delivered to a duly authorized immigration official for such deportation” as a condition of supervised release.⁸³ But the statute does not go on to explain what should happen to defendants serving supervised release while deported. One might expect any rules about tolling or extinguishing to occur in the later statutory section detailing the tolling conditions, but deportation is not mentioned there either.

Instead, courts have relied on the sole statutory indicator—by allowing delivery to immigration to facilitate deportation as a condition of supervised release—as sufficient evidence that Congress did not intend deportation to interrupt the presumption that supervised release continues. At the very least, courts have shied away from imposing their own policy judgments about whether supervised release should be tolled during deportation when Congress has come so close to the issue. Instead, the appellate attitude has been “to leave the resolution of these policy questions to Congress. If Congress determines that the goals of supervised release are better realized by giving district courts discretion to issue these types of tolling orders, then Congress is free to amend the legislation to provide district courts this authority.”⁸⁴

The appellate courts seem resigned to the somewhat absurd results these decisions produce. Probation officers are not globe trotters and exercise no authority over people serving terms of supervised release in other countries. Allowing terms of supervised release to run during deportation avoids any chance of the supervision’s facilitating a transition into community life or further rehabilitation.⁸⁵ Faced with this reality, the Sixth Circuit exhorted district court judges to “use common sense in crafting discretionary conditions so that a defendant facing deportation is reasonably able to comply with the conditions while residing outside the United States.”⁸⁶

B. Immigration Detention Neither Delays nor Tolls a Term of Supervised Release

It is not uncommon for an immigrant defendant’s term of imprisonment to

83. 18 U.S.C. § 3583(d).

84. *Ossa-Gallegos*, 491 F.3d at 545.

85. *See* *United States v. Londono*, 100 F.3d 236, 242 (2d Cir. 1996) (noting that a term of supervised release may have been “subverted by [an] order of immediate deportation”).

86. *Ossa-Gallegos*, 491 F.3d at 543; *see also* *United States v. Ortuno-Higareda*, 421 F.3d 917, 925 (9th Cir. 2005) (expressing similar frustration with the confluence of supervised release and deportation and “trust[ing] that the government will not continue to deport individuals following terms of imprisonment without providing them with a written copy of their supervised release conditions, as required by statute”).

be followed immediately by transfer to immigration authorities while his or her immigration status is determined. Usually the determination results in deportation of the defendant, but in the meantime the defendant remains in custody. This situation raises questions about the timing of the supervised release term, which “commences on the day the person is released from imprisonment.”⁸⁷

To better understand these questions, consider the case of John Smith,⁸⁸ who was sentenced to a single year of imprisonment. Because his term of imprisonment was relatively short, Smith did not serve his term of imprisonment at a federal prison but was imprisoned at a local holding facility, the Metropolitan Correctional Center (MCC), in Manhattan. After his one-year term of imprisonment ended, he was not released from the MCC. He remained there because immigration authorities had placed a detainer on him, mistakenly anticipating that he would be deported. This detainer transferred custody of Smith to immigration authorities as soon as his term of imprisonment ended and kept him at the MCC. When immigration officials realized their mistake, he was released.

The first question presented by this scenario is: did Smith’s term of supervised release begin running when he was transferred on paper to immigration or when he actually walked out of the MCC? The second question is: even if Smith’s term began running immediately after his imprisonment ended, was it then immediately tolled by his immigration detention?

1. Immigration Detention Does Not Prevent a Term of Supervised Release from Starting

No one authority speaks clearly to whether immigration detention delays the commencement of a term of supervised release. This next section therefore considers several indirect authorities on the point: the statutory description of different modes of custody, the Supreme Court’s holding in *United States v. Johnson*, a host of court decisions assuming that supervised release begins even when a defendant is released directly to immigration authorities, and the interaction between supervised release and stays at halfway houses. These sources lead to the conclusion that supervised release begins as soon as a defendant’s imprisonment is over, even if the defendant remains in immigration custody.

First, deportation is not considered punishment,⁸⁹ so detention in anticipation of deportation, as the statutory text makes clear, is a different type of custody than a term of imprisonment imposed as part of a criminal sentence.

87. 18 U.S.C. § 3624(e).

88. This a real case, though the defendant’s name has been changed.

89. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511 (2007) (collecting cases).

We see this statutory classification most powerfully in 8 U.S.C. § 1226(a), which authorizes immigration detention in anticipation of deportation: “On a warrant issued by the Attorney General, an alien may be arrested and *detained* pending a decision on whether the alien is to be removed from the United States.”⁹⁰

Further distinguishing these forms of confinement, subsection (c) refers to both “detention” and “imprisonment.”⁹¹ That subsection authorizes the “[d]etention of criminal aliens” by taking them “into custody” and operates “without regard to whether the alien may be arrested or *imprisoned* again for the same offense.”⁹² Congress’s use of these words in the same statutory subsection demonstrates that the terms have different meanings.⁹³

Despite these statutory labels, Smith’s argument that his term of supervised release began when immigration took custody is not as clear-cut as it first seems. This is because in *United States v. Johnson*, the Supreme Court held that a term of supervised release begins running only once a defendant is released from physical confinement.⁹⁴

Although the defendant in *Johnson* had served “too much prison time” because two of his multiple convictions had been vacated, the Court held that his term of supervised release did not begin to run until his term of imprisonment actually ended and he walked out of prison.⁹⁵ The Court reached this conclusion even though the legally correct term of imprisonment had ended earlier as a result of the vacatur.⁹⁶ The Court explained that “[t]he objectives of supervised release would be unfulfilled if excess prison time offset and reduced terms of supervised release. Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”⁹⁷ The Court concluded, therefore, “that supervised release, unlike incarceration, provides individuals with postconfinement assistance.”⁹⁸

The Court reached this conclusion by holding that the statutory term “release” means “to be free[] from confinement.”⁹⁹ This rigid interpretation brooks no sort of “constructive” release based on the equitable argument that Johnson’s continued incarceration was through no fault of his own.¹⁰⁰

90. 8 U.S.C. § 1226(a) (emphasis added).

91. 8 U.S.C. § 1226(c).

92. *Id.* (emphases added).

93. Other statutes also use the word “detention.” *See, e.g.*, 8 U.S.C. § 1231(a)(2), which notes that “the Attorney General shall detain” an alien during a removal period.” Subsection (g) of the same section also describes “[p]laces of detention.”

94. *Johnson*, 529 U.S. 53 (2000).

95. *Id.* at 54, 59-60.

96. *Id.* at 54.

97. *Id.* at 59 (citations omitted).

98. *Id.* at 60 (citations omitted).

99. *Id.* at 57.

100. *Johnson* also uses imprecise language to describe the statutory provision it interprets by

The Supreme Court's definition of "release" appears to forestall any claim Smith might have that his supervised release began running when immigration assumed custody of him. Like Johnson, Smith was not "free[] from [the] confinement" of his cell, only shuffled around on paper when immigration took custody of him. *Johnson* seems to have read a "fresh air" requirement into the supervised release statutory scheme, and allows a term of supervised release to begin only once someone is walking free from the physical structures of confinement. This requirement clashes with the statutory classification of Smith's confinement for immigration purposes such as detention.

Two pools of jurisprudence help resolve this tension in Smith's favor. First, courts commonly have allowed supervised release to commence as soon as custody is transferred from the Bureau of Prisons to the immigration authorities.¹⁰¹ For example, in *United States v. Perez*, the Tenth Circuit noted without comment that "[a]fter serving his term of imprisonment, Perez was released into the custody of the Bureau of Immigration and Customs Enforcement ('ICE') and detained for nearly two years. Perez's period of supervised release began to run as soon as he was transferred to ICE custody."¹⁰²

The second helpful strand of decisions concerns halfway houses. These facilities, which take various names including Pre-Release Centers, community treatment centers or community correction centers, serve as pre-release way stations for defendants and are considered less restrictive of liberty than incarceration.¹⁰³ In particular, the Ninth Circuit reasoned that state-run halfway houses are not "imprisonment" that toll supervised release because both federal and state law describe them as places where "the defendant is not subject to the control of the Bureau of Prisons"¹⁰⁴ and where authorities use

using "imprisonment" and "confinement" interchangeably. *Id.* These terms are not congruent—"confinement" encompasses a wider range of restrictions of liberty, such as detention before a trial or before immigration proceedings, that are not the same as the circumstances described by the term "imprisonment." One may be "released from imprisonment" but still confined.

101. See, e.g., *United States v. Quezada*, No. 93-1972, 41994 WL 66104, at *2 (1st Cir. Mar. 4, 1994); *United States v. Felix*, 994 F.2d 550, 550 (8th Cir. 1993); *United States v. Brumigin*, No. CR-03-910, 2007 WL 3353510 (E.D.N.Y. Nov. 7, 2007); *United States v. Ramirez-Suarez*, No. 6:07-CR-18, 2007 WL 2710796, at *1 (E.D. Tex. Sep. 14, 2007); *Abiodun v. Maurer*, No. 05-cv-02305-WDM-PAC, 2007 WL 987482, at *1, *6 (D.Colo. Mar. 30, 2007); *Vargas v. Dretke*, No. C.A. C-05-378, 2005 WL 3505163, at *1 (S.D.Tex. Dec. 22, 2005); *Quezadaruz v. Nash*, No. Civ. 04-2081, 2005 WL 1398503, at *7 (D. N.J. Jun. 14, 2005); *Bi Zhu Lin v. Ashcroft*, 183 F.Supp.2d 551, 553 (D.Conn. 2002); *Engelsma v. United States*, No. 01-181-B-S, 98-27-B-S, 2001 WL 1497109, at *1 (D. Me. Nov. 26, 2001); *Granero v. United States*, Nos. 98-3077, CRIM 91-578-1, 2000 WL 236323, at *1 (E.D. Pa. Mar. 2, 2000).

102. *United States v. Perez*, 251 Fed. Appx. 523, 524 (10th Cir. 2007) (footnote omitted).

103. See, e.g., *Reno v. Koray*, 515 U.S. 50 (1995) (holding that a halfway house is not official detention for determining credit against a term of imprisonment); *United States v. Latimer*, 991 F.2d 1509 (9th Cir. 1993) (holding that confinement in a community treatment center is not incarceration that triggers career offender classification).

104. *United States v. Sullivan*, 504 F.3d 969, 971 (9th Cir. 2007) (citing *Koray*, 515 U.S. at 59).

“different methods and seek different goals than imprisonment.”¹⁰⁵ Immigration detention is analogous to residing in a state-run halfway house because the Bureau of Prisons is not controlling the confinement and the purpose of the detention is to determine a detainee’s immigration status, a goal different from those of imprisonment.¹⁰⁶

Figuring immigration detention as separate from imprisonment when it directly follows a term of imprisonment and changes none of the hard realities of the defendant’s daily life has not gone unchallenged. In *United States v. Clark*, a magistrate judge in Washington, D.C. determined that immigration detention preceding deportation prevented supervised release from beginning, but not because the defendant’s immigration detention continued the term of imprisonment.¹⁰⁷ Instead, advancing an argument that neither side had made, the magistrate determined that an additional statutory requirement of supervised release—that the defendant “shall be released by the Bureau of Prisons to the supervision of a probation officer”¹⁰⁸—had never been met because the defendant had been transferred from the Bureau of Prisons directly to immigration authorities.¹⁰⁹ Without Clark’s release to a probation officer, the term of supervised release had never even started.

The district court judge presiding over Clark’s case rejected this conclusion.¹¹⁰ Though the district court did not issue an opinion detailing why, its result is almost certainly correct. Nowhere does the supervised release statute condition the commencement of a term of supervised release on a probation officer’s sign-off. Instead, the term of supervised release “commences on the day the person is released from imprisonment.”¹¹¹ No other condition is mentioned. If reporting to a probation officer were necessary to start the term of supervised release, the statute would read “a term of supervised release begins when a term of imprisonment ends and after a defendant reports to a probation officer.” Instead, the statute notes that a prisoner shall be released to a probation officer and in the following sentence explains when the term of supervised release begins—“the day the person is released from imprisonment.”¹¹² The statute gives no consequence for failure to be released to a probation officer. The reading by the magistrate judge in *Clark* creates an unlikely farrago of distinct statutory parts and serves as a

105. *Sullivan*, 504 F.3d at 973.

106. *Cf.* *United States v. Regen*, 551 F. Supp. 2d 963, 966 (C.D. Cal. 2008) (noting that *Sullivan* only applies to halfway houses not controlled by the Bureau of Prisons); *Rivera v. Clark*, No. C 07-2420, 2008 WL 340653 (N.D. Cal. Feb. 5, 2008) (same); *United States v. Miller*, No. CR-04-264, 2007 WL 4261929 (D. Idaho Nov. 30, 2007) (same).

107. *United States v. Clark*, No. 97-0006, 2007 WL 1020363, at *4 (D.D.C. Mar. 19, 2007).

108. 18 U.S.C. § 3624(e).

109. *Clark*, No. 97-0006, 2007 WL 1020363 at *1.

110. Minute Entry for Proceedings Held Before Chief Judge Thomas F. Hogan, *United States v. Clark*, No. 97-0006 (D.D.C. May 8, 2007).

111. 18 U.S.C. § 3624(e).

112. 18 U.S.C. § 3624(e).

caution about how easy it is to misinterpret the supervised release statutory scheme.

2. *Immigration Detention Does Not Toll a Term of Supervised Release*

Immigration detention does not toll a term of supervised release because it is not imprisonment in connection with a conviction. One district court reached this conclusion directly by relying on the by-now-familiar technique of closely reading supervised release's statutory language to the exclusion of other lines of reasoning.

In *Abimbola v. United States*,¹¹³ the defendant, after being released from federal prison, entered the Connecticut state prison system to serve a sentence for a state conviction—thus delaying the commencement of his term of supervised release—and was detained by immigration authorities after his release from the state prison.¹¹⁴ Examining the supervised release statutory scheme, the court noted that it does “not expressly authorize the tolling of a term of supervised release during a period of detention by immigration authorities, and such tolling would be inconsistent with other statutory provisions.”¹¹⁵

To reach this conclusion, the court cited the statutory language authorizing sentencing courts to make compliance with immigration laws a condition of supervised release.¹¹⁶ Tolling a term of supervised release during immigration detention would be inconsistent with this section of the statute because an alien defendant could not be fulfilling a condition of supervised release—delivery to an immigration officer—if the same delivery tolled the term of supervised release. For this reason, the court concluded “that petitioner's term of supervised release commenced on the day that he was released from the Connecticut prison, and ended one year later, notwithstanding his detention by INS during that period.”¹¹⁷

The finding of a material distinction between immigration detention and imprisonment is central to the court's holding in *Abimbola*. The governing statute provides that supervised release is tolled only if “the person is imprisoned in connection with a conviction for a Federal, State or local

113. 369 F. Supp. 2d 249 (E.D.N.Y. 2005) (dismissing a petition for habeas corpus because the petitioner's federal sentence—untolled by immigration detention—had been fully discharged by the time the petition was filed); *see also* *Fofana v. United States*, No. C06-869-JLR-JPD, 2006 WL 3091152, at *1 (W.D. Wash. Oct. 27, 2006) (noting that the defendant was “currently serving a two-year term of supervised release at the Northwest Detention Center in Tacoma, Washington, in the custody of United States Immigration and Customs Enforcement (ICE) pursuant to 18 U.S.C. § 3624(e)”). *But see* *United States v. Sun*, No. CR 02-0197P, 2006 WL 909995, at *3 (W.D. Wash. Apr. 7, 2006) (cautioning that “it is unclear whether or not the Ninth Circuit would rule that this Court could toll Ms. Sun's supervised release while she is in immigration custody”).

114. *Abimbola*, 369 F. Supp. 2d at 251, 253.

115. *Id.* at 253 (citing 18 U.S.C. § 3583(d)).

116. *Id.*

117. *Id.*

crime.”¹¹⁸ Since *Abimbola*’s term of supervised release was not tolled during immigration detention, it becomes apparent that immigration detention is not “imprison[ment] in connection with a conviction for a Federal, State or local crime.”

The court’s close adherence to the statutory scheme seems to be explained by an unwillingness to open up supervised release litigation to equitable arguments.¹¹⁹ Allowing immigration detention to toll supervised release when it is not explicitly permitted by the supervised release statute might sanction other interpretations of how supervised release functions that are not closely tied to the statutory text, and those types of arguments have been rejected by the Supreme Court in *Johnson* and lower courts.¹²⁰ The supervised release statute does exactly what it says, no more and no less, and courts have rendered it all but impervious to extra-statutory arguments.¹²¹

The result in *Abimbola* is bolstered by the Ninth Circuit’s determination in *United States v. Morales-Alejo* that pretrial detention, though incarceration, does not constitute imprisonment in connection with a conviction and cannot toll a term of supervised release.¹²² The Ninth Circuit reached this conclusion because a “plain reading of [18 U.S.C. § 3624(e)] suggests that there must be an imprisonment resulting from or otherwise triggered by a criminal conviction. Pretrial detention does not fit this definition, because a person in pretrial detention has not yet been convicted and might never be convicted.”¹²³ Therefore, *Morales-Alejo*’s pretrial detention did not toll his term of supervised release.¹²⁴

The Sixth Circuit’s decision in *United States v. Goins*,¹²⁵ however, conflicts with the Ninth Circuit’s ruling that pretrial detention does not toll a term of supervised release. The rule from *Goins* is more nuanced than the one from *Morales-Alejo*: it requires both a conviction and the subtraction of pretrial detention as time served from a later term of imprisonment before the supervised release term is tolled.¹²⁶ Hence, it retroactively casts the period of pretrial detention as a term of imprisonment. This procedure may be tenable from an ex post appellate perspective. However, it will not help trial judges

118. 18 U.S.C. § 3624(e).

119. *Abimbola*, 369 F. Supp. 2d at 253 (explaining that “a term of supervised release is not subject to equitable tolling; its timing is strictly governed by statute”) (citing *United States v. Barresi*, 361 F.3d 366, 376 (2d Cir. 2004)).

120. See, e.g., *Johnson*, 529 U.S. 53 (2000); see also *United States v. Jackson*, 26 F.3d 301, 305 (5th Cir. 2005) (holding that even an unlawful imprisonment tolls a term of supervised release).

121. But see *Delamora*, 451 F.3d at 980 (allowing extra-statutory tolling of supervised release when the defendant was a fugitive).

122. 193 F.3d 1102 (9th Cir. 1999).

123. *Id.* at 1105.

124. *Id.*

125. 516 F.3d 416 (6th Cir. 2008).

126. *Goins*, 516 F.3d at 424.

when addressing a defendant whose term of supervised release would expire during a period of pretrial detention and who need to conduct a revocation hearing before the pending criminal matter is resolved.

Regardless, even the *Goins* rule would not require tolling a term of supervised release during immigration detention. After all, *Goins* conditioned the tolling on a later conviction. Immigration detention is a purely civil proceeding.¹²⁷ It does not have the direct connection to a criminal conviction required by both *Goins* and the tolling provision of supervised release, which notes that tolling occurs when the defendant is “imprisoned in connection with a conviction for a Federal, State, or local crime.”¹²⁸ The Office of Probation and Pretrial Services concurs with this interpretation and recommends that terms of supervision run during immigration detention because “these periods of incarceration are not in connection with a conviction or revocation.”¹²⁹

A close reading of the supervised release statute and the statute authorizing immigration detention leads to the conclusion that immigration detention is not imprisonment, so it cannot delay or toll a term of supervised release. When John Smith’s paperwork was transferred from the Bureau of Prisons to the immigration authorities, his term of imprisonment ended. As a result, his term of supervised release began running and was not tolled during his immigration detention.

CONCLUSION

As one district judge has observed, when someone ostensibly serving a term of supervised release is deported, the supervision becomes “an empty gesture.”¹³⁰ There is “no way to monitor his compliance with the terms of his supervised release,” so “[a]s a practical matter, there [is] no supervised release term at all.”¹³¹ His file at the Probation Department “is simply closed the moment he is transported out of the country.”¹³²

127. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also* Legomsky, *supra* note 89, at 511 (collecting cases).

128. 18 U.S.C. § 3624(e).

129. Monograph 109, *supra* note 15, at V-21; *see also* Toby D. Slawsky, *Looking at the Law, Counting the Days: When Does Community Supervision Start and Stop?*, FED. PROBATION, Sept. 1992, at 71, 72 (noting that “[n]either the statute nor the legislative history illuminates what is meant by imprisonment ‘in connection with a conviction.’ At a minimum, this provision means imprisonment as a result of a conviction. Administrative detention, such as an Immigration and Naturalization Service detainer that does not result in a conviction, would not toll the term of supervision.”); Goodwin, *supra* note 27, at 78 (explaining that “administrative detention awaiting deportation probably does not [toll supervised release] because deportation is not a conviction”); Joe Gergits, *Looking at the Law, Update to Legal Developments in the Imposition, Tolling, and Revocation of Supervision*, 69 FED. PROBATION 2, 35, 36 (expressing the same uncertainty).

130. *United States v. Balogun*, 971 F. Supp. 775, 777 (E.D.N.Y. 1997); *see also* Adair, *supra* note 82, at 79 n. 1 (noting that probation files of deported individuals are “inactive”).

131. *Balogun*, 971 F. Supp. at 777.

132. *Id.*

Similarly, though the Supreme Court has determined that supervised release's goals are fulfilled only when the defendant begins reintegration into society, long periods of immigration detention are allowed to run out a term of supervised release. In each of these scenarios, the defendant is removed from society in the United States by either detention or deportation, both of which forestall any reintegration.

Administrative convenience and an underdetermined statutory scheme—rather than the lofty policy goals of our deportation laws—cause these paradoxical results. Immediate deportation and a snuffing of any real supervision may very well be the right result in many cases, but this decision is not made on the individualized basis that supervised release promises to defendants or the policy goals it purports to advance. With few exceptions, courts do not address what appears to be the common sense notion behind these decisions: why bother wasting our resources on people we are going to kick out of the country anyway? Plugging these holes in the statutory scheme would be easy. Congress would just need to make explicit what courts have found implicit throughout the statute—supervised release and deportation have no common ground.

There is one way to harmonize deportation's overpowering influence with the policy goals of supervised release. Immigration detention and deportation suppose that the individual ensorcelled by immigration law is not wanted by the community—that “integration into the community” is actually ejection from the community. But this sly reconfiguration is hardly apparent on the face of the goals that supervised release has been created to accomplish and operates covertly in the shadow of the statutory scheme.

Appendix: Summary of Supervised Release Tolling

Situation	Tolled?	Authority
Imprisonment in connection with a conviction for a federal, state or local crime for 29 days or less	no	18 U.S.C. § 3624(e)
Imprisonment in connection with a conviction for a federal, state or local crime for more than 29 days	yes	18 U.S.C. § 3624(e)
Pretrial detention	?	yes: <i>Goins</i> , 516 F.3d 416 (6th Cir. 2008) no: <i>Morales-Alejo</i> , 193 F.3d 1102 (9th Cir. 1999)
Halfway house (not run by Bureau of Prisons)	no	<i>Sullivan</i> , 504 F.3d 969, 971 (9th Cir. 2007)
Halfway house (run by Bureau of Prisons)	yes	<i>Regen</i> , 2008 WL 724096 (C.D. Cal. 2008); <i>Rivera</i> , 2008 WL 340653 (N.D. Cal. 2008); <i>Miller</i> , 2007 WL 4261929 (D. Idaho 2007)
Immigration detention	no	<i>Abimbola</i> , 369 F. Supp. 2d 249 (E.D.N.Y. 2005); Monograph 109 at V 21; Slawsky, <i>Looking at the Law</i> , FED. PROBATION, Sep. 1992 at 72; Goodwin, <i>Looking at the Law</i> , FED. PROBATION, Dec. 1997 at 78; Gergits, <i>Looking at the Law</i> , FED. PROBATION, Dec. 2005 at 36
Deportation	no	<i>Balogun</i> , 146 F.3d 141 (2d Cir. 1998); <i>Juan-Manuel</i> , 222 F.3d 480 (8th Cir. 2000); <i>Okoko</i> , 365 F.3d 962 (11th Cir. 2004); <i>Ossa-Gallegos</i> , 491 F.3d 537 (6th Cir. 2007); Monograph 109 at V 21; Adair, <i>Looking at the Law</i> , FED. PROBATION, Jun. 1997, at 77
Absconding	yes	<i>Delamora</i> , 451 F.3d 977 (9th Cir. 2006). <i>But see</i> Monograph 109 at V 21 (“Unless contradicted by controlling law in the circuit, apply the general rule that a term is tolled when an offender makes him or herself unavailable for supervision.”)

