

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Before the
UNITED STATES SENTENCING COMMISSION
Public Hearing
Wednesday, June 1, 2011
Mecham Conference Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, D.C. 20002-8002

The hearing was convened, pursuant to notice, at

8:34 a.m., before:

JUDGE PATTI B. SARIS, Chair

MR. WILLIAM B. CARR, JR., Vice Chair

MS. KETANJI BROWN JACKSON, Vice Chair

CHIEF JUDGE RICARDO H. HINOJOSA, Commissioner

JUDGE BERYL A. HOWELL, Commissioner

MS. DABNEY FRIEDRICH, Commissioner

MR. JONATHAN J. WROBLEWSKI, Ex-Officio Member of the
Commission

1 PANELISTS:

2 Panel I: Executive Branch Panel:

3 THE HONORABLE ERIC H. HOLDER, JR.

4 Attorney General of the United States

5 THE HONORABLE STEPHANIE M. ROSE

6 United States Attorney, Northern District of Iowa

7 Cedar Rapids, Iowa

8 THOMAS R. KANE

9 Acting Director, Federal Bureau of Prisons

10 Washington, D.C.

11

12 Panel II: Practitioners Panel:

13 MICHAEL S. NACHMANOFF

14 Federal Public Defender, Eastern District of Virginia

15 Alexandria, Virginia

16 DAVID DEBOLD

17 Practitioners Advisory Group,

18 Gibson Dunn, Washington, D.C.

19 JAMES FELMAN

20 Co-Chairman of the Sentencing Subcommittee,

21 Criminal Justice Section, American Bar Association

22 Tampa, Florida

1 Panel III: Law Enforcement Experts Panel:

2 THE HONORABLE ASA HUTCHINSON

3 Senior Partner, Asa Hutchinson Law Group

4 Rogers, Arkansas

5 DAVID HILLER

6 National Vice President, Fraternal Order of Police

7 Grosse Pointe Park, Michigan

8 CHRISTOPHER D. CHILES

9 Chairman of the Board, National District Attorneys

10 Association, Huntington, West Virginia

11

12 Panel IV: Judicial Branch Panel:

13 THE HONORABLE REGGIE WALTON

14 Criminal Law Committee of the Judicial Conference,

15 United States District Judge, Washington, D.C.

16

17 Panel V: Academics Panel:

18 MICHAEL M. O'HEAR

19 Associate Dean for Research, Professor of Law,

20 Marquette University Law School

21 Milwaukee, Wisconsin

22

1 Panel VI: Community Interest Panel:

2 MARC MAUER

3 Executive Director, The Sentencing Project

4 Washington, D.C.

5 HILARY O. SHELTON

6 Washington Bureau Director and Senior Vice President

7 for Advocacy, NAACP, Washington, D.C.

8 JESSELYN McCURDY

9 Senior Legislative Counsel, ACLU, Washington, D.C.

10 PAT NOLAN

11 Prison Fellowship, Washington, D.C.

12

13 Panel VII: Community Interest Panel:

14 JULIE STEWART and NATASHA DARRINGTON

15 Families Against Mandatory Minimums, Washington, D.C.

16 NKECHI TAIFA

17 Senior Policy Analyst for Civil and Criminal Justice

18 Reform, Open Society Institute, Washington, D.C.

19 JASMINE L. TYLER

20 Deputy Director of National Affairs,

21 Drug Policy Alliance, Washington, D.C.

22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

P R O C E E D I N G S

(8:34 a.m.)

CHAIR SARIS: Good morning. I want to welcome everyone to this very important hearing on the possible retroactivity of the new guideline amendments implementing the Fair Sentencing Act of 2010.

This hearing will provide critical information to assist us, the Commission, in its deliberations on retroactivity. To date, the Commission has received over 37,000 pieces of public comment on this issue. This is not surprising, as over 12,000 people may be eligible to petition the courts if the new amendment is made retroactive.

These numbers are significant. The challenge of how to deal fairly and justly with the drug sentencing, and in particular crack sentencing, is one of the most essential issues presently facing the criminal justice community. This is particularly true today, as just more than half the people in the Bureau of Prison are there for drug crimes.

In the Sentencing Reform Act, Congress

1 specifically authorized the Commission to make
2 amendments that result in lower penalties
3 retroactive. To help in this retroactivity
4 determination, the Commission has issued a policy
5 statement under what we call 1B1.10. Under this
6 section, we have made some amendments retroactive
7 over the course of the guidelines' history, including
8 the 2007 amendment that reduced crack penalties.

9 However, we don't always make amendments
10 retroactive. This section assists courts in deciding
11 how and to what degree retroactive amendments should
12 be applied to eligible defenders, and highlights
13 public safety as an important consideration for the
14 courts.

15 Only after careful analysis and
16 consideration does the Commission determine that the
17 purposes of sentencing as set forth in the Sentencing
18 Reform Act and the views of the criminal justice
19 community warrant retroactive application of the
20 amendments.

21 Among the factors the Commission must
22 consider are:

23

1 The purpose of the amendment;

2 The magnitude of the change in the
3 guideline range made by the amendment; and

4 The difficulty of applying the amendment
5 retroactively.

6 And of course these considerations must
7 all take place in the context of the sentencing
8 factors set forth by statute.

9 So the testimony and insights of each one
10 of you today – the Attorney General, the prosecutors,
11 defense attorneys, defendants, law enforcement,
12 judges, and academics – are essential to our decision
13 making process, and we appreciate all of you coming
14 through this steamy Washington weather, and the
15 brown-outs, to come here today.

16 So thank you.

17 I would like to begin with introducing the
18 commissioners. I start with Mr. Will Carr, who has
19 served as vice chair of the Commission since December
20 2008. He previously has served as an assistant U.S.
21 attorney in the Eastern District of Pennsylvania from
22 1981 until his retirement in 2004.

23

1 And to my left, Ms. Ketanji Jackson, has
2 served as vice chair of the Commission since February
3 2010. Previously she was a litigator at Morrison &
4 Foerster, and was an assistant federal public
5 defender in the Appeals Division of the Office of the
6 Federal Defender in the District of Columbia.

7 Judge Ricardo Hinojosa served as Chair and
8 subsequently acting chair of the Commission from 2004
9 to 2009. He is the chief judge of the United States
10 District Court for the Southern District of Texas,
11 having served on that court since 1983.

12 It is also my great pleasure, to the
13 extent you don't know it – and he will blush – that
14 last week Judge Hinojosa was selected as the
15 recipient of the prestigious 29th Annual Edward J.
16 Devitt Distinguished Service to Justice Award. So
17 let's just give him applause.

18 (Applause.)

19 CHAIR SARIS: So, Judge Beryl Howell has
20 served on the Commission since 2004. She is a judge
21 of the United States District Court of the District
22 of Columbia, probably still qualifies as what we call

23

1 a "baby judge," having been nominated to that
2 position this past July and confirmed in December.

3 And Dabney Friedrich – we didn't
4 deliberately sit the women here [on one side], and
5 the guys here [on the other side]; it just happens
6 that way – so Dabney Friedrich has served on the
7 Commission since December 2006. Previously she
8 served as an associate counsel at the White House, as
9 counsel to Chairman Orrin Hatch of the Senate
10 Judiciary Committee, as an assistant United States
11 attorney in the Southern District of California, and
12 the Eastern District of Virginia.

13 And over here is Jonathan Wroblewski, an
14 ex-officio member of the Commission, representing the
15 Attorney General of United States. Currently he
16 serves as director of the Office of Policy and
17 Legislation in the Criminal Division of the
18 Department of Justice.

19 So we are all eager to hear your
20 testimony. And before we get going, does anybody
21 here want to make any preliminary comments?

22 (No response.)

23

1 CHAIR SARIS: All right. So this is how
2 it works. Each witness – except the first one – will
3 have up to seven minutes for a statement, followed by
4 a question and answer period.

5 So what we do is – actually this is what we
6 do in the First Circuit; there's the green, the
7 yellow, and the red lights, and that way we all make
8 sure that everyone has time to be engaged in some
9 discussion with us in Q&As.

10 So let me start with our very first
11 witness, or participant, today. And he needs almost
12 no introduction. Eric Holder of course is the
13 Attorney General of the United States. People say,
14 and I think it is a good metaphor, that justice is a
15 three-legged stool consisting of judges, prosecutors,
16 and defense attorneys. And Mr. Holder, Attorney
17 General Holder, has served in all three roles.

18 Upon his graduation from law school,
19 Mr. Holder joined the Department of Justice through
20 the Attorney General's Honors Program, the program
21 that all my clerks are dying to get into. And then
22 in 1988, President Reagan appointed Mr. Holder to

23

1 serve as an associate judge of the Superior Court of
2 the District of Columbia where he presided over
3 hundreds of criminal and civil trials during his five
4 years on the bench.

5 In 1993, President Clinton appointed Judge
6 Holder to serve as the United States attorney for the
7 District of Columbia. In 1997, President Clinton
8 appointed Mr. Holder to serve as deputy attorney
9 general of the United States, a position that he held
10 until the end of the Clinton administration.

11 At the request of President Bush,
12 Mr. Holder served as Acting Attorney General in 2001,
13 pending the confirmation of Attorney General John
14 Ashcroft. He also has joined the Washington, D.C.
15 firm of Covington & Burling as a partner in the
16 firm's litigation group, and he represented clients
17 in both civil and criminal cases.

18 President Barack Obama nominated Mr. Holder
19 to be Attorney General and his nomination was
20 confirmed by the United States Senate on February
21 2nd, 2009, and he began his service as the 82nd
22 Attorney General of the United States the next day.

23

1 I have had the opportunity to meet
2 Mr. Holder before. He spoke before a group of judges
3 last year, and I appreciate the respect and knowledge
4 he shows about the function of the judiciary.

5 Welcome.

6 ATTORNEY GENERAL HOLDER: Thank you.

7 Well thank you, Madam Chair, and
8 distinguished members of the Commission. I want to
9 thank you for the opportunity that you are giving me
10 to appear before you today.

11 Along with my colleagues, United States
12 Attorney Stephanie Rose, and Acting Bureau of Prisons
13 Director Tom Kane, I am here to discuss our shared
14 goals and this administration's ongoing efforts to
15 ensure the firm and fair administration of justice in
16 our nation's sentencing policies.

17 Thanks to the extraordinary work of this
18 Commission and the contributions of policymakers and
19 prosecutors, advocates, and researchers, law
20 enforcement officers, and administration officials,
21 as well as congressional leaders on both sides of the
22 aisle, in recent months significant and I think long

23

1 overdue progress has been made to improve the
2 strength and the integrity of our federal sentencing
3 system.

4 As we can all agree, I would hope, our
5 sentencing policies must be tough. They must be
6 predictable. And they must be aimed at enhancing
7 public safety, reducing crime, reducing recidivism,
8 eliminating unwarranted disparities, minimizing the
9 negative, often devastating effects of illegal drugs,
10 and inspiring trust and confidence in the fairness of
11 our criminal justice system.

12 Last August marked an historic step
13 forward in achieving each of these goals when
14 President Obama signed the Fair Sentencing Act into
15 law.

16 Now this law not only reduced the
17 inappropriate 100:1 sentencing disparity between
18 crack and powder cocaine offenses – a disparity that
19 this Commission itself has found to be unjustifiable
20 and repeatedly recommended should be amended – it also
21 strengthens the hand of law enforcement, and includes
22 tough new criminal penalties to mitigate the risks

23

1 posed by our nation's most serious and most
2 destructive drug traffickers and violent offenders.
3 Because of the Fair Sentencing Act, our nation is now
4 closer to fulfilling its fundamental and founding
5 promise of equal treatment under law.

6 But I am here today because I believe, and
7 it is the administration's viewpoint, that we have
8 have more to do. Although the Fair Sentencing Act is
9 being successfully implemented nationwide, achieving
10 its central goals of promoting public safety and
11 public trust, and ensuring a fair and effective
12 criminal justice system – this requires the
13 retroactive application of its guidelines amendment.

14 Now of course in considering retroactive
15 application of this amendment, protecting the
16 American people is and will remain the
17 administration's top priority. President Obama and
18 I, along with leaders across the administration,
19 understand how illegal drugs, including crack, ravage
20 communities.

21 Crack offenders, especially violent ones,
22 should be punished. And the Justice Department will

23

1 make every effort to prosecute them. However, as
2 years of experience and study have shown, there is
3 simply no just or logical reason why their
4 punishments should be dramatically more severe than
5 those of other cocaine offenders – a position that
6 Congress overwhelmingly supported with the passage of
7 the Fair Sentencing Act.

8 The Commission's sentencing guidelines
9 already make clear that retroactivity of the
10 guideline amendment is inappropriate when its
11 application poses a significant risk to public
12 safety, and the administration agrees.

13 In fact, we believe that certain dangerous
14 offenders, including those who possessed or used
15 weapons in committing their crimes, and those who
16 have very significant criminal histories, should be
17 categorically prohibited from receiving the benefits
18 of retroactivity.

19 The administration's suggested approach to
20 retroactivity of the amendment recognizes
21 congressional intent in the Fair Sentencing Act to
22 differentiate dangerous and violent drug offenders,
23

1 and ensure that their sentences are no less than
2 those originally set.

3 However, we believe that the imprisonment
4 terms of those sentenced pursuant to the old
5 statutory disparity, and who are not considered
6 dangerous drug offenders, should be alleviated to the
7 extent possible to reflect the new law.

8 As a federal prosecutor, and as Attorney
9 General, and as a former judge, as a former United
10 States attorney, and as former deputy attorney
11 general, this issue is very personal to me. It is
12 deeply personal to me.

13 While serving on the bench here in
14 Washington, D.C., in the late '80s and the early
15 '90s, I saw the devastating effects of illegal drugs
16 on families, communities, and individuals. I know
17 what it is like to sentence young offenders to long
18 prison terms, and I did so to protect the public from
19 those who were serious threats and who had engaged in
20 violence.

21 However, throughout my tenure as the
22 United States attorney in the city, I also saw that

23

1 our federal crack sentencing laws did not achieve
2 that result. Our drug laws were not perceived as
3 fair, and our law enforcement officers, and our law
4 enforcement efforts suffered as a result.

5 That is why it is a special privilege for
6 me, and was a special privilege for me to stand with
7 President Obama when he signed the Fair Sentencing
8 Act into law. And that is why I feel compelled to be
9 here in person today to join my colleagues in calling
10 for the retroactive application of the guidelines
11 amendment.

12 Now I recognize that some disagree with
13 this approach. We have heard this before. In 2008,
14 after the Commission decided to apply retroactively
15 an amendment that reduced the base offense level of
16 crack by two levels, known as "the crack-minus-2"
17 amendment, some, including some within the Department
18 of Justice, predicted that such a move would cause a
19 dramatic rise in crime rates.

20 However, as a study released by the
21 Commission just yesterday shows, those whose
22 sentences were reduced after that amendment was

23

1 applied retroactively actually had a slightly lower
2 rate of recidivism than the study's control group.

3 Three years ago, the Bureau of Prisons,
4 the Marshals Service, federal prosecutors, judges,
5 probation officers, and others stepped up and did the
6 necessary work to ensure the successful and effective
7 retroactive application of the crack-minus-2
8 amendment.

9 Today, despite growing demand and limited
10 budgets, my colleagues across the Department of
11 Justice and the criminal justice system stand ready
12 to do that which is necessary to make any sentencing
13 system – our sentencing system fairer and more
14 effective. And once again, we are relying on the
15 Commission to lead the way.

16 Recently, some have suggested that since
17 the Fair Sentencing Act contains no specific
18 provision regarding retroactivity, it is beyond the
19 role of the Sentencing Commission to make the
20 guideline amendment retroactive without direction from
21 the Legislative Branch.

22 We disagree with this position. Based on
23

1 the Commission's authorizing statute, we believe that
2 the Commission would be well within its authority to
3 make the Fair Sentencing Act amendment retroactive
4 along the lines that we suggest.

5 Madam Chair and distinguished members of
6 the Commission, it is time to honor not only the
7 letter of his law but also the spirit of its intent.
8 Our nation's ability to do so rests in your hands.

9 Again, I want to thank you for the
10 opportunity to appear before you. I look forward to
11 continuing to work with each of you, and with leaders
12 across Congress and the administration to strengthen
13 federal sentencing policy and to ensure that our
14 nation's criminal justice system serves as a model of
15 effectiveness and as a model of fairness.

16 I am now pleased to turn this over to my
17 colleagues, U.S. Attorney Rose and Acting Director
18 Kane. They will elaborate further on the
19 administration's position and also will be available
20 to answer any questions that you might have.

21 Thank you very much for the opportunity to
22 appear before you today.

23

1 (Attorney General Holder leaves the room.)

2 CHAIR SARIS: Thank you. Now I am going
3 to introduce the other two panelists. I am not sure
4 which order you have agreed to go in, but let me just
5 start off with Stephanie Rose who is the United
6 States attorney for the Northern District of Iowa.
7 Previously she served as an assistant U.S. attorney,
8 was deputy criminal chief, and a special assistant
9 United States attorney. Welcome, and thank you for
10 coming halfway across the country. Thank you very
11 much for coming.

12 Acting Director Thomas Kane I just met the
13 other day. He serves as an acting director of the
14 Federal Bureau of Prisons in Washington, D.C. He has
15 served in a number of capacities for the BOP, and
16 previously served as an instructor at the New York
17 State Police Academy. Welcome.

18 So have you decided you are going to go
19 first? All right. Thank you.

20 MS. ROSE: Thank you. Madam Chair and
21 members of the Sentencing Commission:

22 On August 3rd of 2010, President Obama

23

1 signed into law the Fair Sentencing Act of 2010, the
2 FSA, a law that had both historic and bipartisan
3 support. The President and the Attorney General have
4 hailed the FSA's enactment as an important step in
5 achieving more just sentencing laws and policy.

6 We appreciate the steps that the
7 Commission has taken to date to implement the FSA,
8 including the promulgation of a permanent amendment
9 to the guidelines this past April.

10 We are pleased now to have an opportunity
11 to testify before you – on behalf of the Department of
12 Justice and federal prosecutors across the country –
13 regarding the extent to which the recently
14 promulgated amendment should be given retroactive
15 effect.

16 The department's position is that the
17 quantity-based component of the FSA amendment should
18 be applied retroactively, except as to offenders with
19 high criminal history scores, or who possessed or
20 used weapons as part of their offense.

21 Like the Attorney General, this is an
22 issue that is personal to me. Prior to becoming the
23

1 United States attorney, I served for 12 years as a
2 prosecutor in the Northern District of Iowa's Drug
3 Unit. During that tenure, I handled more than 100
4 organized crime drug enforcement task force cases
5 involving crack cocaine.

6 As our district's deputy criminal chief, I
7 was tasked with implementing the Northern District of
8 Iowa's response to the 2007 crack-minus-2 amendment
9 for nearly 300 potential inmates. These efforts
10 required coordination with BOP, the United States
11 Probation Office, the Federal Public Defender's
12 Office, the Criminal Justice Act Defense Panel, the
13 clerk of court, as well as our two primary judges in
14 the Northern District of Iowa who hold, as is well
15 documented, extremely divergent views on the crack
16 cocaine laws. And for the past year I have served on
17 the Attorney General's Advisory Committee.

18 These experiences have informed and shaped
19 my view of crack cocaine laws both historic and
20 present. As members of the department have
21 previously testified, public trust and confidence are
22 essential elements of any effective criminal justice
23

1 system.

2 Our laws and their enforcement must not
3 only be fair, but must be perceived as fair. It has
4 been the position of the administration that the
5 100:1 quantity ratio embodied in the federal cocaine
6 sentencing structure for most of the last 25 years
7 failed to appropriately reflect the differences and
8 similarities between crack and powder cocaine, the
9 offenses involving each form of those drugs, and the
10 goal of sentencing major and serious traffickers to
11 significant prison sentences.

12 We believe the structure has been
13 especially problematic because citizens view it as
14 fundamentally unfair. Congress took a big step in
15 rectifying this sense of unfairness with the passage
16 of the FSA. The Commission took another big step by
17 promulgating the recently passed sentencing guideline
18 amendment.

19 We think one additional step is needed
20 this year: to apply that guideline retroactively.

21 My written testimony contains a summary of
22 the case law and policies surrounding the need for

23

1 finality in criminal judgments, the general
2 presumption against retroactive application of
3 guidelines amendments, and a discussion of those
4 concepts in the context of *Booker*, and *Kimbrough*, and
5 *Spears*, and *Pepper*. I won't repeat that information
6 here, but it is clear that the interest in finality
7 as a deterrence is as relevant, if not more so, in
8 the context of the sentencing guidelines as it is in
9 discussing criminal judgments.

10 In reaching our position on retroactivity
11 of the FSA guideline amendment, we are driven first
12 and foremost by the intent of the Act and the
13 administration's goal to remedy the unwarranted
14 disparity created by the 100:1 quantity ratio.

15 We believe the presumption against
16 retroactive application of the guideline amendments
17 is overcome when an amendment is promulgated to
18 rectify an unfairness that is widely recognized by
19 the judiciary, Congress, and the public. The FSA
20 amendment is, in our view, that kind of amendment.

21 However, there is another interest that we
22 believe must inform the Commission in how to apply

1 the FSA amendment retroactively. Public safety, we
2 believe, must be at the heart of the Commission's
3 decision. As such, it is our position that the
4 release dates should not be pushed up for those
5 offenders who pose a significant danger to the
6 community.

7 We believe this limitation should be
8 articulated more clearly in section 1B1.10, and
9 certain dangerous offenders should be categorically
10 prohibited from receiving benefits of retroactivity,
11 a step that goes beyond the current Commission
12 policy.

13 We think this approach to retroactivity of
14 the FSA amendment also recognizes congressional
15 intent in the FSA to differentiate between dangerous
16 drug offenders and to sentence them to no less than
17 the current policy, and in some cases more severely.

18 Outlined further in my written testimony
19 is the Commission's authority to direct limited
20 retroactivity. We believe the Commission should do
21 so by granting retroactive application to just the
22 quantity-based reduction in the amended guideline and
23

1 not give retroactive effect to the mitigating and
2 aggravating factors, and then again only to those
3 crack offenders who did not receive a weapon
4 enhancement, either guideline or statutory, and who
5 have a criminal history category of I, II, or III, as
6 was determined at their original sentencing.

7 With these limitations, all of which
8 should have been determined in a prior court action,
9 or should be documented in the court case files,
10 courts will be able to determine eligibility for
11 retroactivity based solely on the existing record,
12 and without a need for transporting defendants back
13 to court and holding extensive fact-finding.

14 Retroactivity would be available to a
15 class of non-violent offenders who have limited
16 criminal history and who did not possess or use a
17 weapon.

18 While these factors are not a perfect
19 proxy for dangerousness or for the limits Congress
20 intended in the statute, they are a reasonable proxy
21 based on the Commission's own research and a criteria
22 that will not require new hearings.

23

1 As the Attorney General has reiterated,
2 the Fair Sentencing Act of 2010 is a substantial step
3 toward alleviating sentences for those to whom the
4 100:1 quantity ratio was applied. In light of the
5 consensus for change to the federal cocaine
6 sentencing policy and the reasons behind it,
7 retroactive application is appropriate. But we
8 believe our recommended approach achieves an
9 important balance between ensuring public safety and
10 allowing the efficient administration of justice.

11 Thank you for the opportunity to share the
12 views of the Department of Justice on this important
13 topic. We look forward to working with this
14 Commission on this issue, and to working with all of
15 our federal justice system partners to achieve equity
16 and fairness under the law.

17 I would guess that Acting Director Kane
18 may answer some of the questions you would have. I
19 would propose answering questions after his
20 testimony, if the Commission approves that.

21 CHAIR SARIS: Thank you. Mr. Kane?

22 MR. KANE: Good morning. Thank you.

23

1 Madam Chair, Vice Chairs Carr and Jackson,
2 and members of the Sentencing Commission:

3 I appreciate the opportunity to appear
4 before you today to discuss the plan of the Bureau of
5 Prison, the bureau, for applying the sentencing
6 guidelines that the Commission amended in order to
7 implement the Fair Sentencing Act of 2010, the FSA.

8 First, however, I want to thank the
9 Commission for collaborating with the bureau on our
10 data-sharing initiative that has allowed for detailed
11 and careful analyses of potential changes to
12 sentencing, including changes to the crack cocaine
13 sentencing guidelines. I look forward to our
14 continued strong working relationship.

15 As you know, the bureau is the nation's
16 largest corrections system, responsible for the
17 incarceration of more than 215,000 inmates. And our
18 population continues to grow – from 2001 through 2010,
19 we experienced annual net growth averaging 6,400 new
20 inmates. So far this year, we have seen an increase
21 of more than 5,800 inmates, and we expect another
22 5,000 inmates in Fiscal Year 2012.

23

1 The Congressional Budget Office has
2 estimated that modified sentences required under the
3 FSA as enacted – that is, without retroactivity – would
4 slow the expected growth in the federal prison
5 population by about 1,500 inmates between 2011 and
6 2015.

7 The CBO further has estimated that this
8 would result in a cost avoidance of \$42 million over
9 that same period. While the bureau is in the process
10 of coordinating with the Commission to estimate more
11 accurately the cost savings to the bureau if the
12 proposed amendment is given limited retroactive
13 effect designed to promote fairness while ensuring
14 public safety, we assume that such retroactive
15 application would result in additional cost savings.

16 Based on our experiences with the 2008
17 amendment to crack cocaine sentencing guidelines, the
18 bureau has established a plan to implement
19 retroactive guidelines contemplated by the
20 Commission.

21 First, we are prepared to allow inmates
22 expanded access to legal materials, legal counsel,

23

1 and necessary equipment to review their cases and
2 submit legal materials.

3 Second, we are prepared to rapidly and
4 accurately recalculate inmate sentences to reflect
5 amended court orders.

6 We know from experience that retroactivity
7 will result in a marked increase in inmates seeking
8 to review their central files and their presentence
9 reports to determine if they are eligible for a
10 sentence reduction.

11 All policies related to the secure
12 maintenance of the central file would remain in
13 force, including the prohibition on inmates retaining
14 in their possession a copy of their PSR. To
15 accommodate these increases in requests, access would
16 be given as expeditiously as possible with priority
17 given to inmates with the earliest release dates.

18 We also know that retroactivity would
19 result in increased requests for legal telephone
20 calls that, consistent with policy, can be made on
21 unmonitored telephone lines. For such calls, staff
22 must make reasonable attempts to verify that such

23

1 calls are to an attorney's office, a process that can
2 be time-consuming if numerous inmates need to make
3 such calls. Of course inmates can and do make legal
4 calls on monitored Inmate Telephone System
5 telephones, thereby ameliorating somewhat the
6 administrative burden of increased legal phone calls.

7 Legal visits would likely increase in the
8 months following any action regarding retroactivity
9 by the Commission. Institutions would need to
10 contemplate expanding the number of days and the
11 hours that attorney visits are allowed. Additional
12 staff may be required to monitor these visits in
13 accordance with existing policies and procedures, as
14 well as to meet the expected increase in the amount
15 of incoming and outgoing legal mail.

16 Finally, expanded access to the law
17 library would likely be needed to accommodate the
18 increase in inmate legal work, and we would need to
19 ensure that adequate resources such as typewriters
20 and copier machines were available.

21 No doubt, some inmates potentially
22 affected by retroactivity will be housed in Special

1 Housing Units for Administrative Detention or
2 Disciplinary Segregation. Providing these inmates
3 with reasonable access to legal calls, visits, and
4 mail, and access to the law library presents
5 additional administrative challenges.

6 In the event that the guideline changes
7 were made retroactive, the bureau must be prepared to
8 rapidly and accurately recalculate sentences to
9 reflect court-ordered changes. In response to the
10 2008 guideline changes, the bureau established a team
11 of staff at our Designation and Sentence Computation
12 Center that was responsible for the recalculation of
13 sentences based upon the amended orders. The team
14 was responsible for receiving the amended orders
15 through the e-Designate system from the United States
16 Marshals Service. Upon receipt of the order, the
17 team recalculated the sentence.

18 In addition to the new release date
19 appearing in our electronic inmate information
20 system, SENTRY, the team also notified staff at each
21 institution of the amended sentence so that
22 institution staff could ensure that the inmate
23

1 completed appropriate programming and was prepared
2 for release.

3 Finally, based on our experience with
4 accelerated release dates occasioned by the
5 retroactive application of the 2007 amendments to
6 guidelines applicable to crack cocaine offenses, the
7 bureau is prepared to take measures to ensure that
8 offenders released due to the retroactive application
9 of the FSA are transitioned effectively back into the
10 community.

11 First of all, we plan to request that
12 judges stay immediate release orders for ten days to
13 allow the bureau to make required release
14 notifications – for example, drug, violence, and/or
15 sex offender notifications – to conduct Adam Walsh Act
16 civil commitment reviews, and to conduct detainer
17 reviews.

18 Further, successful re-entry is dependent
19 upon the post-release continuation of both treatment
20 needs – for example, drug treatment, sex offender
21 treatment, or mental health intervention – and
22 programming needs – for example GED and other

23

1 educational programs – that offenders otherwise would
2 have received from the bureau while serving their
3 sentences.

4 In the past, the majority of offenders
5 scheduled for immediate release who identified
6 medical, psychological, and psychiatric treatment
7 needs generally received such follow-up care as a
8 condition of their supervised release.

9 Similarly, we expect that most programming
10 needs can be met via supervised release conditions
11 through existing community programs overseen by the
12 U.S. Probation Office.

13 For those inmates who will be scheduled
14 for a fairly rapid, though not immediate, release,
15 the bureau can address some treatment and programming
16 needs through expedited referrals that facilitate
17 inmate placement in the appropriate community-based
18 programs. There will certainly be inmates with other
19 re-entry programming needs that will not be
20 addressed, however – most notably, educational
21 programming needs such as GED completion.

22 With respect to community-based
23

1 programming such as Residential Re-entry Centers and
2 home detention, some inmates identified for immediate
3 release will already have transferred to RRCs and
4 will have access to this important re-entry tool.
5 With respect to inmates identified for immediate
6 release who have not yet been placed in an RRC, or
7 halfway house, the bureau would be open to working
8 with the courts to seek RRC bed space for these
9 offenders should the court choose to order or
10 recommend a period of RRC placement during supervised
11 release.

12 Coupled with our use of home detention for
13 low-risk/low-need releasing offenders – many of whom
14 will likely have the earliest release dates should
15 the amendment be made retroactive – we anticipate no
16 significant challenges in this area.

17 Madam Chair, and members of the
18 Commission, again I want to thank you for this
19 opportunity to discuss the Bureau of Prison's
20 priorities and challenges as they would pertain to
21 the guideline change contemplated today.

22 I am confident that we can effectively

23

1 manage any proposed sentencing changes for inmates
2 within our population, and I would be pleased to
3 answer any questions you may have.

4 CHAIR SARIS: Thank you.

5 VICE CHAIR CARR: Ms. Rose, the President
6 and the Department of Justice were in favor of
7 reducing the disparity of crack and powder cocaine
8 altogether, correct?

9 MS. ROSE: They were.

10 VICE CHAIR CARR: And the Fair Sentencing
11 Act didn't go that far, did it?

12 MS. ROSE: Correct.

13 VICE CHAIR CARR: And if the 100:1 ratio
14 was unfair for people in criminal history categories
15 I through III, I want to know why it is not unfair for
16 people in criminal history categories IV through VI,
17 taking into account a couple of things.

18 One, that the guidelines take into account
19 criminal history and weapon possession in determining
20 a guideline range, so those would still impact
21 negatively people in those situations. And if our
22 own recidivism study – which I realize was just

23

1 released yesterday – reveals that there's no greater
2 rate of recidivism for people who are in the higher
3 criminal history categories who were released early
4 under the 2007 amendment, or weapon possession, why
5 is it fair not to let a district court judge who has
6 the discretion to take into account, and we direct
7 them to, public safety in deciding whether or not to
8 reduce a sentence, why is it fair to limit it to
9 criminal history categories I through III?

10 MS. ROSE: There's a couple different
11 issues in there.

12 First, the data that came out on
13 recidivism came out on May 26th of your
14 Commission there. It didn't show that there was not
15 an increase in recidivism the higher the criminal
16 history category went. In fact, it showed the
17 opposite. Those who were in a Category VI were 44
18 percent recidivist rate in both the control and the
19 other group, in a two-year period.

20 And if you look at the charts there, in
21 particular the tables that are part of that study,
22 that trends up. The longer they're out, the more

23

1 likely they are to recidivate, and the higher the
2 criminal history category, the more significant that
3 rate of recidivism.

4 There was no rate increase with the
5 weapon, Commissioner Carr. You're correct about
6 that.

7 The distinction I think here is not that
8 the administration or the President is saying that
9 there was an unwarranted disparity in those criminal
10 history categories IV, V, and VI, but rather that when
11 this Commission makes a decision about retroactive
12 application, the Commission must consider public
13 safety.

14 And in this case, public safety has to be
15 balanced against some of those unfairness issues, and
16 looking realistically at the efficient and fair
17 administration of justice.

18 This is a department that is in a reduced
19 situation as far as staff goes. This is a department
20 that's been through a more simple amendment cycle
21 regarding many of these same offenders back in '07
22 and '08, and knows well the amount of resources that

23

1 were taken to address those issues, and is looking at
2 those recidivist rates, and in looking at the fact
3 that people who have weapons are more dangerous, and
4 on a balance, not a perfect balance, but on a balance
5 saying our position is that we believe those
6 exclusions are necessary to reach that appropriate I
7 guess resolution.

8 COMMISSIONER HINOJOSA: Well I guess a
9 follow-up question to Vice Chair Carr's question. I
10 guess the point is then why did you not make that
11 distinction with regards to the change in general?

12 Obviously people will continue to be
13 sentenced without retroactivity in all criminal
14 history categories with the benefit of the Fair
15 Sentencing Act, so why is that different? Or do you
16 plan to argue in court that for those criminal
17 history categories IV, V, and VI, the judges should go
18 higher than the Fair Sentencing Act?

19 MS. ROSE: No. I think moving forward is
20 a different analysis than looking back.

21 COMMISSIONER HINOJOSA: And why is that?

22 MS. ROSE: Well I think because the

23

1 statute in 1B1.10 requires us to consider public
2 safety in making a decision about retroactivity.

3 COMMISSIONER HINOJOSA: But so does
4 3553(a). I mean, isn't that one of the big factors
5 in 3553(a), public safety, when we sentence somebody
6 initially?

7 MS. ROSE: It is one of the many factors
8 in 3553(a), yes.

9 COMMISSIONER HINOJOSA: In fact some would
10 argue the most important, because [in] 3553(a)(2) three
11 of the four issues there are public safety.

12 MS. ROSE: Yes, I think it is an important
13 consideration in either one of those scenarios. But
14 the law is different because of finality and a number
15 of other things when you're looking back.

16 CHAIR SARIS: I was wondering what — I was
17 looking at the statistics which we generate, and
18 while you raise really important issues of public
19 safety, I think judges take that into account. I
20 mean, they actually, when you look at them, denied
21 many petitions. In fact, the majority of the
22 petitions in Category VI. And they denied the

23

1 majority in I think 13 percent, in some of the
2 firearms categories.

3 So the judges are taking these issues into
4 account. And why wouldn't we just rely on judges to
5 use these factors, as they did the last time around?

6 MS. ROSE: Well a couple of reasons.
7 Judges denied overall, looking back at the last set
8 of amendments, about six percent on public safety
9 grounds. Now U.S. attorneys around the country
10 recommended the denial in very, very few cases in
11 order to allow us to get through kind of the glut of
12 cases. Almost all offices agreed not to resist, in
13 the vast majority of cases, to go to the bottom of
14 the range, whether they were sentenced high or mid-
15 range last time or not. And they did that because
16 they simply couldn't process this many cases in that
17 short of a space of time without making some of those
18 decisions.

19 That is a different thing than saying that
20 there weren't public safety exceptions that were
21 never brought to the court's attention. The courts
22 also had to make some of those kinds of concessions

23

1 just to move these cases through.

2 I think what we're saying now is, when you
3 start looking at a body of 12,000 people, choices
4 have to be made in order to balance out the fair
5 administration of justice against the public safety,
6 against the disparity that's been there since 1992,
7 and more historically back into the data.

8 And in doing that, what we have said is,
9 these are easy, and clean cuts that can be made.
10 There is clear data showing higher recidivism rates
11 for those higher category offenders. There's an
12 inherent danger when somebody has a weapon involved
13 with a gun that's recognized in all kinds of
14 different areas of the law.

15 And in our view, cutting those folks out,
16 which would be to where we have a group of offenders
17 that would then be eligible of about 5,500, or about
18 45 percent of the 12,000 who would become eligible,
19 becomes a more manageable group where the court can
20 move those cases through more efficiently and more
21 fairly.

22 VICE CHAIR JACKSON: But it seems as

23

1 though you needed that exclusion more in the last go-
2 round because there were more offenders. In other
3 words, we have a smaller pool of potentially eligible
4 offenders right now.

5 So if there is any time in which the court
6 could actually – and the U.S. Attorney's office could
7 actually look at the cases and make these
8 determinations, it would seem to be here rather than
9 in the previous go-round. And it also – I was just – I
10 just wanted to make clear that I understood our
11 recidivism report to show that, although recidivism
12 rate increases by criminal history category overall,
13 that there was no difference between the control
14 group and the group of people who were released
15 early. So you are not solving for the problem.

16 In other words, you know, by keeping them
17 in longer it doesn't seem to make a difference with
18 regard to whether or not they recidivate.

19 MS. ROSE: It does protect the safety of
20 the public, though, when they're not present to
21 recidivate.

22 VICE CHAIR JACKSON: But the amount of
23

1 time in jail doesn't affect that because there's no
2 difference. If we keep them in jail for the extra 36
3 months, or whatever, they're going to recidivate at
4 the same rate as if we released them early. So I
5 don't see how public protection is being affected one
6 way or the other in that scenario?

7 MS. ROSE: Because during the three years
8 they are in prison, they are not out committing new
9 crimes. That's the difference. And I agree, the
10 data does show between the control group and the
11 other group there's not a difference in the
12 recidivism rates. Both of them show that the higher
13 your criminal history the extreme more likelihood
14 that you're going to recidivate. And in a short
15 space of time, and in a serious way. That is what
16 the data shows.

17 I think the difference, at least from the
18 department's perspective, of why this position maybe
19 wasn't advocated in 2007 or 2008, is that you were
20 talking about a much different kind of adjustment.
21 That was at most a two-level adjustment downwards.
22 And what the department could live with with public
23

1 safety concerns and other things in a two-level
2 adjustment downward, is different than looking at the
3 current amendment and all of the ways in which
4 sentences could be very significantly reduced.

5 And there is a difference in my mind in
6 how the department must weigh those factors when
7 you're talking about, you know, potentially 24 months
8 versus many, many years.

9 VICE CHAIR CARR: But the Fair Sentencing
10 Act didn't even go as far as the department wanted in
11 terms of reducing the disparity, did it?

12 MS. ROSE: I think the department of
13 Justice's policies and positions shifted, looking at
14 the different data that was available at different
15 times. What came out is the 18:1 ratio. I think the
16 department has embraced that since the FSA was
17 announced. And beyond that, yes, we had taken a
18 number of positions in the years prior to that.

19 VICE CHAIR CARR: And on average, the
20 people who get this reduction will still be spending
21 more than ten years in jail, won't they?

22 MS. ROSE: I don't know that data.

23

1 COMMISSIONER HINOJOSA: But how -

2 CHAIR SARIS: Judge Hinojosa, and then -

3 COMMISSIONER HINOJOSA: Well, back to this
4 point is how do you justify the fact that from now on
5 these people are going to get released early and
6 you're worried about recidivism for these future
7 defendants, but somehow you don't want to give credit
8 to the ones that are already in prison?

9 By that logic, if people are going to be
10 recidivists, then you would just keep them in jail
11 forever and then there would be no recidivism. But
12 that's certainly not the logic that anybody has
13 espoused.

14 MS. ROSE: No. And I think this is logic
15 that applies to the retroactivity analysis under
16 994(a) and 1B1.10. This is not in the general realm
17 of do we think it's good policy as a matter of, you
18 know, principle across the board to look at when we
19 release people and recidivist rates. This is within
20 the very specific and narrow confines of the exact
21 issue facing this Commission, which is whether to
22 make this particular amendment at this particular

23

1 time retroactive.

2 And that is a different question. The law
3 requires it to be a different question.

4 CHAIR SARIS: Judge Howell.

5 COMMISSIONER HOWELL: Yes. Can I just –
6 this has been a very interesting set of questions.
7 Can I just say that, having lived through the 2007
8 amendment when the Justice Department objected to
9 retroactive application of the crack-minus-2, I just
10 want to say at the outset that I really appreciate
11 the leadership that the Justice Department is taking
12 on this issue and supporting – I think it is one of
13 the very rare circumstances where the Justice
14 Department is taking the position in support of
15 retroactivity, and I really commend the department
16 for taking what I think is a very brave position.

17 I think what you're hearing from the
18 Commission is, you know, exactly how we're going to
19 implement it in terms of the details. And different
20 people can take different looks and examinations at
21 the statistics from our retroactivity analysis – or
22 recidivism analysis from the 2007 release group

23

1 versus the overall group and see that there are
2 different takeaways from that set of statistics.

3 I think it is – although our very precise
4 data analysis staff says the differences between the
5 comparison group and the 2007 group isn't
6 statistically different, but when I look at the
7 statistics I see that the 2007 released group that
8 benefitted from our crack-minus-2 amendment have
9 slightly lower recidivism rates than the overall
10 group, which means that judges were actually doing a
11 good job of looking at public safety concerns and
12 deciding which motions for reduction to grant and
13 which were not. Which is why we have some concern at
14 the administration's proposal, which essentially is
15 to remove that discretion from the sentencing court
16 and just make a categorical exclusion.

17 You know, in particular the cutoff that
18 the Justice Department is making in terms of its
19 decision on categorical exclusion of categories IV
20 through VI, when you look at the statistics, Category
21 IV in the crack-minus-2 amendment group had, you know,
22 a 32.8 percent recidivism rate compared to 45 percent

23

1 at the overall, you know, in the comparison group,
2 which means that's almost an eight percent difference.
3 Which shows that the judges were really doing a good
4 job with that category.

5 So I think that gives us, you know, some
6 pause.

7 I want to turn to a slightly different
8 issue. Some of the testimony that we've gotten
9 specifically from the federal public defenders based
10 on experience with our 2007 retroactivity decision
11 have said that the government has taken the position
12 in court that if there's a downward departure
13 granted, that the court is without jurisdiction to
14 consider a retroactive guideline amendment decision,
15 based upon a sentence in section 1B1.10 that says:
16 If the original term of imprisonment constituted a
17 non-guideline sentence determined pursuant to 3553(a)
18 and *Booker*, a further reduction generally would not
19 be appropriate.

20 Now unlike other limitations in section
21 1B1.10, that has no explanation – you know,
22 application note that explains what it means. I was
23

1 here on the Commission when we made that amendment to
2 the guidelines, and my recollection was that we added
3 that sentence to 1B1.10 simply to mean that the
4 sentencing judges had already determined that a
5 defendant had received a fair sentence, after
6 considering fully all the statutory factors in
7 3553(a), this policy statement required no further
8 reduction to achieve the purposes of sentencing.

9 We certainly didn't mean for it to remove
10 jurisdiction from sentencing courts wherever a
11 downward departure had been granted to consider a
12 motion for retroactive application of a guideline
13 amendment.

14 So I guess my question to you, Ms. Rose,
15 is: Is the department taking that position in court?
16 So that even for, you know – so that for any of the
17 crack offenders who are in jail who were sentenced
18 after, post-*Booker*, that if a downward departure were
19 granted that the department across the board is going
20 to take the position that the court is without
21 jurisdiction?

22 And if so, should we change that? Because

23

1 that wasn't our intention, I don't believe.

2 MS. ROSE: The answer is a little bit, "I
3 don't think so." I think there is a very narrow
4 class of cases. And if you look at the *2009 Sourcebook*
5 data that your Commission publishes, there were
6 267 cases that were cited in 2009 where the district
7 court judge, like in my court, Judge Mark Bennett,
8 who believe a 1:1 ratio was appropriate, and who
9 granted a variance or a downward departure to a 1:1
10 ratio, and imposed a sentence at that point.

11 Certainly I would think the department
12 would come in in those cases and say no further
13 reduction is appropriate, because in fact this
14 defendant has been sentenced at a 1:1 ratio and there
15 is no need to give them any additional reduction.

16 If the downward departure was something
17 else, I find it very unlikely the department would
18 come in and say because you got a 5K, or because you
19 had an overstated criminal history, or because of
20 mental health, or medical conditions, you are
21 therefore not entitled to any further reduction.

22 However, because we don't know yet what

23

1 the Commission is going to do, no guidance has been
2 circulated back to the U.S. attorneys about what
3 positions it will take. So I can't predict with a
4 hundred percent certainty what might happen, but
5 certainly what I would anticipate based on the
6 positions we have taken and the data we have, and the
7 policies that have changed really in the last few
8 years within the department, I can't - I can't
9 conceive that we would come in in a situation and say
10 you're excluded categorically if X happened.

11 If that was our position, I think we would
12 have been testifying to that today.

13 COMMISSIONER HOWELL: Could I ask one more
14 question of Mr. Kane?

15 CHAIR SARIS: Yes.

16 COMMISSIONER HOWELL: So, Mr. Kane, you
17 heard from Chairman Saris's opening statement we've
18 received 37,000 pieces of mail regarding our
19 retroactivity decision. Many of those pieces of
20 correspondence are from currently incarcerated
21 defendants in the federal system, as well as their
22 families. So there is great anticipation across the

23

1 federal – I think federal prison population about
2 what this Commission is going to do in terms of
3 retroactive application of our FSA implementation
4 amendment.

5 You discussed a number of your plans for
6 what – depending on what our decision is. Do you have
7 plans to, or do you think it is necessary to have
8 plans to deal with this situation, that if the
9 Commission decides to exclude entire categories of
10 crack offenders from eligibility to apply for a
11 reduction, in terms of what the impact is going to be
12 within the federal prison population?

13 MR. KANE: Whenever important sentencing
14 matters are on the Hill for consideration, or here
15 with the Commission for consideration in important
16 sentencing matters from the perspective of federal
17 prisoners, we do our absolute best to communicate
18 with them directly and openly about what those are,
19 and what might or might not occur.

20 There have been times, as you all know,
21 when those sorts of issues involved potential
22 outcomes that would be very disappointing to the
23

1 inmate population in general. And that can be
2 frustrating and upsetting to some, and could lead to
3 decisions by the individuals that would not be wise
4 involving misconduct of sorts.

5 But it is our experience that in working
6 with them in advance, with the best information we
7 can obtain, our staff become the individuals who are
8 the foils for the receipt of their disappointment.
9 And we work through that with them so that they don't
10 make any bad decisions with respect to misconduct.

11 It is a delicate balance. We certainly
12 would like to be well prepared to provide the
13 information to the population. I think the greater,
14 more challenging prospect would be that the
15 Commission determine not to support retroactivity at
16 all; those have been the most difficult issues to
17 face with the population.

18 But we will work through it with them.
19 And we will stay in touch with you to ensure that we
20 are articulating where we're going, as we should,
21 with them.

22 COMMISSIONER HOWELL: With our 2007

23

1 amendment we delayed the effective date for at least
2 a couple of months. I think we made our decision in
3 December and we made the effective date the beginning
4 of March of 2008.

5 You mentioned that you were going to
6 recommend that judges delay the effective date of any
7 release order by ten days. Would it also be helpful
8 if we considered a delay in the effective date should
9 we decide to make our FSA implementation amendment
10 retroactive? And if so, how much time would you
11 recommend? The same amount of time we gave in terms
12 of the delay in the effective date for the 2007
13 amendment?

14 MR. KANE: That will be sufficient, yes.

15 COMMISSIONER HOWELL: Thank you.

16 MR. KANE: And on the issue of making a
17 decision for or against retroactivity, writ large, at
18 all, the one thing I would offer is that, as I think
19 you would suspect, you all have worked with offenders
20 over time and you know they are attuned to the issues
21 that are before you. And a decision against
22 retroactivity I believe works against re-entry. And

23

1 the reason I believe that is that these are
2 offenders, these are individuals who have made many
3 mistakes throughout their lives. Most of them are
4 repeat offenders. But 60 percent of them do not
5 recidivate after three years.

6 That 60 percent will be comprised by
7 individuals who hope to receive retroactivity. And
8 if they don't, when they've tried their best to
9 follow the plans that have been laid out for them by
10 the staff, who have looked at their skill
11 deficiencies, and encouraged them to get a GED, you
12 know, to go through vocational training, that they
13 really need drug treatment, et cetera, et cetera, and
14 many of these folks, as demonstrated by the 60
15 percent who don't recidivate, do what they're asked
16 to do. And they do have terms that will have had
17 them incarcerated for a substantial period of time,
18 and over which they will have followed these
19 instructions and encouragements.

20 And what I am concerned about is that
21 individuals who, hoping to see a decision by the
22 Commission in favor of retroactivity, if you were to
23

1 decide against that, would say – this in fact was an
2 issue of fairness – this is unfair. And so all that
3 I've done has been for naught, from my perspective,
4 and that may really hurt their own attitude toward
5 continuing to pursue a productive re-entry into the
6 community after they're released.

7 CHAIR SARIS: Thank you.

8 COMMISSIONER FRIEDRICH: Ms. Rose, I have
9 a question about the department's recommendation that
10 the Commission review its retroactivity policy.

11 Am I understanding your testimony right to
12 mean that you are recommending that we revise our own
13 internal rules, as opposed to making an amendment to
14 1B1.10? Am I correct?

15 MS. ROSE: I believe that is correct.

16 COMMISSIONER FRIEDRICH: Okay. And I'm
17 wondering, is the department simultaneously
18 advocating in Congress that the statute, our
19 authorizing statute, 3582(c), be amended similarly?

20 MS. ROSE: I do not know an answer to
21 that, but I can get an answer for the Commission.

22 COMMISSIONER FRIEDRICH: Thank you.

23

1 VICE CHAIR JACKSON: Can I just – I'm
2 sorry – can I just follow up on our general position
3 with respect to retroactivity?

4 I understood you to answer Judge Howell by
5 saying that there would be no categorical exclusion,
6 or the department wouldn't argue for one based on
7 sort of the post-*Booker* realities and what judges had
8 done in the original sentencing. But what about this
9 presumption against retroactive application of
10 guideline amendments post-*Booker*, which appears in
11 your testimony?

12 I am sort of troubled by this because
13 either guideline amendments matter, or they don't.
14 And I had understood that it was the department's
15 position that the guidelines are important, that
16 judges should follow them, that they should be given
17 substantial weight. And if that is true, then how
18 can we maintain the changes are essentially
19 irrelevant post-*Booker*, and that, you know, in the
20 new regime, if we change the guidelines because
21 judges knew that, you know, they could do whatever
22 they wanted up front, that we shouldn't give them the

23

1 authority to revisit it retroactively. That is sort
2 of the first part of this.

3 And the second part is: Wouldn't this be
4 the particular case in which the presumption would be
5 at its zenith? In other words, here we have a
6 situation in which every judge knew. The Supreme
7 Court said repeatedly that in the crack situation
8 judges could do what they want.

9 So it seems odd to me that, if we're going
10 to have a presumption, the government wouldn't
11 suggest that it be applied in this case.

12 MS. ROSE: I think there's a couple of
13 layers there. The general presumption against
14 amendments being applied retroactively obviously goes
15 to the need for finality and the need for deterrence
16 that is linked to that finality and to that certainty
17 that comes from sentencing.

18 I agree, Commissioner Jackson, that this
19 is "the" case where that is sort of a bizarre
20 conundrum that is presented. If you look post-
21 *Kimbrough* at sentencing in crack cases, only 20
22 percent of those were still outside of the
23

1 guidelines, even after the Supreme Court had
2 repeatedly talked about it. Chief Judge Hinojosa had
3 testified in May of '09 about the crack cocaine
4 disparity. Congress was looking at it. There was
5 all of this activity, and yet for whatever reason 80
6 percent of the judges in our country, when they were
7 sentencing, were still going within the old guideline
8 ranges for crack cocaine offenses.

9 Whether they did that out of deference to
10 the Sentencing Commission, or because the department
11 urged them to – and we did back post-*Kimbrough* – I
12 think that has to be taken into consideration. And
13 that is why the government didn't come in with a
14 position that said the line in the sand should be
15 *Kimbrough*. Anything post-*Kimbrough* shouldn't receive
16 the reduction.

17 Because we recognized that judges
18 continued in part to listen to us, to listen to the
19 Commission about those old guideline ranges. But
20 that is a different thing. And the crack cocaine
21 cases are a very different animal than most other
22 amendment changes.

23

1 If you look at an amendment change such as
2 a criminal history category change where you can get
3 so many one pointers, or where you can't get both the
4 two levels for committing it within a certain number
5 of years, and things of that nature, are much less
6 widely debated, are much less subject to things like
7 variances and departures, than the cases we are
8 talking about right now.

9 And so I think we can't remove from the
10 department's argument the context of it being a crack
11 cocaine case that affects, you know, 12,000 people.
12 But I do think that the department will continue to
13 advocate – and does in my written testimony – a general
14 presumption against retroactive application of most
15 amendments.

16 VICE CHAIR JACKSON: Thank you.

17 COMMISSIONER HINOJOSA: Am I to take it,
18 then, that your position is with those judges who
19 said I'm not listening to you, and I'm not listening
20 to the Commission, and I'm just setting my own policy
21 with regards to what crack should be, that those
22 should not be eligible for retroactive application?

23

1 MS. ROSE: I think that depends on what
2 they did. I think if the judge went to a 1:1 ratio,
3 the argument likely will be: No further reduction is
4 necessary. And that is a pretty limited number of
5 cases.

6 COMMISSIONER HINOJOSA: What if it's
7 anything less than 18:1?

8 MS. ROSE: I don't know what the
9 government's position would be, although I can see us
10 taking a position that no further reduction is
11 warranted.

12 CHAIR SARIS: Thank you. Anything else?

13 (No response.)

14 CHAIR SARIS: I want to thank you all. It
15 was very helpful testimony. Thank you.

16 MS. ROSE: Thank you.

17 (Pause.)

18 CHAIR SARIS: Are you all ready? Welcome.
19 So this is the Practitioners Panel. I am reading,
20 not necessarily in the order that you've chosen, but
21 we'll begin with Michael S. Nachmanoff who is the
22 federal public defender in the Eastern District of

23

1 Virginia, where he also served as the first assistant
2 and acting public defender. Previously he has
3 served, practiced law in Arlington, Virginia, with
4 Cohen, Gettings & Dunham, P.C.

5 David Debold – did I pronounce that
6 correctly? Yes – is chair of the United States
7 Sentencing Commission's Practitioners Advisory Group,
8 fondly known as PAG. He practices with Gibson, Dunn
9 & Crutcher, and previously served as an assistant
10 U.S. attorney in Detroit.

11 James Felman is a partner in the firm of
12 Kynes, Markman & Felman, P.A., Tampa, Florida, and
13 co-chair of the Committee on Sentencing of the
14 American Bar Association. He also serves as a member
15 of the Governing Council of the ABA Criminal Justice
16 Section, and previously co-chaired the Sentencing
17 Commission's Practitioners Advisory Group.

18 And last, but by no means least, James
19 Lavine serves as president of the National
20 Association of Criminal Defense Lawyers and is a
21 partner at Zimmermann, Lavine, Zimmermann, & Sampson in
22 Houston. Previously he was an assistant DA for

23

1 Harris County, Texas, and assistant states attorney
2 for Cook County, Illinois. You've seen a lot of
3 jobs.

4 Thank you. And maybe, unless you have
5 agreed to another order, we would just right down?

6 MR. NACHMANOFF: That's fine. Thank you.
7 Good morning, Madam Chair, and members of the
8 Commission.

9 Thank you for holding this hearing, and
10 for providing me with the opportunity to speak on
11 behalf of the federal and community defenders from
12 around the country.

13 It is especially meaningful for me to be
14 able to address you this morning because, as I think
15 many or all of you know, the Eastern District of
16 Virginia has had more cases affected by crack
17 retroactivity than any other district in the country.
18 And we will have the most, without a close second, if
19 the Commission once again votes in favor of
20 retroactivity as we strongly urge it to do.

21 I think if anyone could have cried "uncle"
22 at the prospect of assisting more than 1,000 clients

23

1 through the process of obtaining lower sentences, it
2 would have been our office, but we were truly happy
3 to help our clients and their families in this
4 important endeavor.

5 The opportunity to go through this process
6 again is one that we welcome wholeheartedly. We
7 firmly believe that it was worth the effort then, and
8 it is worth the effort now.

9 I think if there is one lesson that we can
10 take away from the last round of retroactivity, it is
11 that our criminal justice system is more than capable
12 of efficiently implementing the procedures set forth
13 by this Commission to lower sentences in crack
14 cocaine cases, and that it can be done fairly with
15 individualized judicial review to ensure public
16 safety concerns are addressed.

17 The predictions that this process would
18 bog down the courts, or cause a dramatic rise in
19 supervised release violations, have not come to pass.
20 In fact, we know now, as has been discussed already,
21 that the recidivism rate for the 16,433 defendants
22 who were released a little bit early – some a little

23

1 bit more early – as a result of retroactivity, is
2 lower than the general recidivism rate.

3 The Commission deserves great credit for
4 getting us to this point. After issuing four reports
5 and urging Congress for more than 15 years to act to
6 ameliorate the unjust crack/powder ratio, Congress
7 passed the Fair Sentencing Act. And the Commission
8 now has the opportunity to further achieve the
9 critical goal of ensuring fairness in the criminal
10 justice system and remedying the grave racial
11 injustice that has stained our federal courts for
12 more than 20 years by authorizing retroactive
13 application of the most recent changes to the crack
14 guidelines.

15 For me, I was particularly impressed and
16 pleased to see the Attorney General of the United
17 States here this morning, and to hear the Department
18 of Justice tell the Commission that its position is
19 that we should have another round of retroactivity.

20 I think that is a true reflection that
21 there really is a community consensus that the
22 penalties for crack cocaine were unduly harsh and

23

1 they have had a pernicious and corrosive and racially
2 unfair effect on our justice system that needs to be
3 remedied.

4 And the best way to remedy that is not
5 only by what Congress has done but by what the
6 Commission has done now.

7 Now having said that, and having heard the
8 questions from the Commission to the Department of
9 Justice, as you can imagine the federal and community
10 defenders respectfully and strongly disagree with the
11 notion that there should be any exclusions limiting
12 those who are eligible for relief.

13 We know from the statistics from the last
14 round that the Commission did really an excellent job
15 in predicting how many people would be eligible. And
16 I know that particularly because I saw that huge
17 number for the Eastern District of Virginia last time
18 around. It was about 1,500 that was estimated that
19 there would be in our district. As it turned out,
20 and as the data from the Commission shows, there were
21 1,641 motions filed. And more than 1,000 of those
22 were granted. And we were involved in a lot of

23

1 those. Not every single one.

2 I can't tell you the breakdown between the
3 ones that were granted that we filed versus the ones
4 that were granted that we didn't file.

5 The process that we went through I think
6 was similar to the process that federal defenders and
7 the U.S. Attorney's Office, probation, the clerk's
8 office, and courts went through around the country.
9 It varied a little bit, depending on the size of
10 district and the culture of the court, but it was
11 really a collaborative process. And it was a process
12 that involved looking at who was eligible, trying to
13 prioritize those cases to determine who would get out
14 the fastest, and then trying to decide whether or not
15 we could come to an agreement that those people
16 should get the relief.

17 And in the overwhelming majority of cases,
18 that is exactly what we agreed to. And that is how
19 we were able to get through this process without
20 bogging down the courts.

21 And the predictions that this would
22 somehow be a free-for-all have not come to pass.

23

1 They simply have not come to pass. And the notion
2 that now the Commission should exclude 54 percent,
3 which is what criminal history categories IV, V, and
4 VI, would be, is just plain wrong. And frankly it
5 would undermine the very notion of fairness that we
6 are trying to achieve by going through this
7 retroactive process.

8 I think it was Commissioner Howell who
9 pointed out in the recidivism studies, and of course
10 the statistics aren't perfect, but it is clear that
11 in the case of Criminal History Category IV there was
12 a 12 percent differential. And I think there is some
13 common sense that the Commission can bring to this.

14 And Mr. Kane alluded to it. Which is,
15 that if people who have been serving long sentences
16 and have felt for a long time that the punishments
17 were unfair, are told that their government, that the
18 Sentencing Commission, that people, that the courts,
19 and even perhaps the prosecutors who originally
20 prosecuted them, have recognized that there was some
21 injustice in the original sentence that was imposed,
22 when they get that sentence lowered, whether it's by

23

1 six months, or 12 months, or 24 months, I think it is
2 logical to think that they go back out into the world
3 feeling a little bit better about themselves and the
4 community they live in than having to serve the
5 entirety of that sentence.

6 That is as true for someone who has a more
7 substantial criminal history as it is for someone in
8 criminal history I, or II, or III.

9 And let me be clear about this. People
10 who fall into criminal history IV, V, and VI cannot be
11 painted with a single brush. The Department of
12 Justice I think has used the word "proxy." And
13 clearly they believe that people who fall into those
14 criminal history categories somehow are more likely
15 to be dangerous, or to engage in violence.

16 But that is absolutely not true. In any
17 of those criminal history categories you could have
18 somebody who has no violence in their background, who
19 has no crimes of violence convictions, who has no
20 drug trafficking convictions other than the crack
21 offense for which they're sentenced. And that is
22 particularly true in Criminal History Category VI.

23

1 As the Commission knows, career offenders
2 often find themselves in Criminal History Category VI.
3 And those individuals who are sentenced based on the
4 statutory maximum based on section 4B1.1 are
5 ineligible for relief. We went through that process,
6 and the way the rules are written now those people
7 are ineligible for relief – which is a shame, but that
8 is the way the process works.

9 There are others, though, who are in
10 Criminal History Category VI who are not career
11 offenders. And what does that mean? It means that
12 somehow they managed to get those criminal history
13 points to put them in Criminal History Category VI,
14 but without committing crimes of violence or drug
15 trafficking offenses. Because if they had two
16 predicate offenses, they would be career offenders.

17 What I am saying is that I have had a
18 large number of clients who, because of the
19 misfortune of being poor drivers, or disobeying laws
20 related to bad checks, or other non-violent crimes,
21 have managed to rack up enough criminal history
22 points to be in criminal history IV, V, and even VI.

23

1 And that, to conclude that these are people who
2 should remain at this higher sentence, which everyone
3 including the Department of Justice recognizes is
4 unfair, should not be excepted by the Commission and
5 would really undermine the purpose of retroactivity.

6 There is also a racially disparate impact
7 of excluding up front categories of people in
8 criminal history IV, V, and VI, especially criminal
9 history categories V and VI. The statistics reflect,
10 and the 15-year report commissioned by the
11 Commission, makes clear that African American
12 defendants are more likely to have higher criminal
13 history because they're subject to higher rates of
14 arrest and charging than their counterparts who are
15 White and Hispanic, and we would thereby be cutting
16 off a whole category of people in an effort to try
17 and ameliorate the racial injustice of the crack
18 cocaine ratio.

19 That is equally true with regard to 924(c)
20 and the gun bump. The statistics also show that
21 there has been a disparate racial impact in the
22 bringing of charges, the foregoing of charges between
23

1 924(c) and the gun bump, and that would be
2 exacerbated by up front keeping these people from
3 being considered.

4 The Attorney General stated in the Holder
5 Memo that equal justice depends on individualized
6 justice. That is absolutely true. And that should
7 be the touchstone of this Commission's decision with
8 regard to retroactivity.

9 Judges should be able to make these
10 decisions. They did in the last round. We know that
11 those people in categories IV, V, and VI, those people
12 who had the additional increased punishment as a
13 result of a gun bump or 924(c), are no more likely to
14 recidivate at rates greater, often lower, than their
15 counterparts. And therefore we would ask the
16 Commission not only to vote in favor of
17 retroactivity, but to allow judges to do it in the
18 same way they did the last time.

19 Thank you.

20 CHAIR SARIS: Thank you. Mr. Debold?

21 MR. DEBOLD: Thank you, Madam Chair, and
22 distinguished members of the Commission.

23

1 As the chair of the Practitioners Advisory
2 Group it is always a great pleasure to appear before
3 the Commission and offer our perspective from the
4 private defense bar. We always appreciate that
5 chance, but we especially appreciate it today in
6 giving our perspective on the proposed changes to
7 the – whether the crack amendment should be made
8 retroactive.

9 Like the federal defenders, our members
10 and the defense attorneys who we represent in our
11 service with the Commission have seen firsthand the
12 inequities that have been caused by the very
13 different treatment of powder and crack cocaine over
14 a vast number of years.

15 What I would like to do today is deviate a
16 bit from my prepared remarks and address some of the
17 key points that I think have come out from the first
18 panel.

19 The first question which I know the
20 Attorney General has answered in a way that we agree
21 is the question of whether to make anything
22 retroactive at all. In other words, the question in
23

1 our mind is: Why would we make a change like this
2 and not open it up to those who are adversely
3 affected by it in the past?

4 And perhaps an analogy would help, a drug
5 analogy but a very different kind of drug analogy.
6 Suppose there was a powerful medication on the market
7 to treat a serious chronic illness. And after years
8 of assessing its safety and effectiveness, the
9 researchers discover that the dosage is probably six
10 times more than is truly safe and effective and
11 necessary for most patients, not everybody, but for
12 most.

13 So the manufacturer is told by the
14 regulator to change the dosage for the medication. I
15 don't think that we would stand for a system in which
16 we said those who still have the medication that they
17 bought when it was at the higher dosage should
18 continue to take it; don't worry about it; we're only
19 going to worry about the people who are taking it in
20 the future.

21 We would not tell them to stop taking the
22 drug, whether they took it for the first time years
23

1 ago, months ago, weeks ago, or even the day before
2 the change. And there's no reason to treat the
3 amendments here the same.

4 Now I recognize that comparisons like this
5 are always imperfect, and you could tweak it a number
6 of different ways – some that would sort of make the
7 point more poignant. You could posit that 25 years
8 earlier when the original dosage was chosen it turned
9 out that it was done without any kind of research or
10 any kind of considered judgment on what was actually
11 a last-minute decision based on circumstances that
12 were not very predictive of what the need would be
13 for that particular medication.

14 And I suppose you could also say that the
15 patients are all innocent, unlike members of the
16 prison population, but I submit that the answer would
17 not change if you were giving the medication to
18 prisoners compared to giving the medication to people
19 in the general population.

20 The fact is that the change that Congress
21 made at this Commission's behest would not have been
22 possible without the stories and the experiences of

23

1 those people, just like the experiences of people in
2 my medication example. And to tell them that we are
3 changing the rules because of what you have endured,
4 and because we have decided that what you have
5 experienced is not the right result, but you can't
6 have it, would be an incredibly unfair result.

7 So we agree that the question here is not
8 whether to make the guideline retroactive, but
9 whether – but the question here is: How?

10 And the Department of Justice in a general
11 sense, and also in this particular situation, has
12 said that it should be limited to certain categories.
13 And we have heard more generally about the concerns
14 of finality and how finality should somehow have a
15 role in this.

16 On that topic, I was reminded of what
17 Felix Frankfurter once wrote: Wisdom too often never
18 comes, and so one ought not to reject it merely
19 because it comes late.

20 And that is the situation we have here, I
21 think, quite clearly. The wisdom of changing this
22 ratio has come late, but it should not be rejected

23

1 for anybody, especially for those who are feeling the
2 effects of it most severely in the higher criminal
3 history categories.

4 I think as the questions you've posed
5 yourself to your first panel has indicated, the whole
6 argument about the criminal history categories really
7 does prove too much, because everything you can say
8 about why it shouldn't be applied retroactively for
9 people in the higher criminal history categories
10 could be said and would be said about future
11 application to defendants who have not yet been
12 sentenced.

13 In addition, I think the criminal history
14 category is a particularly bad way to distinguish
15 those who get the benefit of the decision and those
16 who don't. Chapter Four, when I was an AUSA and doing
17 training for our AUSAs in our office, I would often
18 tell them that Chapter Four of the guideline manual has
19 all the simplicity and grace of the Internal Revenue
20 Code. It is a very complicated provision, or part of
21 the sentencing guidelines.

22 It involves some very difficult

23

1 calculations and assessment of factors that can
2 really change an outcome very quickly based on small,
3 real differences in the background of the person. In
4 fact, I know some of the members of the staff
5 remember that after I did my detail here at the
6 Commission 20 years ago, I was so frustrated with how
7 hard it was to teach other people about criminal
8 history category that I created this flow chart, this
9 decision tree, which - I wish I had brought it today,
10 because it is a full page of different decisions that
11 can ultimately affect how many criminal history
12 points you get.

13 And believe me, if you are making a
14 distinction between somebody who has six criminal
15 history points and seven criminal history points, and
16 they have to explain to others why they are not
17 getting the benefit of it, and they have to go into
18 that kind of an explanation, it just is not going to
19 fly.

20 And the Commission has recognized that.
21 If you look at the distinction between Category III and
22 Category IV, for example, and if you go at Offense
23

1 Level 32, the guideline range for Criminal History
2 Category III is 151 to 188. The next highest range,
3 and the next highest criminal history category, of
4 those 37 months, 151 to 188, 20 of those months
5 overlap with Criminal History Category IV, which I
6 think clearly shows the Commission's recognition that
7 these are not very concrete, easy, largely segregable
8 kinds of differences that make such a big difference
9 in the sentence outcome.

10 And as a result you are going to have some
11 very tremendously different results based on very
12 small distinctions between defendants who fall in
13 those different categories.

14 It also should be remembered that the
15 Commission I believe just last year changed the
16 criminal history rules to deal with the issue of
17 recency and decided not to make that amendment
18 retroactive. So you will obviously have a situation
19 where some people would never have been in Criminal
20 History Category IV had that amendment been in effect,
21 and yet they will be denied the advantages of this
22 retroactivity decision.

23

1 So what it comes down to is, we already
2 had a system in which we trust that we can
3 differentiate based on such things as somebody's
4 criminal past, or even whether they possessed
5 firearms, or had firearms involved in the offense.

6 Those people get longer sentences. Those
7 people who are in prison now who had a higher
8 criminal history category, or who had a weapon
9 connected with their offense, got a higher criminal
10 sentence. And that sentence was based on those
11 factors. Those have already been taken into account.

12 So in my medication example, some patients
13 might still get the benefits from a higher dose.
14 Somebody, a doctor looking at that person might take
15 into account their individual circumstances and say I
16 think you need the higher medication despite the
17 increased risks.

18 But in those cases, we don't say we're
19 just going to give it to everybody in a broad
20 category and a broad swath. We make individualized
21 decisions. And that is what judges are appointed to
22 do, and that is what judges did with the 2007

23

1 amendments, and they did it quite well, as the
2 Commission's own data demonstrate.

3 The best solution here is to give the
4 judges the information that they would want to have,
5 and that they would need to make those kinds of
6 public safety decisions, just as we did in 2007, and
7 allow them to make the individualized decision based
8 on the facts of the individual that appears before
9 them.

10 I would also note with respect to the
11 weapons suggestion that the enhancement, the two-
12 level enhancement for possession of a firearm, is one
13 of those what I call passive provisions of the
14 guidelines. There are some provisions that are
15 defendant-specific: abuse of position of trust is a
16 good example. If a defendant abuses his position of
17 trust, then the enhancement applies. But if somebody
18 else in the offense abused their position of trust,
19 it doesn't apply.

20 The firearms enhancement is a passive one.
21 If a weapon was possessed in connection with the
22 offense, you increase by two levels. So there is a
23

1 vast difference between somebody who may have the
2 enhancement because somebody else in the conspiracy
3 had a weapon that was foreseeable to them than
4 somebody who actually wielded the firearm and used
5 it. And the way to make those distinctions, again,
6 is to go back to the judge who sentenced the person
7 in the first place and say: Look at the presentence
8 report. Consider any additional information, if
9 there is any. And then make the decision whether or
10 to what extent the reduction should be imposed.

11 I think it is just an unfair system in
12 which we would make such broad categorizations
13 without allowing for that kind of individualization.

14 And finally I want to just speak for a
15 second about the issue about providing greater
16 clarity on whether and when a reduction is generally
17 not appropriate – the situation where a judge may have
18 already reduced the sentence in the first instance
19 because of a disagreement with the 100:1 ratio.

20 The people who are best positioned to
21 decide whether that actually affected the prior
22 sentence are the ones who are going to be deciding

23

1 these motions: the district judge who imposed the
2 sentence in the first place.

3 And I think the Commission would do well
4 to clarify at a minimum that that is the reason
5 behind that language, so that the judge can look back
6 and say, yes, that's during the time period when I
7 already took into account that the ratio was unfair.
8 And so, no, you don't get a reduction. Or you get a
9 smaller reduction based on how I took it into account
10 in the first place.

11 I think all those things will help to make
12 this a truly memorable and truly historic amendment
13 like the one that the Commission promulgated in 2007.

14 Thank you.

15 CHAIR SARIS: Thank you. Mr. Felman?

16 MR. FELMAN: Chair Saris and distinguished
17 members of the Sentencing Commission:

18 It is a pleasure and an honor for me to
19 appear here before you today. I appear today on
20 behalf of the American Bar Association, the world's
21 largest voluntary professional organization. And our
22 policies reflect the collaborative efforts of all
23

1 aspects and constituencies of the criminal justice
2 system: prosecutors, defense attorneys, judges,
3 professors – indeed, I note Chris Chiles, who will be
4 here later today on behalf of the National District
5 Attorneys Association is a member of our Criminal
6 Justice Section Council. Not to suggest he agrees
7 with my views today; I think you will hear he
8 doesn't; but we hear from every aspect of the
9 criminal justice community, and we try to form our
10 positions by consensus.

11 And it appears to my eye at least that
12 today is a hearing in which we join a larger
13 consensus. I think there is going to be maybe not
14 uniformity but almost consensus before the Commission
15 today that this amendment should be applied
16 retroactively, at least to some degree.

17 And so I note that consensus because it
18 occurred to me that there may be an easier way to
19 find such consensuses – if that is a proper plural;
20 and that might be to go to the annual Sentencing
21 Commission conference, hand out clickers, and have
22 Commissioner Carr just ask the question.

23

1 (Laughter.)

2 MR. FELMAN: Because we got essentially
3 the same answer there from a random group of majority
4 probation officers, over I think 60 percent supported
5 retroactivity.

6 So I think that today presents an
7 opportunity essentially for consensus about the big
8 points, and we are really haggling about, to my mind
9 at least, more the details. But without question,
10 the American Bar Association feels very, very
11 strongly that the retroactive application of the
12 amendments to the drug quantity tables implementing
13 the Fair Sentencing Act of 2010 is a moral
14 imperative.

15 The 100:1 crack/powder ratio stands as one
16 of the gross inequities of sentencing injustice in
17 our generation. After decades of effort, a partial
18 reform of that inequity has been enacted. And the
19 guiding principle should be very simple: It should
20 be extended to the greatest number of people possible
21 to remedy, to the greatest extent possible, the
22 extreme and undeniable unfairness of that injustice.

23

1 The Commission sensibly looks at three
2 factors in determining whether to make something
3 retroactive or not: the purpose of the amendment,
4 the impact of it, and the difficulty of its
5 implementation in a retroactive fashion.

6 And this one strikes me as an easy -
7 relatively easy question on all three. In terms of
8 the purpose of it, this is not a tinkering. The
9 purpose of this is to reverse a drastic and long-
10 standing inequity, a glaring inequity, an inequity
11 that this Commission itself took the lead in
12 recognizing and that Congress has agreed was unfair.

13 There may be no amendment in the history
14 of the Commission that presents a greater imperative
15 for retroactive application than this one.

16 The impact of it also cries out for
17 retroactive application. We're talking about I think
18 an average of 37 months. We're not talking about
19 something that isn't worth the trouble. We're
20 talking about three years of real people's lives.

21 This impact supports retroactive
22 application. And at least as it concerns the changes

23

1 to the drug quantity table, it will not be difficult
2 to apply. And we know that inescapably because we
3 just got done doing essentially the same thing.

4 This time it will be easier. There are
5 fewer cases, and we have the experience of what
6 happened last time. I will say in the Middle
7 District of Florida where I have my office, we were
8 number two in number of cases, behind the Eastern
9 District of Virginia, last time. I think the latest
10 data suggests we would be number three this time, but
11 I can tell you that, even though I was not involved
12 in it, I am keenly aware of who was and what they
13 did, and it was a very collaborative, sensible
14 project between the probation officers, working with
15 the BOP, the federal defenders, the U.S. Attorney's
16 Office. They were able to do this very efficiently.
17 And I will say, as a point of personal privilege, I
18 put a call in to Elaine Terenzi, my chief probation
19 officer in my district, before I came up here today.
20 And Ms. Terenzi of course can take no position on
21 what the Commission should do, but she gives me
22 permission to use her name to state to you

23

1 unequivocally that they are ready, willing, and able
2 to do do this.

3 They have a computer database prepared
4 from the last time around. They believe they can
5 implement whatever retroactive decisions the
6 Commission makes in a seamless and smooth and
7 professional manner, and that it will not unduly
8 disrupt the functioning of the courts.

9 The Commission's prior retroactivity
10 determinations really set the pattern here that lead
11 to this, as well. In 1993 the LSD amendment was made
12 retroactive. In 1995, the marijuana plant amendment
13 was made retroactive. In 2003, the oxycodone
14 amendment was made retroactive. And of course we've
15 all been discussing the minus-2 amendment in '07 that
16 was made retroactive.

17 Virtually every significant change to the
18 drug guidelines that alter the base offense level
19 based on quantity, or the manner of calculating
20 quantity, has been made retroactive. I don't think
21 there's any reason why this one should not be.

22 In terms of the manner of its
23

1 implementation, I just say that the ABA does not
2 support any of the limitations that have been
3 published for comment, including those advocated by
4 the Department of Justice, for the simple reason that
5 they just do not go to the issue. The issue here was
6 that the 100:1 crack/powder ratio was unfair. It was
7 just as unfair for somebody in a Category I as it was
8 in a Category VI. It was just as unfair for someone
9 whose co-defendant had a gun for someone who didn't.

10 There does not appear to be any rational
11 connection between these limitations. And I can't
12 really do much better than the questions asked by the
13 commissioners themselves of the department. You all
14 obviously recognize that these people were already
15 punished for these things. Their criminal history
16 was already taken into account in setting their
17 sentence. Their possession or their co-defendant's
18 possession of a gun was already considered in setting
19 their sentence.

20 All we are talking about is eliminating
21 the added part of their sentence that was directly
22 the result of the 100:1 ratio and nothing more.

23

1 Category VI people are more dangerous than Category I
2 people, and they will continue to serve longer
3 sentences as they should.

4 So there just doesn't seem to be any
5 rational connection between these things. And of
6 course the Commission already directs the courts to
7 look carefully for dangerous people. The application
8 note to 1B1.10 states that the court "shall consider
9 the nature and seriousness of the danger to any
10 person or the community that may be posed by a
11 reduction in the defendant's term of imprisonment."

12 And so they shall be doing a case-by-case
13 look. These are the judges who actually sentenced
14 these people. They know who they are. They know
15 what determinations they made about them the last
16 time. I see no reason not to give the judges who did
17 a fairly decent job on the last round the discretion
18 to look at each case individually.

19 I haven't heard any good argument for a
20 categorical exclusion, or a category deprivation of
21 judicial discretion for these offenders.

22 Obviously we have heard the statistics,
23

1 that if you were to cut out the Categories 4, 5, and
2 6, you're talking about more than half of the
3 offenders just right out of the box. I don't know
4 exactly what the overlap is with the gun limitation,
5 but now you are well over more than half, all really
6 without any basis. There were no such limitations in
7 the 2007 reduction. In fact, I don't think there is
8 any precedent for limiting a retroactive guideline
9 application by category like this. I don't think the
10 Commission has ever done it.

11 And I don't think there is any reason to
12 do it, because it flies in the face of the idea that
13 we give guidance, and we let judges do their jobs.
14 And of course we know that without those limitations,
15 the '07 recidivism rates were actually lower than the
16 control group.

17 So I see no basis for suggesting that the
18 DOJ proxy fits very well what we're trying to do
19 here. I also don't think it fits at all with the
20 aggravators that are in the statute. I mean, that is
21 the justification for it, but the aggravators don't
22 have anything to do with – I mean, they speak in terms

23

1 of actual violence.

2 And I think that criminal history, or some
3 co-defendant's possession of a gun is a pretty poor
4 proxy for actual violence. I am heartened to see
5 that even the department agrees that the limitation
6 on *Kimbrough* should not be used. I think that we
7 even heard in San Diego some judges explicitly
8 voicing the view: Look, we knew after *Kimbrough* that
9 we could do this, but out of respect for the
10 Congress, out of respect for the Sentencing
11 Commission, they'll wait and they want to see what
12 the policymakers do. They don't feel comfortable
13 just going out and making their own policy.

14 We know that. They say that. The
15 statistics show it. So we don't think any of the
16 bases for limiting the retroactive application have
17 force.

18 Thank you.

19 CHAIR SARIS: Thank you. Mr. Lavine?

20 MR. LAVINE: Judge Saris and Distinguished
21 Members of the Commission:

22 Thank you for inviting me to testify here

23

1 today on behalf of the National Association of
2 Criminal Defense Lawyers. As its current president,
3 I am here to present our views on the retroactivity
4 which is the subject of the hearing today and the
5 Fair Sentencing Act of 2010.

6 NACDL strongly supports the retroactive
7 application of the Fair Sentencing Act guidelines
8 amendment. The Act is the culmination of decades of
9 reform efforts to ameliorate the disparate impact and
10 undue severity of the federal sentencing scheme for
11 crack cocaine offenses.

12 It is hard to overstate the negative
13 social and economic impact of this uniquely severe
14 sentencing scheme. Over-incarceration within the
15 Black communities adversely impacts those communities
16 by removing young men and women who could benefit
17 from rehabilitation, educational and job training
18 opportunities, and a second change.

19 While NACDL believes the Act and
20 implementing guidelines amendment did not go far
21 enough in reducing the disparity and the harms of
22 excessive crack sentences, there is overwhelming
23

1 consensus from all sides that the 100:1 ratio was
2 unfair, unjustified, and in need of remedy.

3 There is no question that the
4 congressional intent behind the Act was to fix a part
5 of this notoriously flawed scheme. And the impetus
6 for action was undoubtedly those sentences already
7 handed down, and the disparate impact on individuals
8 already sentenced.

9 Principles of fairness, consistency, and
10 practicality instruct the Commission to include this
11 amendment in the list of amendments eligible for
12 reduction in the 3582(c)(2).

13 Since 1995, the Sentencing Commission has
14 consistently taken the position that the 100:1 ratio
15 was unwarranted from its inception, and has a
16 racially disparate impact. Commission staff
17 estimates that the 85 percent of the offenders
18 eligible for retroactive application of the guideline
19 amendment are African American.

20 The average sentence reduction for all
21 impacted offenders would be a little over 22 percent.
22 Given this dramatic impact in terms of race and

23

1 relief from unconscionably long sentences, failure to
2 apply the amendment retroactively would directly
3 undercut the primary objectives of the Fair
4 Sentencing Act. In other words, to deny
5 retroactivity would deny that the problem existed in
6 the first place.

7 The Commission has recognized that
8 reducing crack cocaine sentences is key to reducing
9 the sentencing gap between Blacks and Whites. In
10 passing the Act, Congress reached the same
11 conclusion. The Act amendment directly contributes
12 to that goal and there is no reason to give it purely
13 prospective application.

14 Ignoring racial disparities among
15 sentences currently being served will significantly
16 stifle the Act's ameliorative effect, increase the
17 distance to the goal post, and promote continued
18 disparity based not only on race but among similarly
19 situated individuals.

20 Perhaps the most compelling reason for
21 retroactivity is the Commission's precedent in this
22 area. While past amendments reducing sentences in
23

1 drug trafficking cases are few, the Commission has
2 made those amendments retroactive, including the
3 crack-minus-2 amendment.

4 Prior to crack-minus-2 amendment, three
5 other drug amendments were made retroactive – dealing
6 with LSD, marijuana, and oxycodone. All three
7 generally benefitted White defendants. The
8 statistics demonstrate, however, that the retroactive
9 application of the Fair Sentencing Act amendment will
10 generally benefit Black defendants.

11 To carve out selected offenders, as urged
12 by the Department of Justice this morning, would
13 continue the notion that crack offenders should be
14 treated differently as a class, a position not taken
15 with LSD, marijuana, or oxycodone.

16 Similarly situated offenders with the same
17 criminal history category and aggravating factors,
18 and the same amount of crack cocaine, would receive a
19 less sentence today than the same defendant who is
20 already serving a longer sentence under the old law.

21 This is the inequity that the Act was
22 designed to alleviate. The only reduction in

23

1 sentence would be based on the change in ratio
2 relating to crack cocaine. The aggravating factors,
3 as was already discussed by this panel and others,
4 already incorporated in the sentence would not
5 change.

6 A decision to deny full retroactivity
7 would likely undermine public confidence in the
8 Sentencing Commission and the federal judicial system
9 as a whole, and cement an understanding that justice
10 is distributed on the basis of skin color. The
11 Commission cannot ignore these potentially negative
12 consequences.

13 NACDL urges the Commission to make the
14 proposed permanent amendment retroactive without
15 further limitations regarding the circumstances in
16 which, and the amount by which, sentences may be
17 reduced. Disqualification based on the dates of
18 certain ameliorative Supreme Court decisions would
19 sweep far too broadly, unjustly penalizing inmates
20 who never benefitted from those decisions.

21 This is precisely the type of case-
22 specific determination that should be left to the
23

1 discretion of the sentencing court.

2 The other suggested limitation –
3 disqualification based on criminal history category
4 or other aggravating sentencing factor – further would
5 serve no rational purpose. They already reflect such
6 factors, as discussed by other members of the panels
7 and I will not repeat that here.

8 Retroactivity is also warranted for the
9 mitigating adjustments which address over-reliance on
10 drug quantity for less culpable participants by
11 capping the guidelines and implementing a new
12 reduction based on offender characteristics neglected
13 by the guidelines.

14 Retroactive application of these
15 amendments would be consistent with the intent of the
16 Act and the language of the remedial purpose of 28
17 U.S.C., 994(u).

18 Given the relatively small number of
19 defendants eligible for release under these two
20 amendment provisions, the costs to the justice system
21 are minimal, especially when compared to the cost of
22 continuing to incarcerate these low-level
23

1 participants.

2 The Commission has the authority to allow
3 sentence reductions for the least culpable drug
4 defendants residing in our prisons. It should
5 exercise that authority.

6 On the other hand, NACDL does not support
7 retroactive application of the enhancements contained
8 in the proposed permanent amendment. While this may
9 appear inconsistent, there is ample justification for
10 treating the enhancements different from the
11 mitigating adjustments.

12 These enhancements address factors likely
13 to have already been considered in determining the
14 initial sentencing under the advisory guidelines.
15 Moreover, even when the amended guideline range does
16 not exceed the original term of imprisonment,
17 retroactive application of the enhancements would, at
18 the very least, result in unnecessary and burdensome
19 litigation regarding Commission authority and *ex-post*
20 *facto* limitations.

21 NACDL applauds both Congress and the
22 Commission for this critical extension of sentencing

23

1 reform. Elimination of the 100:1 ratio and
2 implementation of the Act by the Commission is a
3 milestone on the path to fair drug sentencing.
4 Still, it is not enough.

5 The Commission recognized the horrible
6 injustice. You lobbied the Congress to correct it.
7 And now you must finish the job and allow the
8 multitude of human souls who have been suffering from
9 this universally recognized injustice to get the
10 release that you, yourselves have initiated.

11 I am grateful for the opportunity to
12 testify on behalf of our membership and welcome any
13 questions.

14 CHAIR SARIS: Thank you.

15 COMMISSIONER HINOJOSA: With regards to
16 some of the questions we have asked for public
17 comment on, 3582(c)(2) says: "In the case of a
18 defendant who has been sentenced to a term of
19 imprisonment based on a sentencing range that has
20 subsequently been lowered by the Sentencing
21 Commission pursuant to 28 U.S.C. 994."

22 The question I have is – and you have
23

1 addressed it in some of your written testimony here
2 about we shouldn't limit it in any way whatsoever -
3 but as you well know, the defense has argued,
4 especially post-*Kimbrough*, that this is a guideline
5 range that should not be paid attention to at all.
6 And that it is not based on proper policy decisions,
7 and that it should not be looked at at all from the
8 standpoint of 3553(a) factors as to how it should be
9 followed.

10 And in the cases where that defense
11 argument has been successful, how do we comply with
12 the statute with regards to based on the sentencing
13 range that's subsequently been lowered when somebody
14 has already been convinced in the courtroom that the
15 range should not mean anything with regards to that
16 particular sentence?

17 I think that is the question that I would
18 like to hear something on as to what, if anything, we
19 are supposed to do with regards to retroactivity and
20 still comply with the limits of retroactivity under
21 the statute.

22 MR. LAVINE: Can I give you just a simple
23

1 answer to that? Because I've listened to this
2 morning, and I've looked at the question as posed by
3 the Commission: That's not your job. It is up to
4 the discretion of the trial court who imposed the
5 sentence.

6 If in fact they took it into
7 consideration, the government can argue that and they
8 can equalize or not equalize. There should not be a
9 limitation.

10 COMMISSIONER HINOJOSA: No, but our job is
11 to follow the law here with regards to how we make it
12 retroactive, and what we state. I mean, we have to
13 follow the law as written. And the law is based on
14 the sentencing range. And if the argument has been
15 successful in that particular court, not to base the
16 sentence on the sentencing range and to totally
17 disagree with the guideline range, hasn't that
18 already been taken into account with regards to what
19 the proper sentence would have been in the first
20 place?

21 MR. DEBOLD: You are going to be getting
22 some guidance very soon from the Supreme Court on

23

1 what "based on" means in that provision in the
2 Freeman case, which was argued this term and has yet
3 to be decided.

4 I mean, I could try to answer that
5 question, but I think you are going to get more
6 guidance from the Supreme Court than you would want
7 to take from any of us. But I think -

8 COMMISSIONER HINOJOSA: But isn't that
9 case a little bit different because that's a plea
10 bargain agreement, as opposed to whether there was
11 really anything based on the sentencing range?

12 MR. DEBOLD: Right. But one of the issues
13 there is when you say "based on," it doesn't
14 necessarily mean the judge sentenced within the
15 guidelines and followed the guidelines to the T. It
16 means was this case one that started with the drug
17 guideline and the Drug Quantity Table.

18 COMMISSIONER HINOJOSA: No, that one is
19 easy. Where there's been a departure and it is based
20 on the Sentencing Range. But where you've been
21 successful in the argument which has been made in a
22 lot of the briefs that we get in the courtroom that

23

1 this guideline should not be paid any attention to at
2 all, and that you should just make up your own mind
3 as to what it should be, and what your own guidelines
4 should be, then what do we do in those cases?

5 MR. NACHMANOFF: Judge, if I may, I think
6 first of all I want to congratulate those lawyers
7 that have successfully made that argument.

8 COMMISSIONER HINOJOSA: Well they've done
9 it in some places.

10 MR. NACHMANOFF: They have. There have
11 been judges that have decided to, after *Kimbrough*,
12 engage in analysis to decide whether or not they felt
13 the guideline was sound or not. And of course those
14 judges know exactly the process they went through.
15 And so I think the first answer is that 1B1.10
16 already addresses this, which is where there's been a
17 non-guideline sentence the court is required under
18 1B1.10 to determine whether a comparable reduction is
19 appropriate.

20 If in fact there's been an enormous
21 variance, and the statistics are clear that where
22 there have been variances they've been relatively

23

1 modest, but taking the reality that there are some
2 sentences out there that perhaps went down
3 substantially based on a notion that the ratio should
4 be eliminated altogether, I think there are two
5 responses. And I don't think there's anything about
6 1B1.10 that the Commission needs to do to address it
7 differently.

8 First of all, the judge will know exactly
9 what he or she did, and will be able to determine
10 that perhaps as a matter of his discretion, or her
11 discretion, no further reduction is warranted.

12 The reality is that in the vast majority
13 of cases where there has been a variance, that
14 variance has been for reasons that are specific to
15 that offender. It might be a combination of a
16 departure and a variance. It might be a pure
17 variance. But there will be something about that
18 case that warranted it, and the judge will be able to
19 determine whether or not, had he known that the
20 guideline would be lower, he would have had the
21 comparable reduction based on those factors. So that
22 is a separate issue.

23

1 The other issue that I think really
2 addresses it completely is that, if a judge in fact
3 rejected the ratio altogether and went to 1:1, in
4 virtually every case that individual would be
5 sentenced at the mandatory minimum. Because the
6 mandatory minimum would act as a floor to prevent the
7 judge from imposing a sentence identical to powder
8 cocaine. That's the reality of the way the statute
9 worked.

10 And so that is a person who now wouldn't
11 have an opportunity to get that sentence lowered
12 anyway. So I think you are talking about a very
13 small number of cases, and I think 1B1.10 addresses
14 that issue already.

15 CHAIR SARIS: Thank you. Ketanji -

16 VICE CHAIR JACKSON: Go ahead.

17 COMMISSIONER HOWELL: Well I was just
18 going to follow up on that, because one of the ways
19 that 1B1.10 addresses that issue is not just the
20 proportional reduction, which is the sentence that
21 you're referring to in 1B1.10, but the other way it
22 addresses it is with the sentence that I asked about

23

1 earlier this morning to the Justice Department that
2 says if the original term of imprisonment constituted
3 a non-guideline sentence pursuant to 3553(a) in
4 *Booker*, a further reduction generally would not be
5 appropriate. Which is more the example that I think
6 Chief Judge Hinojosa is referring to, that the
7 federal public defenders pointed out as problematic
8 and asked us to eliminate from our directions. And I
9 think also Mr. Debold's testimony also asked us to do
10 the same thing.

11 Since this has no explanation, and we have
12 heard in your written testimony that this has been an
13 issue in some jurisdictions where the Justice
14 Department, reading 3582 the way that Ricardo talked
15 about – which is, is there any jurisdiction here even
16 to reduce the sentence if you've just ignored a
17 guideline range? And the Justice Department
18 apparently has asserted lack of jurisdiction even to
19 consider a motion for a reduction of sentence in that
20 circumstance – should we add an explanation note that
21 makes it clear that, if the judge has already
22 sentenced a defendant outside the guidelines to a

23

1 term of imprisonment that that judge has determined
2 is fair, that no further reduction is necessary, or
3 may even be appropriate, do you think an explanation
4 of what that sentence means to at least give the
5 court the jurisdiction to review the sentence as
6 opposed to an interpretation that apparently varies
7 across jurisdictions that a judge may have no
8 jurisdiction to even consider the motion, would be
9 helpful?

10 MR. NACHMANOFF: I think the problem can
11 be solved as we suggest by simply eliminating that
12 sentence. However, we absolutely do agree that it is
13 important that judges understand that they do have
14 jurisdiction. And let me just back up one second.

15 In addition to thanking you for getting
16 all the way to pages 25 to 26 of our written
17 testimony -

18 COMMISSIONER HOWELL: I always - I have to
19 say I always compliment the federal public defenders
20 on their testimony because it is always enormously
21 helpful.

22 MR. NACHMANOFF: The Supreme Court has
23

1 made clear that calculating the guidelines is a
2 necessary element of sentencing, and it is necessary
3 under 3553, and it has been necessary since *Booker*
4 and since *Kimbrough*, and that I don't believe truly
5 that there are judges out there that are skipping
6 that part that are not looking at the guidelines
7 appropriately following the procedure. They know
8 they will be reversed.

9 There are cases even recently from the
10 appellate courts reversing judges for not following
11 that procedure. The Supreme Court has emphasized
12 that the guidelines remain a benchmark and a starting
13 point, and that even if a judge concludes that there
14 are reasons to disagree with that guideline
15 ultimately, the idea that judges simply are not
16 paying attention to the book, or throwing it out
17 altogether I don't think is really a situation that
18 we've faced, or that judges who are conscientious, as
19 judges are, are doing.

20 Now having said that, this issue came up
21 when this language, which we believe is confusing,
22 first arose in 2008, in January, at the crack

23

1 summits, and Commission staff at that point
2 articulated that, no, no, no, we think that judges
3 should make an individualized determination to
4 determine eligibility if there's been a departure, if
5 there's been a variance, if there's been some sort of
6 combination – because some judges engage in that kind
7 of analysis – that trial judge will determine whether
8 or not the factors that went into that decision to
9 impose a sentence outside the guidelines were factors
10 that would essentially double-count the lowering.

11 You know, we think that that confusion can
12 be cleared up, as it was orally at the crack summits,
13 by simply making clear – by deleting that sentence.
14 And then it makes it clear that the comparable
15 reduction can be imposed on an individualized basis
16 when that judge goes back to see why he or she
17 lowered the sentence.

18 COMMISSIONER HOWELL: Well if the
19 Commission is not prepared to delete that sentence,
20 would, just as PAG has submitted some explanatory
21 language that they think would be helpful in
22 resolving any confusion that may be prompting in some

23

1 jurisdictions, would the FPD be willing to provide an
2 explanation that you think the Commission should
3 consider, if we decided we want to address that
4 point?

5 MR. NACHMANOFF: We would be happy to.

6 COMMISSIONER HOWELL: I would like to ask
7 one more question, if I could, on Part B of our
8 permanent amendment. I think there's general,
9 uniform consensus, as you mentioned, that there
10 should be retroactive application of Parts A dealing
11 with the Drug Quantity Table with some differences
12 around the edges, and Part C on crack possession
13 retroactive application. Part B on the aggravating
14 and mitigating factors that the FSA – that Part B of
15 our permanent amendment implemented, the Justice
16 Department has made clear that it doesn't believe
17 that any part of Part B of our permanent amendment
18 should be made retroactive.

19 And I want to just be clear from you all
20 whether I am understanding correctly on the
21 mitigating factors. There are two. One is the
22 mitigating role cap. And as I understand your

23

1 testimony, all of you agree that we should consider
2 making retroactive the mitigating role cap. But the
3 mitigating factor that we've added to 2D1.1(b)(15)
4 that provides this two-level downward adjustment for
5 minimum role offenders if certain factors are met, do
6 I understand all of you that you agree that that
7 particular part, mitigating factor in Part B, should
8 not be made retroactive because of the additional
9 fact-finding that may be required?

10 MR. NACHMANOFF: That's correct.

11 COMMISSIONER HOWELL: Can each of you
12 address that?

13 MR. DEBOLD: Yes, that's correct.

14 MR. FELMAN: Yes.

15 COMMISSIONER HOWELL: And, Mr. Lavine, I
16 was confused in your testimony. What is your view on
17 that?

18 MR. LAVINE: Our view is that all
19 mitigating factors should be made retroactive. If
20 it's an additional fact-finding, it would be
21 relatively minor additional fact-finding. But if it
22 in fact helps the defendant in terms of what his

23

1 ultimate sentence would be, it should be made
2 retroactive.

3 VICE CHAIR CARR: And your answer would be
4 the same if she had called you "Mr. Lavine"?

5 (Laughter.)

6 VICE CHAIR JACKSON: Can I just follow up
7 on that? Because I have to say, this Part B issue is
8 making it all complicated for me, and perhaps
9 unnecessarily so.

10 You know, I understand the argument that
11 offenders who committed their crimes before the FSA
12 should not be prevented from getting the same benefit
13 as those who will be sentenced prospectively. But if
14 we exclude the aggravators and the mitigators that
15 the FSA provide for, it seems to me that we have a
16 situation in which prior offenders could actually be
17 getting more of a benefit under some circumstances,
18 and less as far as the mitigators are concerned.

19 Now, you know, the response – which Judge
20 Howell pointed out – is, or at least I took away from
21 your testimony, is that it would be too
22 administratively difficult to sort of figure out the
23

1 aggravators and the mitigators.

2 First of all, I just wanted to figure out
3 if that's really so. We have a smaller pool here -
4 12,000 people as opposed to twice as many the last
5 go-round. It seems as though the commitment that has
6 been articulated by everyone is such that if there's
7 any chance that judges would, you know, go into this
8 and try to figure it out and get it right, it would
9 be in this circumstance.

10 Everybody is committed to sort of, you
11 know, doing the right thing. So it is odd to me that
12 we sort of have given up this notion of having
13 individualized hearings. If we're going to have
14 judges do this, then why aren't judges doing it?
15 That is my first question.

16 Then the second question is: What about
17 the case if we say no individualized hearings, we're
18 just going to do this on the papers, what about the
19 case in which it is clear, very clear on the papers
20 that the aggravator or a mitigator applies? What is
21 a judge supposed to do under those circumstances?

22 MR. NACHMANOFF: I think there are two

23

1 quick answers to that which goes to sort of the
2 pragmatic reality of how this process works. Which
3 is, those facts that are likely to be in the
4 presentence report and be in the record that both the
5 lawyers get access to and the judge gets access to,
6 are things that it makes sense to recalculate and do.

7 With regard to both the aggravators and
8 the mitigators, setting aside the minimal role
9 cap – because that clearly was a finding that would
10 have been made at the time and be in the presentence
11 report and be in the court record – both the
12 aggravators and the mitigators are facts that there
13 would not have been reason for the parties
14 necessarily to argue about, to present to the judge
15 at the time, or for the probation officer to include
16 in the presentence report.

17 And so as a practical matter, unlike the
18 other kinds of fact-finding that can be done and, you
19 know, now that presentence reports and even the
20 Eastern District of Virginia has come into the 21st
21 century and PSRs can be disseminated electronically
22 on ECF, which was one of the benefits that came out
23

1 of retroactivity last time, we now have a process
2 that's relatively efficient even with old cases in
3 getting the essential facts before the court.

4 To ask the parties in that small number of
5 cases where each of those factors may apply to try
6 and figure out where those witnesses are and present
7 it, I think is not an appropriate forum in the
8 3582(c) proceeding. And that is consistent with the
9 history of retroactivity.

10 So it is not a matter of not caring about
11 those issues.

12 To answer the second part of your
13 question: If it is patently clear, for whatever
14 reason, that an aggravator exists, or otherwise, that
15 is something that the lawyers can bring to the
16 attention of the court. And certainly a judge could
17 in his or her discretion say, well, here is a factor
18 that I am aware of that may go into my analysis as to
19 the extent of the reduction.

20 But I think those circumstances are going
21 to be pretty rare, given the nature of these factual
22 changes, unlike all of the other changes that we have

23

1 articulated which relate directly to the drug table.

2 VICE CHAIR JACKSON: Mr. Felman?

3 MR. FELMAN: I think that was the main
4 basis that I was looking at, too, was it's sort of a
5 weighing. You know, if I thought that the mitigators
6 and aggravators were going to be applying in a very,
7 very large number of the cases, I think that could
8 change the analysis. I think you have to weigh the
9 burden of going to all the trouble of transporting
10 people back and having new evidentiary hearings,
11 which can be difficult. Some of these things are
12 pretty old cases. Versus how much is the actual
13 sentencing outcome going to change much?

14 And that is why I think there have been
15 some questions recently about whether the Commission
16 is looking at data on how many cases would these
17 aggravators apply to?

18 And I guess it is just my gut sense that
19 there's probably a pretty small number of cases.
20 They are very specific and fact-intensive – these
21 premises with the use of a – you know, there's a whole
22 lot of things in there. I just don't think the

23

1 number of cases at the end of the day warrants all
2 the extra effort.

3 I have heard the point made that you could
4 have a circumstance in which somebody sentenced now
5 actually gets hurt, compared to somebody sentenced
6 before. And I think the answer there is, look, we're
7 doing the best we can. I think that *Pepper*
8 recognizes that there's going to be occasions where
9 somebody might get a crack at a resentencing, and
10 they might get a benefit that somebody else didn't
11 get because they didn't get a resentencing because
12 they didn't get a remand.

13 These things just happen. I think that
14 what the Commission is doing is rough justice here.
15 We are going to try to do the best we can at
16 implementing fairness and in getting rid of this
17 inequity. And I guess our judgment was that changing
18 the Drug Quantity Table gets it pretty close, and
19 that the rest of it is not worth the effort.

20 CHAIR SARIS: Commissioner Wroblewski?

21 COMMISSIONER WROBLEWSKI: Thank you,
22 Judge Saris.

23

1 Can I ask the same question in a slightly
2 different way? It strikes us that the intent of
3 Congress was to differentiate – was not only to
4 address the 100:1 ratio, but it was to also in the
5 FSA to differentiate the "more dangerous" from the
6 "less dangerous" offenders.

7 Mr. Felman, if we could wave a magic wand
8 and know with certainty everybody who is in prison
9 and whether any of the aggravators and mitigators
10 would apply to them, am I right that you would say:
11 Apply the entire guideline amendment retroactively.
12 Is that right?

13 MR. FELMAN: Yes.

14 COMMISSIONER WROBLEWSKI: Okay, and then
15 what I think you're saying is we can't. And that if
16 we could, certain categories of offenders would be
17 categorically denied any benefit from the change in
18 the Quantity Table based on a finding that those
19 persons were involved in these aggravating factors.

20 We can't, though, wave this magic wand.
21 And so we have to do – because of the burden, which is
22 I think we are in complete agreement about that – and

23

1 so we have to do rough justice. And if we don't do
2 anything with regard to the aggravating factors, if
3 we just sort of leave them aside, there are some
4 people, as Commissioner Jackson indicated, who will
5 get a benefit that if we applied the entire thing
6 together would not get a benefit?

7 Is that correct, roughly?

8 MR. FELMAN: Yes. But of course there's
9 also the mitigators. And so it's on the other side,
10 too. If we could wave our wand, there would be
11 people who would get lower sentences because they
12 would qualify for these mitigators. And so, yes, I
13 think it is the same answer I gave before.

14 And it is not that we can't do it, I think
15 we could do it. It is a question of balancing
16 resources versus outcomes.

17 COMMISSIONER WROBLEWSKI: Right. And
18 Mr. Nachmanoff talked about the purpose of a 3582(c)
19 proceeding, as opposed to an initial sentencing
20 proceeding, and there is a difference. And there is
21 a difference in the fact-finding that we would
22 normally have in the two different proceedings, and
23

1 the amount of individualized examination of all the
2 facts and circumstances of the case.

3 MR. DEBOLD: I view it as a default rule.
4 I mean, our default will be you don't apply the
5 aggravators. But if the government comes forward and
6 says: Look, judge, he would have gotten a two-level
7 increase if this provision had been in effect, so
8 take that into account in the amount of the
9 reduction, then the judge can do that. It is part of
10 the individualized consideration of circumstances.

11 But I would not require all the parties
12 and the court to do this kind of analysis in every
13 case and usually come up empty; but would rather put
14 the burden on the party who is going to,
15 quote/unquote "benefit" from the aggravator or the
16 mitigator to come forward with the information and
17 say, judge, this is a special case. You should take
18 this into account, just like you should take into
19 account all the other public safety factors.

20 COMMISSIONER WROBLEWSKI: But if we did
21 that, wouldn't you, Mr. Debold, wouldn't you insist
22 that the government produce evidence -

23

1 MR. DEBOLD: Yes.

2 COMMISSIONER WROBLEWSKI: - and perhaps
3 live evidence, and you would have an opportunity to
4 rebut that evidence -

5 MR. DEBOLD: In the few cases -

6 COMMISSIONER WROBLEWSKI: - and the
7 defendant would probably have some sort of
8 opportunity to be physically present?

9 MR. NACHMANOFF: If I can just make the
10 brief point that the position that we're taking is
11 really consistent with exactly what the Judicial
12 Conference urged the Commission to do in 1994 when it
13 changed the rules with regard to 1B1.10, with regard
14 to the one-book rule, applying the entire manual as
15 opposed to the change in the guideline itself. And
16 the notion was exactly this: 3582(c) proceedings,
17 when there's been a change, an ameliorative change,
18 that everyone agrees should be applied even to people
19 who have been sentenced, you don't want to have to
20 open the can of worms to create essentially
21 additional fact-finding that would be really
22 burdensome.

23

1 Now let me just be clear that even in the
2 process that we have, based on 1B1.10 as drafted by
3 the Commission originally, there was a need for
4 adversarial hearings. There was a need for counsel.
5 There was a need for litigation when there were
6 arguments over dangerousness, or activity in the
7 jail. I saw a lot of SENTRY reports in which
8 somebody had failed to brush their teeth, or not show
9 up for count, and that could be used as an argument
10 for why they had bad conduct in jail.

11 That was the sort of thing where you
12 needed to have litigation to resolve whether or not
13 those kinds of facts should result in a denial of the
14 retroactive application.

15 Of course if there were serious facts that
16 needed to be presented by the government, like a
17 shanking or a stabbing, that might well result in a
18 denial. But that required a hearing with some fact
19 finding.

20 CHAIR SARIS: Let me ask you this. I
21 think that one of the big concerns of the Department
22 of Justice was the resources that went into

23

1 determining whether someone was a public danger. And
2 they basically used these categories as a proxy for
3 that, because they wanted to avoid having these kinds
4 of hearings, and getting involved in the rough
5 justice business.

6 It is my sense from Boston, which is a
7 very small jurisdiction compared to all of yours,
8 that we actually didn't have that many of those kinds
9 of hearings. There were a few, but in general the
10 collaborative process – and I was the judge who was
11 the liaison to that group – worked out almost
12 everything. And it was precious few cases which
13 resulted in this huge new hearing.

14 MR. NACHMANOFF: That's exactly right.

15 CHAIR SARIS: We're small – and is that
16 your experience in both of your jurisdictions?

17 MR. NACHMANOFF: Yes. And, you know, just
18 to make one point about statistics, in this round –
19 which involves half the number of cases that were
20 filed, 25,000 last time; there are 12,000 that may be
21 eligible this time – 80 percent of the jurisdictions
22 have 200 eligible defendants or less.

23

1 I would point out, there were
2 jurisdictions like the Northern District of West
3 Virginia, which if you look at the data shows that
4 there was a 98 percent granting rate, which was a
5 reflection that probation, and the federal defender,
6 and the U.S. attorneys, and the courts, all worked
7 together to determine who was eligible, and who they
8 were going to fight over, and there were five. There
9 were five denials.

10 And whether or not those had hearings or
11 not, I don't know, but I think that is exactly right.
12 And we know, as a result of *Dillon*, that there will
13 be even less litigation.

14 So I don't think the Commission should
15 worry about resources. It is clear that, both
16 because of the numbers, the experience of having gone
17 through this before, and the resolution of the number
18 of litigations issues, that the resources that the
19 Department of Justice will need to devote just as in
20 all other parts, including the federal defenders,
21 will be significantly less this time around.

22 VICE CHAIR JACKSON: But only insofar as

23

1 we do A and C, right? You're saying if B comes in,
2 then we have this resource problem?

3 MR. NACHMANOFF: Well, I don't know if it
4 would create a resource problem, but it would
5 certainly go to that issue.

6 CHAIR SARIS: Were you the federal
7 defender when the 2007 amendments were retroactive?

8 MR. NACHMANOFF: I was.

9 CHAIR SARIS: So how many full-blown
10 hearings would you say you had, let's say if somebody
11 was in Category VI, or had a firearm?

12 MR. NACHMANOFF: Very, very few. If an
13 AUSA who was – especially we often would have an AUSA
14 who was familiar with the case, who prosecuted the
15 case originally, so it wasn't just a matter of
16 reading the presentence report. They would know the
17 case.

18 If they really thought that this was an
19 individual who posed a risk of danger, they would
20 file a pleading. And if there needed to be a
21 hearing, there would be a hearing. Most of the time
22 the objections came not from past criminal conduct,
23

1 or the possession of a gun, but from post-conviction
2 behavior in jail.

3 And the BOP became very efficient at
4 providing the SENTRY report. And then if there was a
5 dispute over the toothbrush, or the stabbing, that's
6 when you might have a hearing. But those were
7 relatively rare, because as you can imagine it
8 doesn't take a rocket scientist to figure out whether
9 somebody's record in prison is really serious or not.

10 CHAIR SARIS: Did you have that experience
11 in Florida?

12 MR. FELMAN: Yes, like I say I wasn't
13 directly involved in it. I have spoken to the
14 probation officers, the U.S. attorneys, and the
15 defenders, and my understanding is that it was
16 essentially done almost by consensus. They would get
17 the list from BOP. They would compare it to the
18 probation list. They could come up with a pretty
19 accurate list of who was eligible.

20 The defender was then appointed to
21 represent those people. They sat down with a
22 representative of the U.S. Attorney's Office. They

23

1 went through their files. And I think there were
2 very, very few hearings. And it was essentially all
3 done on the paper. And I think that if you were to
4 make Part B retroactive, there probably wouldn't be
5 that much on the mitigating side. I think the role
6 cap you could probably do, because that's going to be
7 in the PSR. The main thing is this super-minimal
8 role/spouse issue, or whatever, and I guess the
9 defender could ask their defendants, hey, do you
10 think you qualify for this? And if so, they would
11 ask for those hearings.

12 I think the more troublesome side would
13 probably be from the government side, because you've
14 got violence, threat of violence, bribery of a law
15 enforcement officer, this premises business, and this
16 super aggravator. It's a pretty - you know, it's a
17 pretty wide array of factual circumstances, and even
18 if there's stuff in the PSR about it, I think we have
19 to be a little bit reluctant on relying on that.

20 I mean, there are times where I don't
21 always make a big deal out of something that's in the
22 PSR if it doesn't affect the guidelines. So now that

23

1 it would affect the guidelines, it might change my
2 calculus.

3 So I think that the issue would be on the
4 government. They would have to decide, I guess, how
5 much of their resources they want to devote to this,
6 and how seriously they want to push these new
7 aggravators.

8 It would certainly be up to them. They
9 wouldn't have to. I think it would be mostly on
10 them.

11 COMMISSIONER FRIEDRICH: This is directed
12 to Mr. Nachmanoff, Mr. Debold, and Mr. Lavine.

13 You all three argue that we should apply
14 just one provision in Part B, correct? And -

15 MR. NACHMANOFF: Minimal role cap.

16 MR. DEBOLD: Yes.

17 COMMISSIONER FRIEDRICH: Right. And the
18 basis of that is because it's administratively easy,
19 right? That's the basis of your recommendation?

20 MR. NACHMANOFF: No. We believe the
21 minimal role cap should apply because it relates
22 directly to the drug table. Unlike the other

23

1 mitigating and aggravating factors which are factors
2 that are not necessarily related to the change in the
3 drug table, which is the essence of this retroactive
4 application, the minimal role cap of course caps
5 based on where you fall in the drug table, and
6 therefore there is a consistency in seeking that.

7 We calculate, I think the data shows there
8 are about 88 individuals who would qualify.

9 COMMISSIONER FRIEDRICH: Well there are 88
10 individuals who would qualify for all drug offenses,
11 but there are only five crack offenders who would
12 qualify. So when the Commission decides whether to
13 apply something retroactively, it looks at the
14 purpose.

15 And as you pointed out, the purpose of
16 this part of the statute is very different than the
17 rest of the statute, which was to rectify an
18 unfairness, right? The purpose of this was to fine-
19 tune 2D1.1. And of course Congress included the
20 mitigating factors, as well as aggravating factors.

21 And so for the Commission to carve out
22 just one aspect of this based on the fact that it
23

1 relates to the drug table, and it's administratively
2 easy, when the purpose is different, and the number
3 are so few, traditionally the Commission hasn't
4 applied amendments that affect so few retroactively.

5 And of course as you point out, when the
6 Commission did the initial minimal role cap it did
7 not apply that retroactively. So my question is:
8 Recognizing that only five crack offenders would benefit
9 from this, do you still think that the Commission
10 should carve out this one part, contrary to sort of
11 the structure of the statute, and apply that
12 retroactively? It just does not make a lot of sense
13 when you consider all the factors as a whole.

14 MR. NACHMANOFF: Well it would not be
15 difficult to do. It would certainly make a huge
16 difference to those five defendants, and it certainly
17 would make a difference to anyone else who was
18 eligible for whom that could be determined who are
19 amongst the least culpable of drug offenders in the
20 system.

21 COMMISSIONER FRIEDRICH: Recognizing that
22 the purpose isn't to rectify an unfairness, but just

23

1 to fine-tune the drug guideline?

2 MR. NACHMANOFF: I'm a great believer in
3 fairness.

4 CHAIR SARIS: And I think that is a good
5 point to take our morning break. Just as with my
6 juries, I don't expect anyone to sit for more than
7 two hours, and we are beyond that. So we will be
8 back here at 11:00 o'clock. Thank you.

9 (Whereupon, a recess was taken.)

10 CHAIR SARIS: Good morning. We need to
11 get going here. I should bring my gavel down to get
12 us going.

13 All right. So thank you very much. This
14 is our law enforcement expert panel, and we begin
15 with Asa Hutchinson, who is a former U.S. attorney,
16 member of Congress, administrator of the Drug
17 Enforcement Administration, and current senior
18 partner in the Asa Hutchinson Law Group in Little
19 Rock, Arkansas. Previously he has served many years
20 in a variety of roles in the federal government and
21 is currently also an adjunct professor at the
22 University of Arkansas at the Little Rock School of

23

1 Law. Welcome.

2 Next we have David Hiller, who is the
3 national vice president of the Fraternal Order of
4 Police. For over 38 years he's worked at the Grosse
5 Pointe Park Department of Public Safety in Grosse
6 Pointe, Michigan, where he has worked in both uniform
7 and plain clothes assignments. Thank you for coming.

8 And finally, Christopher Chiles is the
9 chairman of the board of the National District
10 Attorneys Association. He is a prosecuting attorney
11 of Cabell County in Huntington, West Virginia, and
12 serves as chairman of the board of the National
13 District Attorneys Association. And he has been a
14 prosecutor since 1981 and was elected prosecuting
15 attorney in 1990. Thank you for coming.

16 Mr. Hutchinson.

17 MR. HUTCHINSON: May I proceed?

18 CHAIR SARIS: Yes.

19 MR. HUTCHINSON: Thank you, members of the
20 Commission, for your work on this particular issue,
21 and for your invitation today.

22 I approach this topic as someone who has
23

1 been engaged in this issue for over 12 years. When I
2 first got elected to the United States Congress, I
3 was probably one of the few Republicans that signed
4 on to support reducing the disparity between crack
5 and powder cocaine sentencing.

6 I did this as a member of the House
7 Judiciary Committee. I did this as a former United
8 States attorney, and someone who was very much
9 supportive of law enforcement. And I did this
10 because I saw the fundamental unfairness of the
11 sentencing regime at that time, and believed it
12 should be remedied.

13 And thankfully, for your leadership and
14 others, this has been remedied by the Fair Sentencing
15 Act that was passed. And now the issue is
16 retroactivity, and I am here today to express my
17 support for making the new guidelines retroactive in
18 the application of the Fair Sentencing Act.

19 I think it is the right thing to do, and I
20 think in the long term having a fair sentencing
21 structure aids confidence in the criminal justice
22 system and will help law enforcement as a whole.

23

1 I will make my testimony very
2 straightforward today, and then look forward to the
3 questions that might come after. But my views are
4 shaped as a former federal prosecutor. I look back
5 at the 1980s whenever I was a Reagan appointee. We
6 prosecuted in Arkansas cocaine cases. And it is
7 true, without any doubt in my mind, that tough
8 sentencing laws makes a difference in the public view
9 and the public consumption of illegal drugs.

10 And in fact, since the 1980s it should be
11 noted that we have reduced overall cocaine usage in
12 this country by 75 percent. And I like to underscore
13 that point because most people do not believe that.
14 But it is true under the statistics, and I think
15 there's a lot of reasons for that, but part of it is
16 our tough sentencing law.

17 And I don't want to do anything that
18 undermines that. I do not believe that the Fair
19 Sentencing Act undermines that success, and we can
20 continue down that path. It is also important,
21 though, when I reviewed this again as I was head of
22 the Drug Enforcement Administration. I don't speak

23

1 for them today. The Attorney General did an
2 outstanding job representing the Department of
3 Justice today. But for my experience as head of the
4 DEA, I looked at this issue again and I did not see
5 it undermining law enforcement efforts. I did not
6 see it making it more difficult to pursue the big
7 cases.

8 I think that in the long term it helped
9 what is most important in our society, and that is
10 confidence in law enforcement and our criminal
11 justice system.

12 And whenever you look at the concerns of
13 law enforcement, many times the Department of Justice
14 expresses concern about workload. They, with great
15 congratulations, handled well the 20,000, I believe
16 it was, review of the 2007 two-level reduction. And
17 that was handled well. They handled it under their
18 current workload.

19 And whenever you look at the potential of
20 12,000 that are eligible under the – if we made this
21 retroactive, it breaks down by district fairly well.
22 In Arkansas, there would be 71, in the Eastern
23

1 District of Arkansas, and 29 in the Western District
2 of Arkansas. Those are real lives that are impacted
3 that could be reviewed. But the workload is
4 manageable for those districts.

5 The Eastern District of Virginia would be
6 hit the hardest, about 844, but from my experience
7 you can manage that kind of workload. They have a
8 large office, but you can also assign assistant U.S.
9 attorneys from across the country if they need
10 additional assistance.

11 The other concern of law enforcement is
12 simply that we're going to be releasing dangerous
13 criminals. Well the fact is, those who were
14 sentenced under the guidelines then in effect by the
15 Sentencing Commission, those factors were considered.
16 They should be reconsidered, if there's a
17 resentencing under a retroactive application, and I
18 certainly believe that the public safety issue should
19 be considered by the judge in resentencing. But
20 beyond that, I don't think - I think the concern about
21 safety can be protected by that review once again by
22 a judge in any resentencing because of retroactive

23

1 application.

2 So in conclusion, I do support the
3 retroactive application of the guidelines. I applaud
4 the work of this Commission in taking a leadership
5 role. And I do hope that there will be a growing
6 support for that in the Congress of the United
7 States, as well.

8 Thank you.

9 MR. HILLER: Thank you, Madam Chairman.
10 As indicated, I am the national vice president for
11 the Fraternal Order of Police. We are the largest
12 law enforcement labor organization in the country
13 with over 330,000 members across the country.

14 I want to thank you, Madam Chairman, and
15 the rest of the Commission for inviting me here today
16 to give you the view and the opinion of these rank-
17 and-file boots-on-the-street that work every day to
18 support our communities.

19 The FOP strongly opposes any retroactive
20 application of the guidelines. It would allow for
21 the release of thousands of convicted drug offenders
22 into the communities where the state and local law

23

1 enforcement are already under immense pressure.

2 According to the data provided by the
3 Commission, more than 12,000 offenders would be
4 eligible to receive reduced sentences. And within five
5 years, over 7,000 convicted drug offenders could be
6 released back into society. Half that number, 3,500,
7 would be released within two years of enacting the
8 proposed retroactive reductions.

9 These are significant numbers of offenders
10 that could be released early, placing undue burdens
11 on the law enforcement personnel working the street.

12 It should also be noted that the sentence
13 reductions would be in addition to any other
14 reductions the offender receives. Cooperation with
15 the government, good time rulings in prisons and so
16 on, would also credit early release.

17 It is also important that the Commission
18 recognize that these are not low-level dealers, or
19 first-time offenders. At least 80 percent of them
20 have been previously convicted of a crime. A
21 majority of them have multiple prior convictions.
22 And at least 14 percent of them also possessed a

23

1 firearm in connection with their drug dealing
2 operation.

3 Furthermore, more than 25 percent of these
4 offenders are in the highest criminal category
5 history. Clearly these are the inmates that are far
6 more likely to be what we call "repeat offenders."
7 The current fiscal climate is such that law
8 enforcement agencies are being forced to lay off
9 officers and reduce community services across the
10 nation.

11 State and local agencies have been forced
12 to make drastic cuts to their law enforcement
13 personnel, as much as 44 percent in some cases.
14 These cuts have already placed a great strain on law
15 enforcement officers who work tirelessly to keep
16 their communities safe.

17 As indicated in the intro on my other
18 life, other than the FOP, I am the chief of police of
19 the City of Grosse Pointe Park where I have been
20 there, in January it will be 40 years. We border
21 Detroit on two sides. I can assure you, crack
22 cocaine is a problem that we deal with every single

23

1 day. And the guidelines and the certainty of
2 punishment to me is critical for us to maintain the
3 community that we want to have.

4 Releasing thousands of those drug
5 offenders would only add to that strain, creating a
6 more dangerous situation. These criminals are
7 responsible for creating and feeding the addiction of
8 an estimated 1.4 million Americans. Early release of
9 these criminals would only serve to further the
10 destruction of our communities from the evils of
11 cocaine.

12 In conclusion, Madam Chairman, I would
13 like to thank you and the Commission for your
14 consideration of the view of the 330,000 members of
15 the FOP across the nation.

16 CHAIR SARIS: Thank you. Mr. Chiles?

17 MR. CHILES: Madam Chair, Members of the
18 Commission, I also want to thank you for inviting me
19 to testify before you on behalf of the National
20 District Attorneys Association, the oldest and
21 largest organization representing over 39,000
22 district attorneys, states attorneys, attorneys

23

1 general, and county and city prosecutors who have
2 responsibility for prosecuting 95 percent of the
3 criminal violations in every state and territory of
4 the United States.

5 As the chair mentioned, I am from
6 Huntington, West Virginia, and I have been a
7 prosecutor for right at 30 years. I have served on
8 the board of directors of NDAA for over 15 years. In
9 July of 2008, I became the president-elect, and then
10 served as president from July 2009 to July of 2010.
11 I now serve as chairman of the board of NDAA.

12 It has truly been an honor to serve NDAA,
13 and I have developed even more of an appreciation and
14 respect for those men and women who have chosen to
15 make the sacrifices and serve their communities as
16 state and local prosecutors.

17 It is clear that all of our jurisdictions,
18 be they large, small, or somewhere in between, have
19 many of the same problems, and prosecutors in all
20 these jurisdictions are working every day to find
21 solutions, often innovative solutions, and ways to
22 make our communities safer.

23

1 It has been an honor to represent
2 America's prosecutors these past three years, and it
3 is an honor to represent NDAA on behalf of America's
4 prosecutors before you today.

5 I am also proud that NDAA continues to be
6 at the forefront of promoting equity and fairness
7 within America's criminal justice system. Our
8 membership is made up of state and local prosecutors
9 who have been leaders in introducing drug courts,
10 diversion programs, re-entry programs, mental health
11 courts, and many other initiatives in our
12 communities.

13 As Jim Felman mentioned a little while
14 ago, I also serve as the vice chair on the Criminal
15 Justice Section of the ABA, and I also had the honor
16 of being NDAA's representative to the American Bar
17 Association's Commission on Effective Criminal
18 Sanctions, which was of course the follow-up to the
19 Kennedy Commission.

20 And NDAA, in conjunction with ABA, came up
21 with many historic recommendations of alternatives to
22 incarceration. Prosecutors are not just looking to
23

1 put people in prison. We are looking for
2 appropriate, appropriate dispositions based on the
3 offense, the offender, and all these other factors.
4 We don't just want to put people in prison and lock
5 up the cells.

6 While I was serving as president of NDAA
7 in 2009, we were approached by several senior members
8 of the United States Sentencing - Committee on the
9 Judiciary when the Fair Sentencing Act was first
10 introduced. NDAA agreed that a 100:1 ratio in
11 federal sentencing guidelines between crack cocaine
12 and powder cocaine was outdated and needed to be
13 addressed.

14 And we offered testimony supporting a
15 reduction in this sentencing disparity before the
16 House Judiciary Committee in May of 2009. NDAA
17 worked closely with members of both the House and
18 Senate Judiciary committees on the Fair Sentencing
19 Act to identify the proper adjustments to the
20 sentencing disparity between crack cocaine and powder
21 cocaine.

22 NDAA was one of the first major law
23

1 enforcement advocacy groups to support and actively
2 push for the Fair Sentencing Act to be passed by
3 Congress and signed into law.

4 Now while NDAA firmly believes that
5 passage of the Fair Sentencing Act was the right
6 thing to do for America, we strongly oppose this body
7 making its amendments to the sentencing guidelines
8 retroactive for a variety of reasons.

9 Each individual case handled by America's
10 prosecutors, be they state and local prosecutors, or
11 United States attorneys and their assistants, is
12 analyzed and handled individually based on the merits
13 and the gravity of that case under the laws which
14 existed at the time the crime was committed and
15 prosecuted.

16 Now obviously the contemplated action of
17 this committee regarding retroactive application of
18 these new sentencing guidelines only directly affects
19 the federal court system and the United States
20 attorney's offices around the country.

21 However, state and local prosecutors and
22 local law enforcement agencies have been working very
23

1 closely together with our federal counterparts for
2 many years in this ongoing effort to combat illegal
3 drugs and appropriately prosecute the drug dealers.

4 We have, as state and local prosecutors,
5 have a strong and legitimate interest in this debate,
6 as this decision will directly affect the safety of
7 our communities that we have sworn to protect.

8 Over the last 30 years, probably 90
9 percent of the cases handled in federal court were
10 disposed of by plea negotiations which resulted in a
11 guilty plea. In almost all of those cases, the
12 offender was facing many more charges than those to
13 which he or she ultimately pleaded guilty, including
14 non-drug offenses.

15 The federal prosecutor, defense attorney,
16 and defendant all knew what the possible penalties
17 were for the various offenses to which the defendant
18 was subject to being charged, and the strength of
19 those various offenses.

20 Agreements were reached based on those
21 known factors, especially the likely penalty. The
22 federal prosecutor undoubtedly considered the

23

1 defendant's prior history and potential threat to the
2 community when engaging in these negotiations which
3 resulted in a particular plea and disposition.

4 Had the penalties been less at the time
5 the case was pending, the prosecutor would have had
6 the ability to alter his or her negotiation to still
7 be able to achieve a punishment which he or she felt
8 to be appropriate for that individual for the
9 criminal activities in which the defendant was
10 engaged.

11 To arbitrarily now retroactively apply
12 these new sentencing guidelines totally negates the
13 thoughtful and reasoned negotiations which the
14 federal prosecutor engaged in originally at a time
15 when he or she knew far more about the individual and
16 the appropriate sentence.

17 This result would have a negative effect
18 on our communities. But there are other ways in
19 which this contemplated action by the Commission
20 would directly and unfairly impact state and local
21 prosecutors.

22 Many of these defendants were also

23

1 committing state and local crimes, including non-drug
2 offenses such as burglary, aggravated assault, and
3 robbery. In the vast majority of those cases, state
4 and local prosecutors agreed to dismiss their state
5 charges, or in some instances agreed to a concurrent
6 sentence due to the federal sentence the defendant
7 received.

8 Had the federal sentence been
9 significantly less, or more aptly for this discussion
10 had the state or local prosecutor been told that
11 years after the plea and sentencing in federal court
12 the sentence of the defendant would be significantly
13 reduced, then the prosecutor would have never agreed
14 to dismissal of the state charges in the first place.

15 If this sentence reduction is applied
16 retroactively, it will negate the well-reasoned,
17 good-faith negotiations that the state or local
18 prosecutor engaged in with the defense attorney, and
19 the decisions made by him or her based on their
20 knowledge then of the seriousness of the other
21 offenses, the degree of violence used in committing
22 those offenses, and the danger these offenders caused

1 to the respective communities.

2 And it will happen without us having any
3 input, any say, which we had originally. And that is
4 not fair.

5 These state and local prosecutors relied
6 on and had an absolute right to rely on the federal
7 sentences received by these offenders in making their
8 decision to dismiss local charges. And such actions
9 went on virtually across the United States. To
10 change the rules of the game now when the state or
11 local prosecutor is now barred from bringing those
12 same charges that could have been prosecuted at the
13 time but were dismissed due to the sentence received,
14 and in reliance on the fact that the sentence would
15 not change, is simply wrong for the victims of the
16 crimes committed, and the communities affected by the
17 crimes.

18 Such a decision would affect literally
19 thousands of cases and decisions made by state and
20 local prosecutors across the United States and would
21 place the citizens and their communities at risk.

22 By your own statistics, over one-half of
23

1 those eligible for retroactivity were sentenced
2 between 2011[sic] and 2011, and the average age of
3 those eligible on November 1st will be 36 years of
4 age. That means over one-half of the people eligible
5 for release were 30 years old or more when convicted.
6 So we're not talking about 18 and 20-year-old kids
7 who made a mistake. These are mature men and women
8 who were clearly old enough to know better, and who
9 were almost all prior offenders also.

10 State and local prosecutors, as I said,
11 prosecute over 95 percent of all the crime in this
12 country. To be prosecuted in federal court, these
13 offenders have to earn it. This was not, generally
14 speaking, their first or even second offense. They
15 deserved the sentence they received, and everyone had
16 the right to rely on the sentence which was imposed.

17 And I would submit this is also shown by
18 Table 5 of your May 20th, 2011 memorandum. That
19 table shows that for 7,000 of the 12,000 eligible for
20 retroactivity, 60 percent, their crimes involved
21 weapons or other aggravating factors. And many of
22 them used weapons in state charges that were not
23

1 prosecuted because of the agreement reached in
2 federal court. So there was a lot of violence
3 attendant here, also.

4 Unfortunately for America's communities
5 and the countless victims of crime brought on by the
6 sale, distribution, and use of drugs in America, drug
7 criminals are not stupid. It is dangerous for
8 America's communities if we make this sentencing
9 retroactive, and it also opens the door for further
10 decriminalization debate for other drug-related crime
11 in the future.

12 A very dangerous precedent, and one that
13 is very unfair to America's prosecutors and citizens
14 that we are sworn to protect will be set if this
15 Commission decides to apply these sentence reductions
16 retroactively.

17 Again, I would like to thank you for
18 giving me the opportunity to testify before this
19 Commission on behalf of America's state and local
20 prosecutors, and I would be happy to answer any
21 questions.

22 CHAIR SARIS: Thank you, Mr. Chiles.

23

1 VICE CHAIR CARR: Mr. Hiller and
2 Mr. Chiles, according to our research the average
3 reduction in sentence for the people who would be
4 eligible would take them from 164 months to 127
5 months. Why do you think an average sentence in
6 excess of ten years for these defendants is inadequate
7 for purposes of punishment and deterrence, given the
8 fact that the whole reason for the reduction under
9 the Fair Sentencing Act was that the 100:1 disparity
10 was unwarranted, had a disparate racial impact, and
11 was unfair?

12 MR. CHILES: I'll answer that from my
13 side. As a state and local prosecutor, and I assume
14 as a federal prosecutor also, when I get a case I
15 look at the offender. I look at the offense, the
16 seriousness of the offense. And I decide what
17 sentence is appropriate, or what range I feel would
18 be appropriate for that offender.

19 And then I structure my negotiations
20 around that. So I have the option then of taking
21 into account guidelines, quantities, different things
22 like that. If I don't feel, even though -

23

1 VICE CHAIR CARR: Let me interrupt you
2 there.

3 MR. CHILES: All right.

4 VICE CHAIR CARR: Because I retired from
5 the U.S. Attorney's Office six years ago, and that's
6 not the way we operated. That's not the way the
7 Department of Justice directed us to operate. And
8 before 2005 and the *Booker* decision, that is not the
9 way a prosecutor or a judge could operate.

10 The sentences were determined by mandatory
11 minimums. They were determined by guidelines. And
12 we didn't sit there and get to decide what a fair
13 sentence should be. We were dictated by what
14 Congress and the Sentencing Commission had
15 determined, which we have now, the Congress and the
16 Sentencing Commission, determined was excessive.

17 MR. CHILES: I understand. But you had
18 the right to decide on how many counts you were going
19 to make them plead to.

20 VICE CHAIR CARR: Counts didn't matter.
21 Drug quantity mattered. I'm just saying that the
22 differences in our systems may be vast, but my

23

1 question was why is an average sentence in excess of
2 ten years for these defendants inadequate for purposes
3 of punishment and deterrence?

4 And I am guessing that that is a greater
5 sentence than most state jurisdictions would be
6 meting out.

7 MR. CHILES: Well if they also committed
8 an aggravated robbery in my jurisdiction, and I chose
9 not to proceed on the aggravated robbery because of
10 that ten-year sentence, I had a right to rely on the
11 fact that they would serve that ten years.

12 VICE CHAIR JACKSON: Mr. Chiles, that
13 argument, which I understand and in some ways
14 appreciate, which is that the negotiations were
15 structured around what you understood the federal
16 sentence was going to be, would seem to undermine any
17 retroactivity determination on the part of the
18 Commission.

19 In other words, it is not really directed
20 at crack versus powder, which you say that you all
21 supported in terms of the Fair Sentencing Act
22 prospectively, but I mean is it your assertion then
23

1 that the Commission should never make a retroactivity
2 determination with respect to any issue? Because
3 that would be the case with respect to your relying
4 on the previous penalties.

5 MR. CHILES: I am not familiar enough with
6 the federal laws, because all I've been is a state
7 prosecutor my whole career. In state court, they've
8 got 30 days to file a motion to reconsider and then
9 it's done. There's something to be said for
10 finality. There's something to be said for the
11 victim knowing what the sentence was going to be, and
12 being entitled to rely on that. And there's
13 something to be said for the community knowing what
14 the sentence was going to be and being able to rely
15 on that.

16 When these defendants and their counsel,
17 again, enter into plea negotiations, they knew what
18 the guidelines were. And everything was agreed upon
19 at that time based on the law. And I just don't
20 think it is right to go back now, years later, and
21 change it.

22 VICE CHAIR JACKSON: And so retroactivity

23

1 is not a common thing in the state.

2 MR. CHILES: No, ma'am. Not at all.

3 MR. HILLER: I listened to the panel
4 before us, and I share the panel today with
5 additional legal minds that I am very thankful I'm a
6 cop - we're the boots on the street. We're the ones
7 that make the arrests.

8 And I was in charge of our detective
9 bureau for a number of years, and we have never, ever
10 convicted an innocent person under my watch. But
11 that's not to say that a number of them weren't given
12 some tremendous breaks. And again I'm familiar with
13 state courts. Wayne County Third Circuit Court in
14 Wayne County, Michigan, which is Detroit, and which
15 we are part of, 90 percent of our felony cases never
16 go to trial, never go to trial.

17 We don't have the time. We don't have the
18 volume. We don't have the prosecutors. We don't
19 have the judges. We don't have the courts. We know
20 the cops that send them down to court. We cut deals.
21 And that is, we believe no retroactivity, absolutely.
22 That's from the police perspective.

23

1 You broke the law. You got sentenced.
2 You took your lumps. Do your time. That's the cops.
3 When we make a mistake on the street, we're now held
4 to a higher standard also, which we should be, and we
5 agree. But we take a little bit different
6 perspective than the legal minds, and I respect all
7 of them. You know, I envy them for their guidance
8 and their support. But on the same token, the guys
9 on the street are saying: You broke the law. You've
10 got to pay.

11 In fact we were just talking about, I
12 noticed huge, dynamic differences in our communities
13 since we have less law enforcement and unemployment.
14 And I actually anticipated crime going up in the
15 communities. And, knock on wood, it hasn't. And I
16 attribute that to consistency.

17 You break the law; you're going to be
18 arrested.

19 VICE CHAIR JACKSON: Did you see any
20 difference after 2007? The Commission previously
21 made a retroactivity determination, and I'm just
22 wondering whether from the law enforcement
23

1 perspective there was any impact in your community.

2 MR. HILLER: Understand, we deal mainly,
3 99.9 percent state and local stuff, not the federal
4 stuff, but we know the federal guidelines are there,
5 the federal laws are there. And we work, as Chris
6 said, we work with the Federal Government also. And
7 we take the best case for the victim, the community,
8 and the defendant. And they cut the deals, and they
9 do it. And I think that - I don't know the 164, 127,
10 the numbers you quote, how many of those deals are
11 out there, but they broke the law. And the cops on
12 the street are saying: Do your time. That's us.

13 COMMISSIONER HINOJOSA: I guess a follow-
14 up question. Does this mean, Mr. Chiles, that you
15 would be making different decisions now that we have
16 the Fair Sentencing Act as to what cases you would
17 call on the Federal Government or the federal
18 prosecutor to take, as opposed to the cases that you
19 did in the past? Because obviously the penalties are
20 still high from the standpoint of the mandatory
21 minimums apply. So the question is: Does this mean
22 you're going to have a different viewpoint as to what

23

1 cases you would turn over to the Federal Government,
2 as you did before, since you supported the Fair
3 Sentencing Act?

4 MR. CHILES: Yes. I think what it means -
5 and again, I can't obviously speak for 39,000
6 prosecutors around the country - but I think again,
7 one of the things we look at is the total picture of
8 what is the appropriate resolution of this case based
9 on the seriousness of the offense, the seriousness of
10 the offender, the injury to the victim, et cetera.

11 And we take all of those things into
12 consideration. Will there be some cases where now,
13 because of the 18:1, or the new sentencing amount,
14 whatever it is, that we might also hold out for a
15 state charge where we didn't before, sure. I can see
16 circumstances where that might happen.

17 Will it happen in every case, just as a
18 matter of form? No sir. But it will be a factor in
19 the determination in the plea negotiation process.

20 CHAIR SARIS: Judge Howell.

21 COMMISSIONER HOWELL: Mr. Hutchinson,
22 thank you so much for being here, and thank you also

23

1 to Mr. Hiller and Mr. Chiles.

2 I take it that you differ with the
3 Department of Justice's position on retroactive
4 application of the FSA implementation amendment in
5 that the Justice Department would like to exclude
6 certain categories of crack offenders from having the
7 judge being able to exercise discretion about whether
8 or not to grant a motion for a reduction.

9 And I take it that you differ from that
10 and feel that we should trust the judges to exercise
11 their discretion in evaluating all the public safety
12 factors which, you know, as Mr. Hiller and Mr. Chiles
13 pointed out, are very, very important to the
14 consideration. Am I understanding your testimony
15 correctly?

16 MR. HUTCHINSON: You are. And that is my
17 view. And let me elaborate on it. I did review the
18 Attorney General's testimony as I came in today, and
19 I believe one of the assistants that outlined some
20 of the restrictions on the retroactivity.

21 And I sort of understand where they're
22 coming from from a political perspective, but in

23

1 terms of a rational, logical application of the
2 sentencing guidelines, I do not see carving out those
3 distinctions. The reason being, obviously, as you
4 know, that the criminal history category is one of
5 the biggest factors in the original sentencing.

6 I think another category was whether they
7 had a mandatory minimum for the gun charge, or a gun
8 was in place at the time. Those are all factors in
9 the original sentencing, in addition to the quantity.
10 We are simply saying that the quantity should be
11 re-evaluated under the Fair Sentencing Act.

12 That to me is a logical, sensible
13 application of the guidelines.

14 COMMISSIONER HOWELL: In fact, some of the
15 witnesses that we're going to hear from later have
16 used the word, if we exclude certain categories it
17 will be like double counting them in a reduction
18 context. Is that a view that you share?

19 MR. HUTCHINSON: Well, I would share the
20 view that it would be unfair. It would be
21 inconsistent. And I am sure that some creative
22 lawyers can figure out some ways to try to challenge

23

1 that. Now I don't know whether they would be
2 successful or not.

3 But for those reasons, I think it is
4 important to make it retroactive and to not make a
5 hodgepodge decision of retroactivity. I think that
6 could create a lot of problems.

7 But let me elaborate, though. In
8 particular I respect Mr. Chiles as to his testimony's
9 concern as a state prosecutor. One of the things he
10 pointed out was they would not have any input into
11 the resentencing. And I think that is the whole
12 design of the public safety review and discretion of
13 the federal judge. And any United States Attorney
14 should reach out to the state prosecutor if they have
15 any concerns about the application of retroactivity
16 in a particular case. It can be expressed. It can
17 be raised, and the judge should take the public
18 safety concerns into consideration, as has been done
19 in the past, that resulted in hundreds not getting
20 that applied.

21 So public safety is hugely important to
22 me, but I believe the Attorney General's concerns can

23

1 be addressed by the judge's discretion and not by
2 those carve-outs.

3 CHAIR SARIS: Let me ask you. You gave a
4 statistic that the tough drug laws have reduced
5 cocaine usage by 75 percent. Did that include crack
6 usage?

7 MR. HUTCHINSON: Yes. That's all cocaine.

8 CHAIR SARIS: That's all cocaine. And so
9 where do you -- where are those statistics from? And
10 does that give us any guidance as to how we implement
11 this?

12 MR. HUTCHINSON: Excellent question. And
13 the cocaine statistics has been a 75 percent
14 reduction in overall drug use. Overall there's been
15 a 50 percent reduction since the height of drug use
16 in our country in the late '70s and the early '80s.

17 Now obviously it's way too high, still.
18 But you asked where those statistics come from. It's
19 two surveys that have been consistently applied
20 measuring usage. I believe one of them is Monitoring
21 the Future; and I think the other is a SAMHSA program.
22 So one is government and one is non-government.

23

1 Consistent surveys over the last 30-some years that
2 have been testing this.

3 They are available on the DEA website,
4 those statistics. And there's a lot of different
5 combinations. I quite frankly believe that the
6 national leadership and what we say about drugs in
7 our society makes as much difference in usage as – in
8 addition to tough sentencing.

9 But to put it in contrast, I don't want to
10 lose my reputation as a tough prosecutor but as was
11 pointed out by Commissioner Carr, it's 164 months
12 now. It goes to 128 months with the new guidelines.
13 Those are still pretty doggone tough laws, and most
14 state prosecutors would defer because it is so much
15 tougher than what would be ever given in the state
16 system.

17 It is internationally still – our standards
18 are still higher and tougher than other countries. I
19 was asked to testify before the Canadian Parliament
20 on our sentencing structures here in the United
21 States because they were considering for the first
22 time a mandatory minimum.

23

1 Well I learned: Don't do this. If you're
2 invited to go to a foreign country, don't go.

3 (Laughter.)

4 MR. HUTCHINSON: I mean, our sentencing
5 structures are so different. They are debating a
6 one-year mandatory minimum for selling drugs in a
7 school zone. You know, and you compare that to the
8 United States of America.

9 So we are not going to diminish the impact
10 on reducing drugs because we're modifying our
11 sentencing.

12 CHAIR SARIS: So in general are we tougher
13 than most states still?

14 MR. HUTCHINSON: Absolutely.

15 CHAIR SARIS: Under the new laws? So that
16 if you're correctly heralding the reduction in crack
17 and cocaine use, that will in your view still
18 continue under the drug laws as they exist now under
19 the new statute?

20 MR. HUTCHINSON: The new statute, the
21 sentencing will continue the tough approach to drugs
22 in our country. Now what I'm worried about are other
23

1 factors that you don't control that will reflect on
2 drug usage such as national leadership, our
3 advertising campaign, our money that goes to
4 rehabilitation, money that goes to drug treatment
5 courts, and other issues.

6 But the sentencing regime will still be
7 effective as a deterrent to drug usage in our
8 country.

9 VICE CHAIR JACKSON: I was just wondering,
10 Mr. Hutchinson, do you have a position on whether the
11 entire amendment should be applied retroactively as
12 opposed to just Parts A and C? There is something of
13 a side debate going on about that aspect of it.

14 MR. HUTCHINSON: And I don't know enough
15 about that side to debate the comment.

16 VICE CHAIR JACKSON: Okay.

17 CHAIR SARIS: Mr. Wroblewski.

18 COMMISSIONER WROBLEWSKI: Thank you all
19 for coming. Congressman Hutchinson, I just have one
20 quick question.

21 One of the reasons we are sort of in this
22 whole mess about crack and powder cocaine is that

23

1 powder cocaine is brought into this country, it's
2 prosecuted at the federal level largely as a
3 wholesale drug with very large quantities.

4 Crack cocaine, on the other hand, is
5 largely a street-level drug and we're prosecuting
6 retail sellers and people who are involved in
7 violence and other crimes, the kinds that Mr. Chiles
8 and Mr. Hiller spoke about.

9 When you were the Administrator of the
10 DEA, you suggested a new sentencing regime that would
11 sentence retail offenders – it would have a new
12 mandatory minimum. Instead of a five-year and a ten-year
13 mandatory minimum, perhaps a new two- or three-year
14 mandatory minimum – I don't quite recall – for retail
15 level offenders with higher mandatory minimums for
16 those wholesalers who were moving large quantities.

17 Do you still support that kind of reform
18 to the drug sentencing laws?

19 MR. HUTCHINSON: You've got a better
20 memory than I do. We put a lot of thought into it
21 while I was Administrator of the DEA, and I'll
22 certainly stand by the positions that I took then.

23

1 My reaction is that can make some sense. I'd want to
2 give it a little bit more thought and refresh myself
3 on it.

4 But in terms of the enforcement policy
5 toward powder and the retail marketing of crack
6 cocaine, it just always struck me as inconsistent.
7 You know, generally you go after the higher level
8 producer. You go after what is the source product.
9 And crack cocaine comes from powder cocaine. And to
10 have a lower sentencing regime for powder cocaine
11 than crack cocaine, the retail product, always seemed
12 to be reverse to me.

13 Now I am very happy with what we have done
14 here, but that I struggled with whenever I was
15 Administrator of the DEA on that enforcement policy.
16 I think the DEA goes after high-level producers, the
17 cartels, the ones that are bringing it in. But
18 sometimes you have to deal at the retail level to
19 work your way up. And so I do think you need to have
20 some toughness there toward the retail producer, but
21 it certainly should be distinguished.

22 VICE CHAIR CARR: Do you still think there

23

1 should be mandatory minimums?

2 MR. HUTCHINSON: Yes. I have no problem
3 with the concept of mandatory minimums. And while
4 I've been a good ally with my good friend Julie
5 Stewart on this issue of crack/powder cocaine, you
6 know for the Congress of the United States, or for
7 their elected representatives to express outrage at a
8 particular societal problem through a mandatory
9 minimum, I think can be appropriate.

10 I think they should be reserved, and
11 careful, and I think there needs to be some, I say
12 safety valves, which actually changes it from a
13 mandatory minimum, I guess you could argue that, is
14 inconsistent. But I think there has to be some
15 exceptions to it.

16 But, you know, for example, the gun
17 mandatory minimum, I certainly think that is
18 appropriate in our society.

19 CHAIR SARIS: Anything else?

20 (No response.)

21 CHAIR SARIS: Well thank you very much for
22 all of you coming. Thank you for providing the law

23

1 enforcement perspective. Thank you.

2 MR. HUTCHINSON: Thank you.

3 (Pause.)

4 JUDGE WALTON: Good morning.

5 CHAIR SARIS: Good morning. And thank you
6 so much for coming this morning. Many of us already
7 know Judge Walton, who is a United States district
8 court judge for the District of Columbia, and a
9 member of the federal judiciary's Criminal Law
10 Committee. He has taken a big leadership role in
11 this issue of crack cocaine and the fairness or lack
12 of fairness of the penalties, but when I was reading
13 your bio, there were lots of things I didn't know
14 about you.

15 For one, you were an associate judge of
16 the Superior Court of the District of Columbia from
17 1981 to 1989. He served as associate director of the
18 Office of National Drug Control Policy, an executive
19 assistant U.S. attorney in the Office of the U.S.
20 Attorney in Washington, D.C.; that, in addition, he
21 served some in Philadelphia as a staff attorney for
22 the federal defenders.

23

1 So I thank you and would love to hear your
2 testimony.

3 JUDGE WALTON: Again, good morning and
4 thank you for having me appear before you on behalf
5 of the Criminal Law Committee of the Judicial
6 Conference of the United States.

7 I listened to the last panel and, like
8 Congressman Hutchinson, I don't want to lose my
9 reputation of being tough on crime, and I don't think
10 anybody would accuse me of being tough on crime.
11 They call me a long-ball hitter because I do think
12 when people do certain crimes they deserve to be
13 punished, and punished severely, if appropriate.

14 The predicate for the position that I take
15 on behalf of the Judicial Conference is one of
16 fundamental fairness. And I think that permeates all
17 that I will say to you. I have prepared written
18 testimony, and I would ask that that be adopted, or
19 accepted by the Commission, but I would like to
20 basically summarize it and maybe supplement what I
21 have to say in reference to this issue.

22 I was involved early on in the drug issue

23

1 as a part of the first Bush administration as the
2 associate director of the Office of National Drug
3 Control Policy. At that time, based upon some of the
4 things I had seen happen in reference to drugs and
5 what they do to communities and individuals, I took a
6 very hard line position regarding penalties that
7 should be imposed for drug trafficking offenses.

8 And I had the view, based upon the
9 knowledge that we knew about crack cocaine at the
10 time, that we were in fact talking about a different
11 substance, that we were talking about a substance
12 that was more addictive. We now know it's not
13 chemically more addictive; it may be more addictive
14 because of the way that it is used. We believe that
15 it had a greater impact on the fetus. At the time
16 there was a lot of violence related to the crack
17 trade, and that was because it was a cheap drug. It
18 was proliferating in our society, and there was a war
19 taking place in communities to garner that market.

20 I can say now, however, I don't see any
21 difference between the level of violence that I see
22 in reference to cases coming before me involving

23

1 crack as compared to any other drug.

2 So many of the predicates that I operated
3 under at the time when I took the position that there
4 should be disparity – never took a position it should
5 be 100:1 – I think have been dispelled by our current
6 knowledge.

7 And the Commission has recognized that the
8 disparity was a problem for a long time, and was
9 calling out for a long time for the Congress to take
10 some action to remedy this situation. Fortunately,
11 Congress has now acted. But there was a period of
12 inertia when Congress did not act. So if Congress
13 had acted at the time when the Commission first
14 called for these changes, many of the individuals who
15 are incarcerated now would not be serving the long
16 sentences they are serving.

17 And I don't think the irony of when
18 Congress decided to act should continue to work an
19 unfairness on individuals who otherwise should not be
20 serving the sentences that otherwise they should.

21 I heard the testimony concerning the
22 concerns that communities and individuals have about

23

1 the crime and drug problem, and I share those
2 concerns. I, before I got married and married a
3 doctor and she is able to now let us live in a
4 different environment than I used to because judges
5 don't make a whole lot of money, I lived in two
6 neighborhoods in Washington where drugs proliferated.
7 And I can tell you, it was very troubling to look out
8 of my window and see drug dealers selling drugs.

9 So I have been exposed to that
10 environment, and I fully appreciate the adverse
11 impact that drug selling and drug activity has on
12 communities. But I also know that in many of those
13 communities that are affected most by crack cocaine,
14 you are talking about poor communities. You are
15 talking about communities of color. And many of
16 these people in those communities don't believe in
17 our justice system, and they don't believe in our
18 justice system because they know that the system has
19 been unfair.

20 One of the things I also just finished not
21 long ago was chairing the National Prison Rape
22 Elimination Commission, and had the opportunity to

23

1 travel all throughout the country going into various
2 institutions, federal, state, and local. And the one
3 thing I saw as I went into most of those
4 institutions, are people who look like me.

5 And I have no problems with locking up
6 people, regardless of who they are, if they deserve
7 to be locked up. But many of our prisons are
8 congested with people of color, young men of color,
9 just because of this unfair disparity that we know
10 exists. And I am not in any way suggesting that
11 anybody, and clearly not me, advocated that when the
12 disparity went into effect that it should be done for
13 the purpose of racially locking up people.

14 But mistakes were made. And I am willing
15 to admit that my psyche in reference to the issue was
16 mistaken because of the premises that I operated
17 under. And now that we know that those premises that
18 predicated that 100:1 disparity were wrong,
19 fundamentally unfair, and imposed too harsh of a
20 sentence on people, I don't think it is fundamentally
21 fair to say that now we're not going to redress the
22 unfairness that many of those people experienced.

23

1 The Judicial Conference takes the
2 position, in reference to the specific question you
3 asked about which parts of the new law should be made
4 retroactive, that it should be Part A and Part C. We
5 don't take a position in reference to Part B. Those
6 are obviously factors, however, I would assume,
7 judges would inevitably take into account in
8 assessing whether someone should be subject to the
9 reduction if this were made to be retroactive.

10 I want to leave enough time for you to ask
11 me some questions, so I won't go on much longer, and
12 I do have to get back – I serve on the FISA court so I
13 need to get back to handle matters that I have to
14 deal with on that court, but I do want to respond to
15 any questions that you have. But I would basically
16 like to conclude my comments at this time with an
17 example of who we are talking about.

18 And I don't think we can group everybody
19 who we're talking about in the same category, as I
20 heard being suggested just a minute ago. And believe
21 me, I have the highest respect for law enforcement.
22 I worked as an assistant United States attorney with
23

1 police officers and FBI agents, and DEA agents, for a
2 significant part of my career. And I have the
3 highest regard for law enforcement and the things
4 that they do. They keep us – they protect us, and I
5 think all of us when we get in trouble, or something
6 happens, that is who we call out to. So I have the
7 greatest respect for them.

8 But I think the perspective that we should
9 not change this now is just wrong-headed. And the
10 one example which I'm sure all of you are familiar
11 with, is the case of Kemba Smith, a young lady who
12 grew up in a suburban area of Richmond. She was the
13 only child – sort of reminds me a lot of my child, who
14 is the only child – who grew up somewhat naive to the
15 world. And she went off to Hampton University, a
16 historical Black college. She wanted to go to that
17 school because she had lived in a majority White
18 environment and wanted to go to a historical Black
19 school.

20 So she went there. And unfortunately, she
21 fell in love with a drug dealer, a drug dealer who
22 not only used her but abused her. And as a result of
23

1 her love for him, mistaken as it may be, she got
2 involved in trafficking drugs for him. Never used.
3 Never sold, but trafficked in drugs as a mule for
4 him.

5 And as a result of her involvement, she
6 ended up getting a 24-1/2 year sentence. And that
7 was, to a large degree, because of the disparity that
8 existed between crack and powder.

9 And that young lady needed to be punished.
10 No question. But 24-1/2 years? No. And if she had
11 not been pardoned by President Clinton in the year
12 2000, she would still be in the ranks of who we're
13 talking about here today. And she would be there
14 probably until, assuming she got good time, and I
15 assume she would, and she went into a halfway house
16 six months before she finished the end of her
17 sentence, she would be incarcerated until
18 approximately 2017.

19 Here is a young lady now who has formed a
20 foundation, who travels throughout the country going
21 to colleges. My brother heard her speak in
22 Pittsburgh and he said she was eloquent. And talking

23

1 to young people about not doing the things that she
2 did. And hopefully that is acting as a deterrent.

3 If we had – if she had not been pardoned,
4 she would still be there, and we would be paying \$24-
5 to \$26,000 a year to incarcerate someone who clearly
6 does not have to be incarcerated for that period of
7 time.

8 So if for no other reason other than pure
9 economics, this country is drowning in debt. We
10 cannot continue to incarcerate all the people that we
11 incarcerate who do not need to be incarcerated for
12 long periods of time in certain instances, and
13 continue to exist as a thriving nation.

14 So I think for pure economics we have to
15 revisit some of the things that we do in reference to
16 incarcerating people – again, not that we shouldn't.
17 Some folks need to be locked up. I remember the joke
18 that Richard – it wasn't a joke, he got locked up out
19 in Arizona, Richard Pryor, and he went in. And when
20 he saw some of the folks who were there, he said:
21 Thank God we have prisons!

22 (Laughter.)

23

1 JUDGE WALTON: So the reality is, yes,
2 there are people who need to be locked up. But some
3 people, like Kemba Smith, no. Not for the period of
4 time she was locked up. We throw away money. We
5 throw away lives – because not only was she involved
6 with this man who was a drug dealer, she had become
7 impregnated by him. So her parents had to raise her
8 child for about the first six or seven years of his
9 life.

10 Now she's back in his life. She can be a
11 mother to that kid and hopefully steer him away from
12 the things that she fell into. So at bottom, the
13 position of the Judicial Conference is that
14 fundamental fairness, fundamental fairness dictates
15 that this change be made retroactive.

16 And then judges – in reference to the
17 change that the Commission made in 2007, I took that,
18 and I know my colleagues took that issue very
19 seriously. I did not just willy nilly grant those
20 requests. In fact, I probably denied 50 percent of
21 the applications that were submitted to me because I
22 was not going to, as I believe is the case with most

23

1 of my colleagues, they are not going to put somebody
2 in the community who has not done well in prison, who
3 has had a history of violence, who would probably go
4 back and engage in more violence. That is not what
5 we are talking about.

6 We are talking about the Kemba Smiths of
7 this world, and other individuals like her, who don't
8 need to be locked up for the extended period of time
9 that they've been locked up. And would it impose a
10 burden on the courts? Yes. To some degree, yes.
11 Even if it's to a significant degree, that in my view
12 doesn't justify our not making this retroactive
13 because I can't in good faith say that just because
14 I'm going to have to work a little harder that we
15 shouldn't rectify a clear unfairness.

16 Thank you.

17 CHAIR SARIS: Thank you.

18 VICE CHAIR CARR: Do you think one of the
19 ways we could relieve the crime problem in this
20 country is if more of us would become, or marry,
21 doctors?

22 (Laughter.)

23

1 JUDGE WALTON: It would make life a lot
2 easier.

3 (Laughter.)

4 CHAIR SARIS: Commissioner Friedrich.

5 COMMISSIONER FRIEDRICH: Judge Walton, as
6 you know in 2007 when we made the two-level reduction
7 retroactive, we made significant changes to the
8 policy statement 1B1.10, including adding a real
9 emphasis on public safety, which you've stressed here
10 today.

11 I am just wondering, based on your
12 experience handling these motions over the course of
13 the last several years, whether there are any
14 additional recommendations you would make to this
15 Commission regarding that policy statement? Whether
16 in your view it has worked well?

17 JUDGE WALTON: I think it has worked well,
18 and I know, talking to the judges I've talked to,
19 that they take those policy statements very
20 seriously. And because the Commission did express
21 its concern about public safety and the fact that
22 judges should be taking that into account in deciding
23

1 whether they would grant the reduction, they did so.

2 And I believe the judges would do that. I
3 mean, we are not in the business of releasing people
4 if we have a reason to believe that if we do that
5 they are going to go back into the community and
6 commit further crimes. So I think, yes, I think
7 those policy statements are important. I think those
8 policy statements should be a part of any change you
9 would make in regard to this application.

10 COMMISSIONER FRIEDRICH: And just to
11 follow up, at least one judge, maybe more, in your
12 district had applied a different ratio than the
13 100:1. Do you think the Commission needs to address
14 that issue specifically and give some sort of
15 direction to the courts in situations where they've
16 given maybe less than 18:1 that would warrant
17 additional reduction under this amendment? Do you
18 think that that sort of clarity is needed?

19 JUDGE WALTON: Well I can't speak on
20 behalf of the Criminal Law Committee and the Judicial
21 Conference because that is something that we have not
22 addressed, but I will speak to it from a personal,
23

1 individual perspective.

2 Having worked in a system, the District of
3 Columbia local system, as a judge for 18-1/2 years, I
4 saw the consequences of no guidelines and the
5 disparity that existed within our system. And it
6 depended upon which courtroom you went into as to
7 what sentence you were going to give.

8 So therefore I have a real problem with
9 the issue of disparity, because I think it is a real
10 problem from the perspective of fairness, and from
11 the perspective of the individuals who are being
12 sentenced when they're sitting in the cell and
13 they're talking to each other and they basically have
14 the same background, the same crime, and they're
15 doing very disparate sentences.

16 And I had a problem, to be blunt, with the
17 perspective that some judges took one position, and
18 others took another position. Because, again, it was
19 now going to depend upon which courtroom you went
20 into as to what sentence you received.

21 So, yes, I think there should be some
22 guidance, some policy guidance that the Commission

23

1 would give to judges as to what type of sentences
2 they should be imposing if they are permitted to
3 retroactively redress the problems that resulted from
4 the 100:1 disparity.

5 COMMISSIONER FRIEDRICH: Thank you.

6 CHAIR SARIS: Go ahead.

7 COMMISSIONER HOWELL: Just to follow up on
8 another aspect of 1B1.10 that Commissioner Friedrich
9 was talking about, she was focusing on the part of
10 that policy statement that gives directions to the
11 sentencing courts on how to apply a retroactive
12 application.

13 I want to turn to another aspect of
14 1B1.10, which is the explanation of what the
15 Commission itself looks at in deciding whether to
16 make a guideline-reducing amendment retroactive.

17 There are three factors we generally look
18 at: the purpose of the amendment; the magnitude of
19 the change; the administrative burden on the courts
20 in administering it.

21 You raised an issue that we actually have
22 not talked about yet very much this morning, although

23

1 it has been mentioned by a couple of witnesses,
2 including the acting head of BOP, and that is
3 overcrowding in our prisons.

4 We have about 35 percent overcrowding in
5 our federal prisons today, which as you said is a
6 huge taxpayer burden. It is one of the mandates to
7 the Commission in 28 U.S.C., 994(g) that the Commission
8 should take into account in all of our guideline
9 amendments, including retroactive ones in my view,
10 the capacity of the prisons and services available to
11 formulate the guidelines and to minimize the
12 likelihood that the federal prison population will
13 exceed the capacity of the federal prisons.

14 Do you think that – that is part of our
15 organic statute. Do you think that that is an
16 appropriate factor to add to the directions to
17 ourselves when we decide retroactivity? What the
18 capacity is of the federal prisons?

19 JUDGE WALTON: Absolutely. I can tell
20 you, again from my experience chairing the National
21 Prison Rape Elimination Commission, that one of the
22 significant contributing causes to prison rape is

23

1 overcrowding.

2 So I think to the extent that we reduce
3 overcrowding, that has a significant impact on those
4 incidents which cause our society to expend
5 tremendous amounts of money, and the impact obviously
6 it has on those who have been abused in that manner.

7 So, yes, I think it should be an
8 appropriate factor to consider in deciding internally
9 whether this change should be made retroactive.

10 CHAIR SARIS: Let me ask you, the
11 representative from the Department of Justice when
12 she testified expressed some concern about the
13 resources it would take from the courts, and I guess
14 probation, if we had to triage every single person
15 for public safety.

16 It was my experience when we did this last
17 time in Boston, a smaller jurisdiction, that it
18 actually didn't demand so many resources, and that
19 much of it was resolved through collaboration and
20 cooperation. I wanted to know what the District of
21 Columbia's experience was. How much time did it
22 actually take in court? How much probation time?

23

1 That sort of thing.

2 JUDGE WALTON: It didn't take an extreme
3 amount of time. It did take some additional effort,
4 there's no question about that. I think the major
5 burden was on our probation department. And I just
6 this morning talked to our chief probation officer,
7 Gennine Hagar, and asked her whether the burden that
8 will be placed on them would be oppressive, and
9 therefore they would have a problem with
10 retroactivity. And she said absolutely not.

11 And she has talked to a lot of her co-
12 chiefs around the country and they take the same
13 position. They believe, as I believe, as the
14 committee believes, that the disparity was
15 fundamentally unfair. And if it takes, you know,
16 more effort and more work to try and redress it, that
17 we just have to make that effort.

18 Yes, it did impose a greater burden on me
19 because I did not, just because the application was
20 filed, conclude that there should be the relief
21 granted. So I had to hold hearings in certain
22 respects. But at bottom I had to assure myself that

23

1 the individual I was releasing was not going to pose
2 a danger.

3 So, yes, it would impose a greater burden
4 but I don't think burden can trump fairness.

5 COMMISSIONER HINOJOSA: Judge Walton, one
6 of the things the Commission did when we made the
7 2007 amendments retroactive is give some period of
8 time before it became effective, so that the courts
9 could be prepared. Did you find that helpful? Or
10 would that still be necessary at this point, if the
11 Commission decided to vote for some retroactivity
12 here?

13 JUDGE WALTON: I think some period of time
14 is obviously, and did in fact help us gear up to deal
15 with the 2007 change. However, as I understand, the
16 change, if you recommended retroactivity and Congress
17 did not oppose it, would not take place until
18 November in any event. And I think that probably
19 would be a sufficient amount of time, especially in
20 light of the fact that we've done it before.

21 So I don't think it would entail the same
22 amount of preparation that it did the last time

23

1 around.

2 CHAIR SARIS: Anyone else?

3 (No response.)

4 CHAIR SARIS: Thank you very much. Thank
5 you for coming.

6 JUDGE WALTON: Well thank you again for
7 having me, and I would like to publicly commend Judge
8 Hinojosa for receiving the Devitt Award as one of our
9 top judicial officers in the country. I think it is
10 well deserved.

11 COMMISSIONER HINOJOSA: Thank you, Judge.

12 (Pause.)

13 CHAIR SARIS: So, Professor O'Hear, you
14 are our panel. It turns out, because of a last-
15 minute problem, Professor Chanenson could not come,
16 and so we welcome you to represent the academics of
17 the country.

18 Mr. O'Hear is the associate dean for
19 research and professor of law at Marquette University
20 Law School. He is an editor of the *Federal Sentencing*
21 *Reporter*, which I always enjoy reading, and the
22 author of more than 40 scholarly articles on

23

1 sentencing and criminal procedure. Welcome.

2 PROFESSOR O'HEAR: Thank you, Madam Chair.

3 And I won't feel myself obliged to speak twice as

4 long to fill in for my missing colleague.

5 (Laughter.)

6 PROFESSOR O'HEAR: In fact, having talked

7 a few times in the dreaded "11:00 to 12:15" teaching

8 slot, I know the perils of standing between an

9 audience and its lunch break. So I will try to stay

10 brief.

11 I want to thank the Commission for giving

12 me an opportunity to appear today to speak on a very

13 important topic. I would like to focus my remarks

14 today on urging retroactivity for Part A, and

15 distinguishing Part A from the new "aggravating

16 specific offense characteristics" in Part B. Then I

17 want to very briefly respond to a couple of the

18 aspects of the Department of Justice's presentation

19 this morning.

20 First of all, with respect to Part A, the

21 case for retroactivity is clear and compelling.

22 There is widespread recognition that the old 100:1

23

1 ratio was a profound injustice, and the 2007
2 amendment only partially corrected that injustice.

3 Indeed, there is good reason to think that
4 even the new 18:1 ratio is excessively harsh. Be
5 that as it may, there can be little doubt that making
6 the new ratio retroactive would result in many
7 thousands of crack offenders receiving new sentences
8 that are more closely commensurate with the gravity
9 of their offenses.

10 If the Commission agrees that the amended
11 Drug Quantity Table advances the cause of just
12 punishment, then it should be made available to as
13 many defendants as possible unless there are good
14 countervailing reasons.

15 Although the concerns relating to
16 recidivism and administrative burdens are certainly
17 not trivial, they do not seem compelling,
18 particularly in light of the very recent experience
19 of implementing retroactivity for the 2007 amendment.

20 I believe that the new aggravating
21 specific offense characteristics, however, present a
22 very different picture for at least three reasons.

23

1 First of all, they do not respond to long-
2 standing, widely shared views that the crack
3 sentencing guidelines are too lenient with respect to
4 the targeted classes of offenders. Although some of
5 the new factors, such as acts of violence, or bribery
6 may be perfectly appropriate sentence enhancers in
7 the abstract, we have to bear in mind that many of
8 the underlying concerns are already addressed through
9 existing guidelines enhancements.

10 For instance, we get at dangerousness
11 through the dangerous weapon enhancement, through
12 existing mandatory minimum statutes such as section
13 924(c), and of course through existing stand-alone
14 offenses such as bribery offenses.

15 Moreover, district judges have always been
16 able to take these considerations into account in
17 selecting a sentence within a range and, in extreme
18 cases, selecting a sentence above the range.

19 I am not aware of any arguments that
20 district judges have been unable historically to
21 impose appropriately severe sentences under the
22 guidelines in any subcategory of crack cases, and
23

1 certainly I have not heard those sorts of arguments
2 made in the way that we have constantly heard the
3 drumbeat of criticism going the other way that crack
4 sentences are systematically across the board too
5 high.

6 Second, even if the new aggravating
7 characteristics are not formally made retroactive,
8 district judges are still free to consider them in
9 response to sentence modification requests. The
10 commentary to section 1B1.10 contemplates that the
11 3553(a) factors will be taken into account in
12 deciding whether and to what extent to grant a
13 sentence reduction. And these factors would
14 authorize consideration of the new specific offense
15 characteristics.

16 Preserving some flexibility in the way
17 that the new aggravators are weighed is consistent
18 with the basic approach of the post-*Booker* federal
19 sentencing world and respects the capacity of the
20 district judge to put these aggravators into
21 appropriate context and not apply them
22 mechanistically.

23

1 Finally, the flexibility is especially
2 important in light of the fact that many of the cases
3 presenting the new specific offense characteristics
4 may have already resulted in enhanced sentences,
5 either within the range or above the range. There
6 seems some risk of double counting. A defendant may
7 have received a much longer sentence the first time
8 around on the basis of the new specific offense
9 characteristics and now lose the ability to obtain a
10 sentence reduction on the basis of the same
11 considerations.

12 So for that reason I think district judges
13 should retain the ability to take these into account
14 on a case-by-case basis.

15 Now briefly in response to the Department
16 of Justice's position in favor of limitations on
17 retroactivity for Part A, the Commission of course
18 did nothing like this with respect to the 2007
19 amendments. And I haven't heard any explanation for
20 why 2011 is different than 2007, what compelling new
21 information is available that tells us that we ought
22 to carve out these categories of offenders that the

23

1 department would like to carve out.

2 If anything, the just-released recidivism
3 data would seem to validate the approach that the
4 Commission used in 2007.

5 As far as a justification for this, from
6 Ms. Flowers this morning, what I heard was that the
7 real issue here is that the Department of Justice
8 can't realistically assess and litigate danger -

9 CHAIR SARIS: "Ms. Rose"? Not "Ms.
10 Flowers"?

11 PROFESSOR O'HEAR: Is that right? I'm
12 sorry. I'm sorry.

13 (Laughter.)

14 PROFESSOR O'HEAR: Smells as sweet, I
15 suppose, whatever the term is we use. I heard
16 Ms. Rose say that the issue is that the department
17 can't realistically assess and litigate dangerousness
18 on a case-by-case basis, and so needs to use what I
19 think even the department would admit are very crude
20 proxies for dangerousness in lieu of case-by-case
21 litigation.

22 But I don't understand what the rush is in
23

1 these cases where the department believes that there
2 is some significant dangerousness concern. Why can't
3 the department take the time that it needs to assess
4 and litigate these cases properly based on the
5 Commission's data?

6 Most of the people affected by the
7 amendment would not be released until year three, or
8 later – in some cases, much, much later, giving quite
9 a bit of time for the department to explore and
10 litigate the dangerousness on a case-by-case basis.

11 If the judges are driving the cases faster
12 than the department can deal with them, and I didn't
13 hear the department's representatives saying that,
14 but if that is the underlying concern that the judges
15 are driving the process too quickly, then I would
16 hope the department would suggest to the Commission
17 what some appropriate deadlines and timetables are
18 and the Commission could provide guidance to judges
19 in that regard as to what categories of cases the
20 department needs additional time to consider, and how
21 much time the department needs to consider them.

22 If necessary, the Commission might even

23

1 consider a rolling series of effective dates also to
2 provide more time for the department to assess
3 individual cases. Say for instance setting the
4 effective date for high criminal history offenders an
5 additional six months out, or something of that
6 nature, to give the system an opportunity to process
7 the easy cases, the cases that can be handled in a
8 non-adversarial fashion, get those handled quickly and
9 then give the department more time to handle the more
10 difficult cases.

11 The criminal history cutoff that is
12 proposed I thought was particularly odd, given that
13 the data from 2007 shows that Criminal History
14 Category IV actually has a lower recidivism rate than
15 Criminal History Category III. So it is hard to see
16 any basis for excluding Criminal History Category IV
17 from the people who benefit from retroactivity.

18 And then finally, the weapons possession
19 exclusion. Weapons possession is very broad, given
20 the way that vicarious liability operates in the
21 conspiracy context. This is going to sweep a lot of
22 people into the excluded category who may have had

23

1 little or no contact with a weapon, did not actually
2 use a weapon, and don't present any heightened risk
3 of dangerousness.

4 If it is felt necessary to deal with
5 weapons' issues through an exclusion, then the
6 Commission might consider a narrower, much narrower
7 exclusion for instance just for defendants who
8 received a 924(c) enhancement for brandishing or
9 otherwise using a firearm, rather than focusing on
10 possession alone.

11 Thank you.

12 CHAIR SARIS: Thank you.

13 VICE CHAIR JACKSON: Mr. O'Hear, thank you
14 for being here. I have actually been anticipating
15 your testimony because I am really trying to flesh
16 out the effect of the retroactive application of the
17 entire statute as opposed to just Part A, Part C, et
18 cetera.

19 I understood you to say the district court
20 should retain the ability to take the aggravators
21 into account on a case-by-case basis. What I don't
22 understand is why that wouldn't still happen if we
23

1 made the entire statute retroactive.

2 A previous panel indicated that it would
3 be the government's obligation to press the
4 aggravators; that the government would have to come
5 to the fore with the evidence. The government would
6 have to say violence was used, and here it is.

7 And then I heard the government say, oh,
8 my goodness, you know, administrative burden. We
9 don't want to have to do that.

10 Well, fine. They can just waive it. Like
11 I don't understand. The government doesn't have to
12 in every case apply the aggravators. So why would
13 the Commission do sort of Jiu-Jitsu gymnastics to get
14 out of Part B when it doesn't seem to me it has to
15 apply all the time, and the district court could
16 still use the flexibility that you suggest?

17 PROFESSOR O'HEAR: Well, first of all I
18 mean I guess we have to all concede that when we talk
19 about retroactivity for an enhancer in any sense we
20 are in new terrain here. So it is not entirely clear
21 as a practical matter what it would mean to make
22 these new specific aggravating circumstances

23

1 retroactive.

2 As I understand it, the question is
3 whether – the retroactivity question for these
4 enhancers – is whether you would categorically exclude
5 defendants from taking advantage of the reduced Drug
6 Quantity Table numbers if there is a corresponding
7 and offsetting new enhancer in place. That is how I
8 would understand it.

9 So that there would not be flexibility for
10 a district court judge to say, all right, there was a
11 premises here, there was drug-dealing on the
12 premises, it was maintained for that, but in the big
13 picture this isn't really worth taking into account,
14 or it is not worth weighing it as much as is called
15 for with the two-level increase.

16 VICE CHAIR JACKSON: That is interesting,
17 though, because I didn't – I mean, if I read 1B1.10
18 correctly, we would just put Amendment 2 in the
19 list. And as you read that, you would see that as
20 somehow excluding judges from applying Part A if Part
21 B was too significant, categorically? They wouldn't
22 be doing the entire weighing of Part A and Part B,

23

1 but somehow we wouldn't do Part A. We would do Part
2 B first, and if Part B is so significant than we
3 wouldn't even worry about Part A. So you would be
4 excluded from – an offender would be excluded from
5 getting the benefit of Part A?

6 PROFESSOR O'HEAR: That is my concern, at
7 least. Again, I think we are in uncertain terrain
8 here, but that would seem to me to be a plausible
9 reading of 1B1.10, is that you take the amendment in
10 its totality and determine whether there is a net
11 decrease in the sentencing range based on application
12 of all of the pieces of the amendment.

13 Now the Commission has already –

14 COMMISSIONER WROBLEWSKI: What is
15 problematic about that? Could you explain that?

16 PROFESSOR O'HEAR: What is problematic
17 about it in my view is that it precludes district
18 judges from weighing on a case-by-case basis the
19 significance of the aggravators as they would do in
20 the prospective cases under *Booker*; that there's
21 flexibility under *Booker* going forward, but
22 retrospectively we would be setting up a different

23

1 system which in effect is mandatory.

2 COMMISSIONER WROBLEWSKI: But didn't the
3 Supreme Court in *Dillon* decide that for us and say
4 that's precisely what we have?

5 PROFESSOR O'HEAR: The Supreme Court in
6 *Dillon* said that you could do that. You're
7 authorized to do that if you think that is the best
8 policy. And I am arguing that that is not the best
9 policy.

10 CHAIR SARIS: I was — oh, I'm sorry,
11 Dabney. I jus

12 COMMISSIONER FRIEDRICH: I just want to
13 make sure I understand your testimony. The way I
14 interpret how this would work if we were to apply the
15 statute as a whole is a judge would apply the new
16 ratio, 18:1, calculate the base offense level, and
17 the Drug Table, and then would consider whether you
18 get the plus-two bump for maintaining a premises for
19 the purpose of drug dealing.

20 VICE CHAIR JACKSON: If the government
21 pressed that issue.

22 COMMISSIONER FRIEDRICH: Of course. And

23

1 then – so therefore the court would be working from
2 the Drug Table up plus two. Now that might not be
3 all the way up to the initial sentence imposed. It
4 might be somewhere in between, but the defendant
5 could still get the benefit of the reduction, the
6 overall reduction.

7 Are we saying the same thing? Because I
8 understood what you said to mean that it would – I
9 guess it could conceivably negate it entirely, but it
10 also could fall somewhere in between. Right?

11 PROFESSOR O'HEAR: It could. And if so, I
12 think the new level would constitute a floor, a firm
13 floor below which the judge could not go.

14 COMMISSIONER FRIEDRICH: And your problem
15 with that is?

16 PROFESSOR O'HEAR: The problem with that
17 is that again in effect you are giving a mandatory
18 effect to the – you're giving a mandatory weight to
19 the new – no, wait a minute. I may be actually – I may
20 be – we may not be saying the same thing here.

21 Are you – is your suggestion here that the
22 judge would, if you have aggravating circumstances,

23

1 that the judge would weigh how much weight to give to
2 those aggravating circumstances? In other words, the
3 judge might be able to say, premises here, I'm going
4 to bump the offense level by one instead of two?

5 COMMISSIONER FRIEDRICH: No. I mean, I
6 agree with Jonathan Wroblewski that *Dillon* says we
7 can limit it, and we can limit it with a firm floor.

8 PROFESSOR O'HEAR: Right.

9 COMMISSIONER FRIEDRICH: But my point is
10 that firm floor can be somewhere below the initial
11 sentence imposed. It's not going to, in some cases,
12 negate the entire effect of the retroactive amendment
13 should we decide -

14 PROFESSOR O'HEAR: Right. But I think
15 we're still saying, I think, that you would be giving
16 mandatory effect -

17 COMMISSIONER FRIEDRICH: Yes.

18 PROFESSOR O'HEAR: - to the new specific
19 offense characteristics, and I am agreeing that under
20 *Dillon* that the Commission could do that. And I am
21 arguing that the Commission should not take advantage
22 of its power to do that.

23

1 COMMISSIONER FRIEDRICH: But we should
2 apply – to make sure I understand your testimony – we
3 should apply the mitigating provisions, but not the
4 aggravating? That's your testimony?

5 PROFESSOR O'HEAR: Yes.

6 COMMISSIONER FRIEDRICH: All the
7 mitigating provisions?

8 PROFESSOR O'HEAR: Well, in my written
9 testimony I agreed with the position taken by the
10 defense practitioner representatives.

11 COMMISSIONER FRIEDRICH: Just the
12 mitigating role?

13 PROFESSOR O'HEAR: Right.

14 COMMISSIONER HINOJOSA: Well to clarify
15 something, what you're saying is, with regards to
16 Part B you would just do anything that was mitigating
17 and ignore any aggravating factors that have been
18 added? Is that right? I think that's –

19 COMMISSIONER FRIEDRICH: No, he's taking
20 role cap only.

21 PROFESSOR O'HEAR: Just the mitigating
22 role cap.

23

1 COMMISSIONER HINOJOSA: Right. And you
2 wouldn't deal with any of the other aggravating
3 factors that are in there as far as -

4 PROFESSOR O'HEAR: Right. I wouldn't deal
5 with them at the level of a Commission pronouncement.
6 I would permit district court judges to take those
7 into account on a case-by-case basis.

8 COMMISSIONER HINOJOSA: But you would
9 agree that if we did have judges consider the
10 mitigating factors as well as the aggravating factors
11 that it doesn't have to be the prosecutor who brings
12 it up, it would be the duty of the judge to make
13 those determinations without the prosecutor bringing
14 those up? Right? I mean, that would be the role of
15 the judge, as it is on any aggravating or mitigating
16 factor, or any determination of the guidelines. It
17 is not the prosecutor or the defense attorney
18 bringing those up. The judge has the responsibility
19 to make those decisions and to consider all of them
20 on a one-by-one as far as each one of the SOCs or the
21 base offense level in relevant conduct matters.
22 Isn't that the way you would think this should be?

23

1 PROFESSOR O'HEAR: I would agree with
2 that. There is the sort of formal answer to the
3 question. There is also the practical answer to the
4 question; that with respect to some of these
5 aggravators in some of the cases, there's not going
6 to be any record that's going to tip the judge off
7 that the aggravator is present, in which case the
8 aggravator is, even though formally available to the
9 court, is practically not available to the court
10 unless the government presents the information and
11 makes the argument.

12 COMMISSIONER WROBLEWSKI: Professor, I've
13 got a couple of questions about a case called *Freeman*
14 *v. United States*. Are you familiar with that? It's
15 a case before the Supreme Court now.

16 PROFESSOR O'HEAR: Only in fairly vague
17 contours. This is the plea bargaining case?

18 COMMISSIONER WROBLEWSKI: Right. And the
19 question there before the Court is what the term
20 "based on" in [3582](c) really means.

21 So for example we've had some debate
22 internally here today about whether someone who has
23

1 gotten a reduction, a *Booker* reduction in their
2 initial sentence, should be eligible for a further
3 reduction? And one of the questions is that under
4 the statute which says you can get a further
5 reduction if the guideline that your sentence was
6 based on is reduced.

7 The question is: Well, what does "based
8 on" mean if you got a 3553(a) sentence rather than -
9 so one of the things that was suggested by Mr. Debold
10 was that the Commission wait, probably no more than
11 30 days, until the Supreme Court decides the case,
12 hear what they have to say. Do you think that is
13 okay? Do you have any concerns about the Commission
14 waiting for that decision?

15 PROFESSOR O'HEAR: Well, it will come out
16 soon. The amount of time is not likely to have a
17 material effect on very many people. On the other
18 hand, I don't know that the Commission needs to.
19 3582 and that based-on language is I believe a
20 directive to judges, isn't it, rather than a
21 directive to the Commission? And so it should be the
22 district judges who are concerned about what "based
23

1 on" means because this, as I understand it, defines
2 the scope of their jurisdiction to modify a sentence.

3 COMMISSIONER WROBLEWSKI: Right. Well one
4 of the things that was debated, again, and suggested
5 by the defenders, was to eliminate a particular
6 sentence in 1B1.10 about *Booker* variances. So I
7 think it has still some impact.

8 But let me get to the facts of that case
9 in particular because I think it addresses some of
10 the things that Commissioner Jackson was talking
11 about.

12 In that case the defendant was arrested as
13 a suspect in an armed robbery case. It turned out,
14 when he was arrested by the local police officer, he
15 had in his possession about 3.5 grams of crack, as
16 well as a loaded weapon. A plea bargain was
17 established. They negotiated a plea bargain where
18 the defendant would be charged in federal court with
19 the crack offense and with possession of a gun, and
20 he would get a 106-month sentence. That is the case
21 that we have.

22 Now if that goes back to the district
23

1 court, if this is applied retroactively without any
2 limiters for possession of a weapon or so forth,
3 there is a possibility – without the limiters that the
4 Attorney General was suggesting – and the government
5 wanted to have consideration of that robbery, if you
6 were this person's – if you were Mr. Freeman's defense
7 attorney, would you insist on proof, perhaps even
8 beyond a reasonable doubt, about whether violence was
9 committed as part of that robbery?

10 And what proof would you require from the
11 government as part of that?

12 PROFESSOR O'HEAR: So this is – what world
13 are we in here? Are we in a world where Part B is
14 retroactive in its entirety?

15 COMMISSIONER WROBLEWSKI: Well that is
16 another question about why would it be inappropriate
17 to apply Part B in that circumstance where there
18 might have been some proof of violence. Let's say
19 Part B. I now would like to hear your answer on both
20 possibilities, both worlds –

21 PROFESSOR O'HEAR: I'm digging myself a
22 deeper hole here.

23

1 COMMISSIONER WROBLEWSKI: – and without
2 Part B. But let's say with Part B, and there is some
3 evidence that there was a robbery that took place.

4 What would be the level of proof? Who
5 would have to prove it? Would the defendant have a
6 right to be physically present, either if Part B was
7 applied or not?

8 PROFESSOR O'HEAR: There are a lot of
9 questions in that that I don't know the answer to,
10 and I'm not sure what the right answer is to it.
11 This is sentencing, and I would think –

12 COMMISSIONER WROBLEWSKI: It's not
13 sentencing. It's a re-sentencing.

14 PROFESSOR O'HEAR: Well, yes.

15 COMMISSIONER WROBLEWSKI: And the Supreme
16 Court said that there's a difference there.

17 PROFESSOR O'HEAR: Actually they said it's
18 not a resentencing; it is a sentence modification.

19 COMMISSIONER WROBLEWSKI: Exactly. That's
20 correct.

21 PROFESSOR O'HEAR: In *Dillon*. Still, my
22 instincts would be to apply the same standards of

23

1 proof that normally obtain, and the same processes
2 that normally obtain at sentencing; and that the
3 judge would weigh the evidence that is presented and
4 make findings. And under my view where Part B is not
5 retroactive, the aggravators are not retroactive, the
6 judge has really discretion to decide how much weight
7 to give to that evidence.

8 CHAIR SARIS: Let me ask you this: The
9 tail end of your testimony, "Other Considerations," and
10 you talk in terms of drug sentencing reform more
11 generally, you had a statement which intrigued me.

12 You said: "Yet, it should be possible to
13 identify ways in which the federal system is
14 significantly out of step with a substantial majority
15 of states – as it was with the 100:1 ratio – and to
16 move the federal system in the direction of the states'
17 center of gravity." Which makes me think – you don't
18 amplify – that you have something in mind.

19 When we've asked people in prior panels,
20 sometimes the state systems are more severe, and
21 sometimes they're less severe. So I want to
22 understand what you have in mind when you suggest

23

1 sort of the federal sentencing guidelines are out of
2 step in other ways, other than crack/powder.

3 PROFESSOR O'HEAR: I don't really have a
4 hidden agenda there, believe it or not. Certainly
5 one thing that stands out really quite dramatically
6 is drug treatment courts, which have just grown
7 explosively in state systems across the country.

8 There are -- the last numbers I saw were
9 2,000, and that was a few years ago; there's probably
10 far more than that now. The options available for
11 drug defendants to receive treatment in lieu of
12 prison in state systems is vastly greater than in the
13 federal system.

14 CHAIR SARIS: So there is no one drug that
15 you feel, other than the crack/powder, which we've
16 just addressed, there's no other drug that you have
17 in mind which creates a gross disparity between the
18 way the feds deal with them and the states deal with
19 them?

20 PROFESSOR O'HEAR: No. I simply haven't
21 seen research on that, so I don't want to say that
22 that drug doesn't exist. It may well exist. This is

23

1 really a suggestion that I think this would be a very
2 fruitful area for the Commission to engage in some
3 research to determine whether such drugs exist.

4 CHAIR SARIS: Go ahead.

5 COMMISSIONER HINOJOSA: But isn't that a
6 factor, the fact that the person that gets charged in
7 the state system is a very different defendant that
8 in the federal system? The federal system, as you
9 heard Mr. Chiles, takes on the cases that involve
10 large drug traffickers, or large amounts, as opposed
11 to a personal user who is arrested for personal use.
12 I don't even remember the last - in fact, I don't know
13 of a case where I have had someone who was arrested
14 and then came to my court in federal court for a
15 personal use amount, as far as other than drug
16 trafficking. There might be smaller amounts that it
17 was in drug trafficking, but not just simply because
18 somebody had possession for use, regardless of what
19 the drug is.

20 PROFESSOR O'HEAR: Well, yes.

21 COMMISSIONER HINOJOSA: So that is why
22 that is different as to what happens in the state

23

1 versus the federal with regards to rehabilitation, as
2 far as what's available.

3 PROFESSOR O'HEAR: Right. And this, as
4 far as I know, is something that varies a lot from
5 district to district. When I speak with federal
6 prosecutors, or federal defenders for that matter,
7 around the country I hear very different amounts as
8 far as what is going to trigger federal action in one
9 district versus another.

10 And there are also the weird kind of
11 random outliers who end up in the federal system for
12 no apparent good reason.

13 So I am not pushing the drug treatment
14 court thing hard here, but I'm pointing that out as
15 one area where there's a pretty dramatic difference
16 in terms of what's available to appropriate
17 defendants in state court systems versus the federal
18 system.

19 And this is a topic, again, that I think
20 would be appropriate for the Commission to explore
21 and consider whether there are ways of making these
22 sorts of opportunities available in the federal

23

1 system to appropriate offenders.

2 CHAIR SARIS: Anybody else?

3 (No response.)

4 CHAIR SARIS: Thank you very much for
5 being our academic panel.

6 PROFESSOR O'HEAR: Thank you.

7 CHAIR SARIS: We will have lunch. Let me
8 just -- we are hopefully going to come back in -- we got
9 going a little bit late, but not too late -- we are
10 hoping to come back around 1:30 for the community
11 interest panel. So we will see you then.

12 Thank you.

13 (Whereupon, at 12:32 p.m., the meeting was
14 recessed, to reconvene at 1:30 p.m., this same day.)

15

16

17

18

19

20

21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

AFTERNOON SESSION

(1:32 p.m.)

CHAIR SARIS: Good afternoon. Welcome back to the community interest panel. We've all eaten well and are ready to go. So I am going to introduce this panel.

I begin with Mark Mauer. Welcome back.

MR. MAUER: Thank you.

CHAIR SARIS: Who is the executive director of the Sentencing Project where he has served since 1987. He is also an adjunct faculty member at George Washington University, and began his work in criminal justice in 1975 as the national justice communications coordinator with the American Friends Service Committee.

Next to him is Hilary Shelton. Welcome, who is the NAACP's Washington Bureau director and senior vice president for advocacy and policy. Previously he served as federal liaison and assistant director to the Government Affairs Department of the United Negro College Fund. And as the federal policy program director to the United Methodist Church's

1 Social Justice Advocacy Agency. And he serves on a
2 number of boards of directors.

3 Jesselyn McCurdy is a senior legislative
4 counsel for the ACLU. Previously she served as
5 counsel for the House Subcommittee on Crime,
6 Terrorism, and Homeland Security; as the co-director
7 of the Children's Defense Fund's Education and Youth
8 Development Division; and as a staff attorney for the
9 American Prosecutors Research Institute.

10 And last but by no means least is Pat
11 Nolan, the vice president of Prison Fellowship, a
12 Christian ministry serving prisoners. And he also
13 heads the Justice Fellowship, the criminal justice
14 reform arm of that organization. Previously he
15 served for 15 years in the California State Assembly,
16 four of those as the Assembly Republican leader. He has
17 also served 29 months in federal custody for a
18 racketeering conviction, and since his release has
19 testified many times on prison-related issues.

20 Welcome. So did you all organize
21 internally, or do I just start at the end?

22 MR. MAUER: You're in charge.

23

1 CHAIR SARIS: All right, first at bat.

2 Thank you.

3 MR. MAUER: Well thank you so much for
4 inviting me here again, and my thanks again for all
5 the hard work the Commission has done over the years
6 on this important issue.

7 You have my written testimony, and I
8 address a number of issues supporting retroactivity
9 in terms of fairness, compassion, and public safety
10 goals.

11 I think my time may be best used here to
12 address the issue that has been raised significantly
13 this morning about whether there should be any
14 excluded categories of offenders who would not
15 benefit from retroactivity, which I do find
16 problematic.

17 It strikes me that in setting up a policy
18 like that it has a lot of parallels to the whole
19 issue of mandatory sentencing, which the Commission
20 is taking an investigation on, where essentially we
21 have a one-size-fits-all sentencing, or retroactivity
22 policy rather than letting judges make individualized
23

1 decisions about individual cases.

2 And we have seen all the excesses that
3 have been caused by mandatory sentencing, and I think
4 such a policy here would be overly broad, as well.

5 It strikes me, as well, that the way in
6 which dangerousness or public safety is defined here
7 is not terribly useful, and is overly broad by quite
8 a bit. The data that the Commission has just
9 released on recidivism I think makes that argument
10 very clearly, where a substantial majority of the
11 people who would be excluded from any consideration
12 of retroactivity we know would not offend, or at
13 least to the extent they are similar to the 2007
14 cohort and the measurements there.

15 The highest rate of recidivism, even
16 Criminal History Category VI, even there 55 percent
17 would not be expected to recidivate. When it comes
18 to weapons involvement, as much as two-thirds of the
19 people would not be expected to recidivate. And yet
20 we are excluding 100 percent of these people from
21 consideration.

22 It seems it gets even more bizarre in some
23

1 respects if we were to exclude categories IV, V, and VI
2 criminal history, Criminal History Category IV, where
3 no one would be considered eligible for
4 retroactivity, has a recidivism rate that is actually
5 somewhat lower than Criminal History Category III.

6 So Category IV is 32 percent, 32.8;
7 Category III is 35.5. So if public safety as measured
8 by recidivism were the only consideration, it seems
9 like the policy should promote that we exclude
10 Category III, but not Category IV. And it is not clear,
11 you know, how this is going to help us make informed
12 decisions about who should be eligible for this.

13 The definition of "dangerous" also strikes
14 me as being very much sort of outdated in the sense
15 that we are not talking about people who are
16 sentenced 12 or 24 months ago in most cases. In many
17 of these cases these are people who have been in
18 prison 10, 15, 20 years or more and the 25-year-old
19 who carried a gun while committing a crack sale 15
20 years ago is now a 40-year-old who is a very
21 different person in many ways. We have seen this for
22 all sorts of offenders. In prison, people do grow

23

1 up. People getting out, or are eligible to get out,
2 largely are going to be in their late 30s or 40s. We
3 know that there is a significant aging out process of
4 criminal activity. It doesn't tell us about any
5 given individual, but as a group these people should
6 be less of a threat to public safety.

7 And so to base their eligibility on their
8 behavior more than a decade ago seems to be looking
9 at the wrong picture there. I was also struck this
10 morning listening to the testimony from the acting
11 director of the Bureau of Prisons who talked about
12 the programming that goes on in the Bureau of Prison,
13 a program that would be implemented to help prepare
14 for releases, all of which sound fine to me.

15 But what is strange here is that it seems
16 that by excluding certain categories of offenders
17 from any consideration is essentially making an
18 assumption that not a single one of these more than
19 6,000 people could possibly benefit from any
20 constructive programming that goes on in the Bureau
21 of Prisons. And that would be a rather sad state of
22 affairs if we assume that nothing good could happen

23

1 to any of these people when we sort of have this
2 assumption in general we think rehabilitation, we
3 think programming for re-entry is a good thing to do.
4 We have some evidence that it can make a difference
5 in people's lives.

6 So why would we assume categorically that
7 it was not at all effective potentially for any of
8 this group of people. We know, as well, I think from
9 the recidivism data, the 2007 group, where the people
10 who spent more time in prison had slightly higher
11 rates of recidivism. You know, many people have
12 speculated, and there is some research to support it,
13 that prisons may be either criminogenic, or the
14 longer you spend in prison the more removed you are
15 from family and community.

16 And so there certainly is an argument that
17 more time in prison may actually make re-entry more
18 difficult and may actually contribute to higher rates
19 of recidivism.

20 So if we are concerned about public
21 safety, yes, excluding these people may delay that
22 onset of recidivism by several years or so, but it is

23

1 not eliminating that by any means.

2 The other part of this thinking about the
3 public safety issue is to try to put that in
4 perspective. If all 12,000 people were eligible for
5 consideration, the Commission's estimates suggest
6 that in the first year, which would be the biggest,
7 the most numerous number of people getting out, we
8 would have something like an additional 2,000 people
9 above what would normally be expected to be released
10 for crack cocaine offenses.

11 This is 2,000 people out of about 50,000
12 people released from the Bureau of Prisons, and out
13 of about 700,000 people released from any state or
14 federal prison in a given year. And I should also
15 note that 700,000 people certainly includes many
16 people who have significant criminal histories; many
17 people convicted of a violent offense; and yet every
18 day of the year corrections systems are releasing
19 people because they have done their time and they are
20 eligible for parole.

21 And, yes, this is a problem. That is why
22 the re-entry movement has taken off. But there are

23

1 things we can do to try to prevent and reduce the
2 risk of re-offending. This is what corrections
3 people and parole and community groups are doing
4 every day of the year.

5 So the additional problem posed by 2,000
6 people out of 50,000, or 700,000, yes, any individual
7 case can be a problem, but the scale is what we
8 really need to be thinking about here.

9 Let me just say finally that it seems to
10 me to be highly unfortunate at a time when the BOP
11 prison population is expanding and expected to keep
12 going up in the next couple of years, in sharp
13 contrast to what is happening around the country at
14 the state level where prison populations are
15 stabilized or even being reduced significantly in a
16 number of states. This is a golden opportunity to
17 have an impact on that overcrowding and what I think
18 most people would consider to be excessive
19 incarceration now, to limit by more than half the
20 number of people eligible. The fiscal cost is
21 probably in the range of hundreds of millions of
22 dollars that we are talking about in additional

23

1 costs. And those costs have to be balanced out in
2 terms of public safety.

3 You know, there are tradeoffs here and
4 money that could be invested in public safety and
5 other ways I would argue would be much better used
6 than expanded incarceration for people who could
7 otherwise be eligible here.

8 Finally of course are the racial dynamics
9 of crack cocaine. This has been one of the key
10 driving forces in addressing the sentencing policy
11 change. Over the last 20 years, crack cocaine, as
12 you well know, has been viewed as the most sort of
13 egregious aspect of mandatory sentencing, excessively
14 punishing lower-level offenders, and having an
15 unwarranted racial effect.

16 And to say that some 6,000 offenders, 85
17 percent of whom are African Americans, should be
18 denied this possibility of consideration for release
19 by a federal judge seems to me would send a very
20 unfortunate message and would be unfortunate, given
21 the momentum we have seen on the issue, and given the
22 constructive change enacted by Congress and this

23

1 Commission.

2 So it seems to me we have a very good
3 model in place from the previous retroactivity
4 system. There has been – you know, it has been a
5 relatively smooth process by all accounts, and the
6 recidivism data confirm that this has not been
7 problematic any more so than anything else would be
8 in prison release on any given day.

9 So I appreciate your consideration. I
10 would strongly encourage you to make this apply as
11 broadly as possible, and I think this would be a very
12 strong signal to send around the country in terms of
13 fairness, equity, and compassion in sentencing.

14 Thank you.

15 MR. SHELTON: Thank you, Chair Saris, Vice
16 Chairs Carr and Jackson, and members of the U.S.
17 Sentencing Commission, for inviting us here today to
18 share our perspective, the perspective of the NAACP.

19 For almost 25 years, sentences for
20 conviction of crack cocaine possessions have had a
21 tremendously disparate and devastating effect on
22 racial and ethnic minority Americans, especially

23

1 African Americans.

2 The result has been not only the loss of
3 millions of African Americans and others of their
4 basic rights for which the NAACP has fought for so
5 long and so hard, including voting rights, the right
6 to affordable high-quality education, as well as the
7 essential rights including assistance for housing,
8 employment, and food; but the sentencing guidelines
9 which led to the incarceration of a vastly
10 disproportionate number of African Americans and
11 Latinos has led to a very real destruction of entire
12 communities of color and has also led to the crisis
13 of confidence in the American judicial system.

14 Founded more than 102 years ago in 1909,
15 the National Association for the Advancement of
16 Colored People, the NAACP, is our nation's oldest,
17 largest, and it is the most widely recognized
18 grassroots-based civil rights organization.

19 We currently have more than 2,200
20 membership units across the nation with members in
21 every one of the 50 states. For over 15 years now
22 I've been the Director of the NAACP's Washington
23

1 Bureau, our association's legislative and national
2 public policy arm.

3 As many of you know, the NAACP has
4 testified before you at previous hearings regrading
5 the disparate impact of crack cocaine laws on African
6 Americans in particular, as well as communities
7 nationwide served by the NAACP.

8 The members of the NAACP across our nation
9 know all too well the devastating impact the 100:1
10 sentencing disparities have had on our communities.
11 That is why we celebrated on Tuesday, August 3rd,
12 2010, when President Obama signed the Fair Sentencing
13 Act into law.

14 This important legislation reduced
15 mandatory minimum sentences for a federal conviction
16 of crack cocaine possession from 100 times that of
17 people convicted of carrying the drug in its powder
18 form to 18 times that sentence.

19 The NAACP supported this legislation as an
20 important first step towards completely eliminating
21 this racially discriminatory sentencing disparity.
22 There is still work to be done, however, to fully

23

1 correct this injustice.

2 The NAACP appreciates all the hard work
3 that went into passing this legislation, as well as
4 the fact that it represents the first time the U.S.
5 Congress has moved to reduce any mandatory minimum
6 sentence in over 40 years.

7 The NAACP also recognizes and appreciates
8 that everyone involved in the negotiations seem to
9 agree that the current 100:1 sentencing disparity has
10 had a hugely unfair and racially discriminatory
11 impact on racial and ethnic minority Americans.

12 The NAACP will continue, however, to push
13 for a complete elimination of the disparities between
14 crack and powder cocaine sentencing. Because of the
15 mandatory minimum jail sentences for those convicted
16 of possession of five grams of crack cocaine or more,
17 people of color are being put in prison at much
18 higher rates than their Caucasian counterparts. And
19 the judges have virtually no discretion to mitigate
20 the sentence for first-time or non-violent offenders
21 for special circumstances.

22 This is especially galling in light of the

23

1 fact that there is no scientific reason for the
2 sentencing disparity. We know that crack and powder
3 cocaine are pharmacologically indistinguishable.
4 Furthermore, ongoing research into crack and powder
5 cocaine has further eroded the myth that crack
6 cocaine is more addictive than powder cocaine; that
7 crack cocaine users are, because of their choice of
8 drug use, more violent than powder cocaine users, or
9 that the prolonged presence of crack cocaine in our
10 communities has led to a maternity ward full of crack
11 babies.

12 It was these initial theories which were
13 widely held beliefs in 1986 which led to the dramatic
14 disparities in the treatment of crack versus powder
15 cocaine in federal law. The question before us today
16 is whether or not to apply the new guidelines as
17 dictated by the Fair Sentencing Act retroactively to
18 those who were convicted of crack cocaine possession
19 prior to enactment of this new law.

20 To us, the answer is a clear and
21 resounding "yes." Retroactive applications of the
22 revised guideline is a necessary next step in
23

1 addressing the unfair, unjustified, and racially
2 discriminatory disparity in the treatment of powder
3 and the crack forms of cocaine.

4 Let's look for a minute at who would have
5 their sentences reduced with retroactive application.
6 Of the more than 12,000 men and women currently in
7 jail who would be impacted by retroactivity, more
8 than 10,000 – or more than 85 percent – are African
9 American. Another 8.5 percent of those who would see
10 their sentences reduced are Hispanic; and 5.5 percent
11 are Caucasian.

12 By applying the new law retroactively, the
13 U.S. Sentencing Commission would, by agreeing with
14 the Congress when it passed the Fair Sentencing Act
15 and with President Obama when he signed the bill into
16 law that too many racial and ethnic minority
17 Americans have been unfairly and discriminatorily
18 incarcerated under that new law.

19 While not fully correcting the sins of the
20 past, applying the new guidelines retroactively would
21 send a strong signal to those who are currently
22 incarcerated, as well as to their families, their
23

1 friends, and their communities, that the
2 discriminatory nature of the law has been recognized.
3 And this is a big, crucial, and necessary step.

4 As the U.S. Sentencing Commission said in
5 its 2002 report to the Congress, and I quote, "even
6 the perception of racial disparity (is) problematic.
7 Perceived improper racial disparity fosters
8 disrespect for and a lack of confidence in the
9 criminal justice system among those very groups that
10 Congress intended would benefit from the heightened
11 penalties for crack cocaine." Unquote.

12 In developing and debating the Fair
13 Sentencing Act, as I said earlier, the NAACP was
14 gratified to see that everyone seemed to agree that
15 the policies adopted in the 1986 law had a racially
16 disparate impact.

17 It is now up to the Sentencing Commission
18 to follow through on Congress's attempt to ameliorate
19 that discrimination. By the U.S. Sentencing
20 Commission's own estimate, more than 12,000 men and
21 women who are currently incarcerated because of a
22 crack cocaine conviction would have their sentences

23

1 reduced if the guidelines of the Fair Sentencing Act
2 are applied retroactively.

3 A vast majority, again according to our
4 own research, are African American. Your actions
5 have the potential to have a dramatic impact on our
6 communities and their perception of justice.

7 As I have in the past, I would like to
8 again thank the U.S. Sentencing Commission for their
9 efforts to correct many of the problems associated
10 with the federal convictions for possession of crack
11 cocaine. By holding this hearing, and by accepting
12 and reviewing my testimony, the NAACP is grateful
13 that somebody is indeed listening.

14 It is, however, our further wish that
15 change will come and fair and equal justice will be
16 served for all Americans.

17 I want to thank you again, and I welcome
18 any questions you may very well have for me. Thank
19 you very much.

20 CHAIR SARIS: Ms. McCurdy.

21 MS. MCCURDY: I would like to thank the
22 Commission for inviting the American Civil Liberties

23

1 Union to testify today on whether Amendment 2 to the
2 United States sentencing guidelines promulgated in
3 response to the Fair Sentencing Act should be applied
4 retroactively.

5 The ACLU urges the Commission to
6 retroactively apply Part A of Amendment 2 which
7 changes the Drug Quantity Table by lowering base
8 offense levels for certain amounts of crack cocaine,
9 Part C, and the mitigating role cap provision in Part
10 B.

11 These parts of the amendment implement the
12 heart of the congressional objective behind passing
13 the Fair Sentencing Act, which is to increase the
14 fairness of federal sentencing by reducing the
15 disparity in treatment between crack and powder
16 cocaine.

17 Also, these parts of the amendment can be
18 implemented easily, almost mechanically, without the
19 complicated calculus and additional fact-finding
20 required by most of the role adjustment factors in
21 Part B.

22 In addition, the ACLU believes that a
23

1 straightforward retroactive application to all
2 affected defendants would best balance the goals of
3 actualizing the Commission's findings over the years,
4 and congressional intent, while avoiding significant
5 complications in the re-sentencing process.

6 The Fair Sentencing Act, also known as the
7 FSA, represents the culmination of more than a decade
8 of debate and controversy about reducing the racial
9 disparities caused by federal crack cocaine
10 sentencing laws.

11 The FSA also represents Congress's efforts
12 to restore much-needed confidence in the criminal
13 justice system, especially in communities of color,
14 and to reserve sacred law enforcement dollars for the
15 most serious criminal offenders.

16 Correcting the racial disparities inherent
17 in the federal crack cocaine sentencing law and
18 reducing overly harsh punishment for those offenders
19 are goals of the FSA. This is clear from the
20 legislative history and the bipartisan floor
21 statements during the debate about the bill.

22 It would be contradictory for the
23

1 Commission, having just promulgated Parts A and C, to
2 avoid future inequities and now leave defendants
3 whose sentences are already tainted by the extreme
4 racial disparity of the prior crack cocaine
5 sentencing regime without a remedy.

6 As others have said, the Commission will
7 consider three factors to determine whether the FSA
8 should be applied retroactively.

9 The first is the purpose of the amendment.
10 The second is the magnitude of the change. And the
11 third is the difficulty of applying the amendment
12 retroactively.

13 The ACLU thinks that when all three of
14 these factors are considered in the context of the
15 Fair Sentencing Act, it supports applying Parts A and
16 C, along with the mitigating role cap, retroactively.

17 First, the purpose of the FSA. Congress's
18 purpose in passing the FSA was to rectify the
19 unfairness inherent in the prior cocaine sentencing
20 policy. Simply stated, continued application of that
21 discredited regime and its associated guidelines to
22 previously sentenced offenders would undermine

23

1 Congress's goals of promoting fairness and reducing
2 penalties.

3 The only difference between an offender
4 sentenced one year ago and an offender sentenced
5 today is the date of the sentencing relative to
6 Congress's moment of recognition that a restoration
7 of fairness was in order.

8 Subjecting these two offenders to two
9 different sentencing levels, one of which has now
10 been recognized by Congress as unfair, would not only
11 be arbitrary but would perpetuate the unfairness of
12 the prior system.

13 The fact that 85 percent of the offenders
14 who would be eligible for relief if the amendment
15 were retroactive are African American dramatically
16 demonstrates the effect retroactivity will have on
17 addressing racial disparities as well as implementing
18 congressional intent.

19 Denying retroactivity would be
20 inconsistent with the Commission's previous decisions
21 on retroactivity. This Commission has rendered
22 amendments retroactive when they serve to correct
23

1 congressional and Commission errors related to the
2 harms of drugs or the inflated penalties that result
3 from a poorly reasoned sentencing policy.

4 For all these reasons, the FSA's purpose
5 strongly supports making it retroactive as the
6 Commission applied the 2007 amendments for crack
7 cocaine retroactively.

8 Second, the magnitude of the change. The
9 Commission's Office of Research and Data reports that
10 for offenders sentenced between October 1991 and
11 September of 2010, the effect of the new base offense
12 levels would be to reduce the average crack cocaine
13 sentence by nearly one-fourth, or about 37 months out
14 of an average of 164 months. And for a small group
15 of offenders, sentence reduction would exceed ten
16 years.

17 In all, if the new base offense levels
18 were applied retroactively, 12,040 offenders
19 sentenced between October '91 and September of 2010
20 would be eligible to receive a reduced sentence.

21 In other words, the guideline
22 modifications significantly alter penalties across
23

1 the crack cocaine landscape, and if applied
2 retroactively would impact a wide range of offenders
3 to a significant extent.

4 On the other hand, if not applied
5 retroactively, thousands of offenders sentenced under
6 the flawed guidelines would be left behind to serve
7 an average of three more years than Congress now
8 believes is fair.

9 Third, difficulty of applying the
10 amendment retroactively. The decision of the
11 Commission to apply the 2007 amendments retroactively
12 and its results provided a valuable lesson about the
13 ease of retroactive implementation of the FSA
14 amendment.

15 The relatively smooth application by
16 courts of the two-level reduction in 2007 and 2008
17 demonstrates that retroactivity can be done without
18 burdening the courts or other parts of the criminal
19 justice system.

20 In fact, the courts granted a
21 significantly greater number of reductions in 2007
22 than the number of individuals estimated to be
23

1 eligible for a reduction during this amendment cycle.

2 As in 2007, Parts A and C can be
3 implemented easily because they involve no more than
4 a change to the base offense levels. Likewise, an
5 adjustment to the mitigating role cap only involves a
6 mechanical change in offense levels and therefore
7 could be implemented easily.

8 For these reasons, and just out of pure
9 fairness, the Commission should apply Parts A and C
10 of the Fair Sentencing Act amendment, as well as the
11 mitigating role cap retroactively.

12 The Commission is also considering whether
13 there should be limitations on retroactivity for
14 specific categories of defendants. The ACLU does not
15 think that limitations on retroactive application are
16 warranted or necessary.

17 The starting point for all crack cocaine
18 defendants, regardless of whether they were sentenced
19 within the guideline range, received departures, or
20 variances, had criminal history points, or
21 aggravating factors, or were sentenced before or
22 after *Booker*, *Kimbrough*, or *Spears*, were a guideline
23

1 range driven by an unfair 100:1 ratio.

2 Limiting retroactivity based on whether
3 the court granted or could have considered a variance
4 would be inappropriate. Any limitation based on
5 whether the guidelines were advisory under *Booker*,
6 whether a policy disagreement could have applied
7 under *Kimbrough*, or whether an alternative ratio
8 could have been imposed, *Spears*, would be premised on
9 the false assumption that every defendant sentenced
10 under these cases received, for policy reasons alone,
11 a benefit equivalent to what would be provided under
12 the FSA amendment.

13 Even after *Booker*, *Kimbrough*, and *Spears*,
14 while some defendants have received variances, many
15 others have not. But the vast number of defendants
16 who did not benefit from policy-based variances at
17 the outset, or where such variances were not
18 sufficient to reflect the change in the guideline
19 range, the Commission should not restrict the
20 opportunity to benefit from Congress's recognition
21 that the old law was unfair to everyone.

22 In conclusion, the ACLU appreciates the
23

1 opportunity to testify on the proposed retroactivity.
2 We urge the Commission to seize this historic
3 opportunity to correct the injustices of the past by
4 making Parts A and C, along with the Mitigating Role
5 Cap, retroactive.

6 Thank you.

7 CHAIR SARIS: Thank you. Mr. Nolan.

8 MR. NOLAN: Madam Chair, and
9 Commissioners, I thank you for allowing me to testify
10 before you. It is a privilege to be on this panel
11 with these esteemed colleagues.

12 I am Pat Nolan. As the Chair mentioned, I
13 am vice chair of Prison Fellowship, and I head up
14 their justice reform arm, Justice Fellowship. I was
15 a member of the California Legislature for 15 years,
16 and was Assembly Republican leader for four of those
17 years.

18 I was a leader on crime issues, especially
19 involving victims' rights. I was one of the original
20 sponsors of the Victims' Bill of Rights, and received
21 the Victims' Advocate Award from Parents of Murdered
22 Children.

23

1 I was prosecuted for a campaign
2 contribution I accepted, which turned out to be part
3 of an FBI sting. I pleaded guilty to one count of
4 racketeering and served 29 months in federal custody.
5 So I have seen the criminal justice system from both
6 sides.

7 I sit before you as a conservative
8 Republican, a former legislator, and a former
9 prisoner, who is convinced that this country needs a
10 more rational approach to apprehending, prosecuting,
11 and sentencing those who traffic in cocaine.

12 Congress and the President moved us in
13 that direction by enacting the Fair Sentencing Act.
14 Prison Fellowship respectfully asks you to take the
15 next important step to apply those changes
16 retroactively.

17 While I was in prison, I saw the bitter
18 resentment created by the disparity in punishment of
19 those who dealt in powder cocaine with those who
20 dealt in crack. It made no sense that an inmate who
21 sold crack cocaine received a longer sentence than a
22 dealer of powder who sold 40 or 50 times that amount
23

1 when both substances are pharmacologically
2 equivalent.

3 Congress recognized the injustice of this
4 disparity and passed the Fair Sentencing Act.
5 However, unless you make the new sentences
6 retroactive, there will remain a terrible injustice
7 in the system as offenders incarcerated under the new
8 sentences arrive, serve their time, and go home while
9 inmates convicted of the same offense under the old
10 law will remain behind bars for several more years.

11 If you approve retroactivity, these
12 offenders will not be getting off easily. The
13 average offender benefitting from retroactivity will
14 see their sentence drop from 167 months to 127
15 months. That is, they will end up serving over
16 10-1/2 years. That is not a light sentence in
17 anyone's book.

18 Prison Fellowship works with prisoners to
19 help them turn their lives around. We share the good
20 news of the gospel and work with inmates to develop a
21 moral compass so they can make good, moral decisions
22 after they leave prison.

23

1 We found our efforts ring hollow if we
2 don't also care about the condition in which the
3 inmates' families live, and the justice of the system
4 that keeps them in prison.

5 If you allow this disparity in sentences
6 to remain, our volunteers will have a difficult time
7 explaining the unequal treatment to the men and women
8 we minister to. And it will be very hard to tell
9 their spouses and children why they must suffer
10 without a parent or partner when someone who did the
11 same thing gets to go home.

12 The extra 30 months may not seem that
13 long, but to someone inside prison it seems like
14 forever. Think of the family events they will miss
15 if held for a longer time:

16 Graduations of their children and
17 grandchildren; walking their daughters down the aisle
18 at their weddings; funerals of parents, loved ones;
19 coaching soccer; leading a Girl Scout troop. I know
20 the importance of these family occasions.

21 My first furlough from my first halfway
22 house was to take my eldest daughter's first

23

1 communion. My three-year-old son ran through the
2 house shouting: My daddy home! My daddy home! To
3 anyone who would listen.

4 It would have broken my heart to miss that
5 special day for my daughter and my family, but it
6 would have been even more devastating if someone
7 convicted of the same crime were let out and I had to
8 remain in prison.

9 Support of families are the most important
10 factor in helping offenders make the difficult
11 transition from prison to freedom. Why would we keep
12 these families apart a day longer than necessary,
13 particularly when Congress has recognized the
14 injustice of those original sentences.

15 Now some will say they should have thought
16 of that before they committed the crime. In fact, I
17 probably would have said that when I was a member of
18 the Legislature. But it would have been wrong.
19 Because if a lot of things had been different they
20 wouldn't have committed the crime.

21 Punishing them harder and longer than
22 someone else with the same offense just isn't right.

23

1 It is unfair to both the inmates and their families.
2 It is a fundamental principle of the law from the
3 Code of Hammurabi through the Bible's *lex talionis*,
4 and to our common law, that the punishment for a
5 crime should do no more harm than the underlying
6 crime.

7 The disparity in the justice of the
8 system – excuse me – the disparity in sentences between
9 crack and powder has done far more harm to our
10 communities than the original offenses. To leave
11 this vestige of disparity unaddressed would be a
12 tragedy not only for the individuals and their
13 families but for those communities, as well.

14 Now some have warned that you will unleash
15 a wave of violent criminals if you apply these new
16 sentences retroactively. This is not borne out by
17 our past experience. Kingpins and violent drug
18 dealers will not be set free if you make the
19 amendment retroactive.

20 In fact, not a single offender will be
21 released automatically. Retroactivity will merely
22 permit certain offenders who have already served long
23

1 sentences to request a reduction in their sentence.
2 The decision to grant a sentence reduction can only
3 be made by the sentencing judge. If there is reason
4 to believe that the offender remains a danger to the
5 community, the government can present that evidence
6 to the judge.

7 In fact, the statute that allows
8 retroactivity also directs the court to make public
9 safety – take public safety into account. No one
10 wants to inflict an increase in crime and violence in
11 our cities. We know from past experience that that
12 won't happen.

13 In 2007 I testified before you on whether
14 to make your recently enacted two-level downward
15 adjustment retroactive. I listened as several
16 officials with impressive titles made breathless
17 predictions that mayhem, violence, and social
18 disintegration would follow your decision.

19 An assistant U.S. attorney flatly
20 predicted, quote, "These offenders likely will
21 reoffend and will do so within a short time of
22 getting out of jail." She testified that

23

1 retroactivity would contribute to the growing violent
2 crime problem, increase the number of murders, and
3 undermine public safety.

4 Of course those overheated predictions
5 didn't come about. Nothing of that sort happened.
6 So for those who predict that applying the Fair
7 Sentencing Act retroactively will set free thousands
8 of violent criminals to run riot in our cities, I
9 press them to explain why this retroactivity would be
10 different than the previous one in 2007.

11 In addition, those benefitting from
12 retroactivity would still have served ten years on
13 average. Do those who oppose applying the new
14 sentence retroactively really believe that ten years
15 in prison won't change someone, but an additional 30-
16 or-so-months will? I would really like them to make
17 that argument with a straight face.

18 At the 2007 hearing, an assistant director
19 of the U.S. Marshal's service predicted that his
20 agency would be overwhelmed by the flood of requests
21 and, quote, "manpower and funding (will) be diverted
22 from task forces, protection details and new
23

1 initiatives like the Adam Walsh Child Protection and
2 Safety Act."

3 We can always rely on bureaucrats to
4 threaten to close down a popular effort like the Adam
5 Walsh Act in order to resist reforms. His prediction
6 of cataclysm of course proved erroneous.

7 The courts, prisons, prosecutors, and
8 marshals coordinated the processing of requests for
9 retroactive sentence reduction, and the system
10 handled them seamlessly.

11 The Bible tells us that we are to seek
12 punishment in proportion to the crime. The same
13 punishment should be meted out for the same offense,
14 measure for measure, and pound for pound.

15 The Commission has the opportunity to
16 restore fairness and balance to our sentences for
17 crack cocaine. As a matter of principle and justice,
18 the Commission should make the new sentences
19 retroactive.

20 Thank you.

21 CHAIR SARIS: Thank you. Judge Howell?

22 COMMISSIONER HOWELL: Mr. Mauer, you spent
23

1 a few pages in your written testimony talking about
2 prison overcrowding, and it is one of the mandates
3 that the Commission has to keep track of prison
4 overcrowding in the prisons. And the Commission has
5 taken, I think, an important step to fulfill that
6 obligation in our organic statute by having the head
7 of the Bureau of Prisons testify at the beginning on
8 our proposed amendments, testify here today.

9 And one of the things I have been thinking
10 about is whether or not we should incorporate more
11 directly that obligation that the Commission has been
12 given – and using "shall" a couple of times in 994 – to
13 the Commission by incorporating that more explicitly
14 in our consideration of retroactive application of
15 the guidelines in 1B1.10, in addition to the three
16 other factors that Ms. McCurdy talked about that we
17 normally look at.

18 I asked this question of Judge Walton, my
19 colleague on the bench here, and I wondered from your
20 perspective – since you spent so much time talking
21 about overcrowding – what your reaction would be to
22 that proposal.

23

1 MR. MAUER: Well, you are all lawyers and
2 I am not, so I am going to be careful about the
3 "shall" and the "may" and things like that, and I
4 will leave that to your discretion. But certainly as
5 a matter of policy, it certainly seems like there is
6 a very close relationship to the extent that you are
7 looking at prison overcrowding issues as part of
8 sentencing policy, why would retroactivity be
9 substantially different?

10 You know, essentially we are talking about
11 how many people should go to prison, and how much
12 time should they spend there. And the sum total of
13 those decisions adds up to overcrowding potentially.
14 And it is just a matter of circumstances in large
15 part whether people are getting out at 85 percent of
16 their time, or some people benefit from retroactivity
17 for good policy and legal reasons.

18 And so it would seem to me that it is
19 essentially the same argument in terms of what the
20 Commission should be looking at, and to do so in a
21 responsible manner certainly.

22 Public safety is always going to be a
23

1 concern, but public safety concerns can be addressed.
2 And if there is an additional benefit of dealing with
3 overcrowding, it is hard to see any objections to
4 doing something like that.

5 Yes, Mr. Nolan?

6 MR. NOLAN: Could I also respond to that?

7 COMMISSIONER HOWELL: Yes. Anybody else
8 can respond to that, as well.

9 MR. NOLAN: I really think that is a very
10 important idea. I served on the Prison Rape
11 Elimination Commission with Judge Walton. I also
12 served as a member of the Commission on Safety and
13 Abuse in America's Prisons. And it is very clear
14 from the evidence that crowded prisons create a
15 violent atmosphere.

16 Oftentimes the inmates end up running the
17 institution. They overpower the guards. It's the
18 most the correctional officers can do to keep a lid
19 on it by protecting the perimeter of the prison. A
20 riot out in California occurred in a dorm where two
21 rival gangs were. There were 250 inmates in a dorm,
22 a squad bay that in the military would have housed 50

23

1 people.

2 There was one correctional officer for
3 those 250 inmates with the bunks stacked three high.
4 Literally, the officer who went in the dorm could not
5 see what was going on halfway down the dorm, let
6 alone all the way down.

7 And all those inmates were put at risk,
8 not just the violent ones but those who were in for
9 relatively low-risk offenses. And frankly, those
10 ones in for low-risk offenses are younger, and
11 usually are the ones that are the victims of rape and
12 of other types of violence perpetrated on them.

13 I come from California. I no longer live
14 there. But in California, the prisons are so bad
15 there's no room for re-entry. Every hallway, every
16 chapel, every library, every classroom has bunks in
17 them. They literally do not have room in which to
18 run drug education classes, to run Bible studies, to
19 teach life skills, no re-entry preparation can go on
20 because of the crowding.

21 And I realize that is a state prison, but
22 we can see the impact of crowding. And so I really

23

1 commend you for suggesting that. That should be very
2 much a priority.

3 If a corrections department can be
4 worthy of saying "corrections," there has to be room
5 in which not only to warehouse people but to have
6 programming to have them leave prison better than
7 they come in. And that is impossible with these
8 crowded prisons that are so violent.

9 CHAIR SARIS: I had a question. You know,
10 as we were discussing this morning, some judges have
11 already gone 1:1, and some judges have stuck with the
12 really tough former penalties. And so as we roll
13 this out, some prisoners aren't going to get much of
14 a benefit because they've already received the
15 benefit. And how do we — I guess this would be true
16 for both Mr. Nolan who has been there and understands
17 how communications are effective within the prison,
18 and you Mr. Shelton, how are we going to tell the
19 communities this, so that there aren't going to be
20 unrealistic expectations that not everyone is going
21 receive a reduction? Some may have already received
22 it. I don't know if you have any ideas for us.

23

1 MR. SHELTON: I would just say there are
2 many ways to actually educate the community on the
3 changes that are occurring. And certainly even as we
4 celebrated the marginal, we've - though extraordinary
5 change has already occurred, I think people
6 recognize, celebrate, but look forward to other
7 things that need to be done.

8 Certainly as we talked about, going from
9 100:1 down to 18:1. Many of us celebrated. This was
10 the first time we have seen this kind of movement,
11 and the thousands upon thousands of people that it
12 would affect.

13 Explaining that to the community made
14 people feel better about the direction the nation was
15 going in; that their cries were not going unheard,
16 but that still much more needed to be done.

17 I think the short answer is that I think
18 people will appreciate that we are going in the right
19 direction, and appreciate that there are those that
20 have actually taken the extraordinary step even
21 before we have gotten to formal retroactivity along
22 these lines. And I think they will appreciate that

23

1 still much more needs to be done.

2 Don't forget, even after we go beyond
3 retroactivity, we will still be here fighting to
4 bring this down to 1:1. Because as one of my good
5 friends on Capitol Hill said, though we've seen a
6 major change in going from 100:1 down to 18:1, that
7 is going from a lot of racism down to a little
8 racism. The world is getting better. It is
9 something to celebrate, but there is still so much
10 more to be done.

11 I think it can be done very well, and
12 people will be measured, quite frankly, in their
13 enthusiasm over these very positive changes.

14 CHAIR SARIS: Mr. Nolan, how would it be
15 best to communicate?

16 MR. NOLAN: I am so glad you brought this
17 up, because frankly I hadn't thought of it. And it
18 will be a big problem. The inmate underground is
19 unusually accurate in most ways, but they tend to
20 over-hope. I don't know if there's such a word, but
21 to -

22 CHAIR SARIS: We'll make it one.

23

1 (Laughter.)

2 MR. NOLAN: In fact, every year I was in,
3 rumors would sweep through the camp that there were
4 warehouses full of GPS devices just waiting to have
5 us all sent home on home confinement. And they all
6 believed it.

7 I think the best thing – and I am so glad
8 you brought this up, because again I had not
9 anticipated that. The important thing is that we
10 educate the inmates, those of us, to train our
11 volunteers to discuss this, and knowledgeably have
12 something to hand to the inmates – groups like FAMM,
13 other groups, NAACP, [ACLU], others. I frankly think
14 that we should have a little brochure that explains
15 that not everyone is going to benefit from this.
16 And, depending on their own unique circumstances,
17 some will benefit more than others.

18 That is very different than just saying
19 categorically those under the old law can't. But
20 that's a very good point. I'll undertake an effort
21 to educate our people, because it is really important
22 that we not falsely give them hope – expectations more

23

1 than hope. So that is a very good point.

2 MR. SHELTON: I would only add that the
3 NAACP, and I think so many of our other
4 organizations, actually have units within the
5 prisons. So certainly that [task] of educating the
6 prisoners on how this change would affect them is
7 something that we can very easily do.

8 But also on the outside, not forgetting
9 that most of these prisoners have families, and
10 indeed those families still live in our communities,
11 the assumption is, as they come out of prison they
12 will be going back to the same communities they left,
13 and a community which houses their families, as well.

14 So certainly educating the prisoners
15 inside through the various entities, and educating
16 them outside throughout the community structure is
17 something that we can easily do.

18 CHAIR SARIS: Does anybody have any other?

19 COMMISSIONER HOWELL: Let me just have one
20 last question to Ms. McCurdy. And that is, you know
21 this morning we had some discussion with some of the
22 panelists about one of the directions in 1B1.10

23

1 regarding directions to sentencing courts, should we
2 decide to make the FSA implementation amendment
3 retroactive in whole or in part.

4 There is a specific direction that says
5 that if a court has already given a non-guideline
6 sentence, which could be interpreted as a downward
7 departure, then any further reduction in the sentence
8 may not be appropriate. Even if we made the
9 guideline retroactive.

10 The federal public defenders have a very
11 strong position that we should eliminate that line.
12 Our Practitioners Advisory Group says the same thing.

13 I was interested to see that in your
14 testimony that you think that no changes to 1B1.10
15 are required, and specifically cite to that sentence
16 as a good thing, as opposed to one that we have heard
17 other people say should be eliminated. And if not
18 eliminated, then certainly provide an explanation
19 that would allow judges, sentencing courts who have
20 given downward departures to still evaluate whether
21 or not a further reduction should be required.

22 Could you just explain whether I am

23

1 reading your testimony correctly? And whether that
2 can be reconciled with the other testimony we have
3 heard?

4 MS. McCURDY: You are reading our
5 testimony correctly. And I guess what we looked at
6 was a balance. Again, our position is there
7 shouldn't be any limitations on who should benefit
8 from this amendment, or these parts of the amendment,
9 if they are applied retroactively.

10 And if there is concern, if the Commission
11 has concerns about whether, for example, cases post-
12 *Booker*, post-*Kimbrough*, post-*Spears*, that that
13 particular part of the guidelines, 1B1.10, will give
14 the judges enough direction so that they can take
15 into account whether a person has already had a
16 variance or not.

17 And so that is why our position is you
18 don't need to change it. We think that that
19 particular part of 1B1.10 gives judges the kind of
20 flexibility to be able to look to see whether a
21 variance has happened in the past, and take that into
22 consideration.

23

1 And again, as I said in my testimony, and
2 we say in our written testimony, most people have not
3 benefitted from either a *Booker*, a *Kimbrough*, a
4 *Spears*, a variance. And so the majority of the
5 people have not, and so that is why it is not fair in
6 our mind to then say categorically that these
7 defendants should be – there should be limitations on
8 their retroactivity if most people have not
9 benefitted from it.

10 COMMISSIONER HOWELL: Okay. So if I am
11 understanding your testimony correctly, both your
12 written testimony and what you've explained orally,
13 it's that the ACLU's position is that just because a
14 crack offender had at his or her original sentence
15 been given a downward departure, that should not
16 preclude that defendant from eligibility for a
17 further departure should we make this amendment
18 retroactive? And, that interpretations of that
19 specific sentence that you cite to the contrary –
20 meaning you get a downward departure, you're not
21 eligible anymore – in your view is not the correct
22 interpretation of that sentence?

23

1 MS. McCURDY: Right. Because our view is
2 that the judge – that, while it discourages the judge
3 from – the judge will be discouraged from giving
4 further variances, we feel like that will give judges
5 an opportunity to be able to decide on individual
6 cases whether it is appropriate in this case to give
7 a Fair Sentencing Act variance or not, or that judge
8 can see from the record that that person has already
9 gotten a variance.

10 COMMISSIONER HOWELL: Understood.

11 CHAIR SARIS: Thank you. Anyone else?

12 (No response.)

13 CHAIR SARIS: Thank you, very much. It
14 was very helpful.

15 (Pause.)

16 Well, so this is the second community
17 interest panel and I want to introduce Julie Stewart
18 whom most everyone in this room knows already, the
19 president and founder of Families Against Mandatory
20 Minimums, fondly known as FAMM, which she organized
21 in 1991 to promote fairer sentencing laws.
22 Previously she worked at the CATO Institute for three

23

1 years as director of public affairs.

2 Next is Natasha Darrington, who is current
3 enrolled in a full-time business administration
4 college program in North Carolina. She was arrested
5 in 1997 in her husband's cocaine-based conspiracy,
6 and was sentenced to 15 years and eight months in federal
7 prison. She was released in March 2008 after serving
8 11 years as a result of the Commission's 2007 crack
9 cocaine retroactivity amendment.

10 Now I am not going to do justice by this,
11 Nkechi?

12 MS. TAIFA: That's good.

13 CHAIR SARIS: Taifa?

14 MS. TAIFA: That's it.

15 CHAIR SARIS: All right. She is a senior
16 policy analyst for civil and criminal justice reform
17 at the Open Society Institute, and a commissioner on
18 the District of Columbia Commission on Human Rights.
19 Previously she was an adjunct professor at Howard
20 University School of Law, legislative counsel for the
21 American Civil Liberties Union, public policy counsel
22 for the Women's Legal Defense Fund, and staff

23

1 attorney for the National Prisons Project. Wow.

2 And finally is Jasmine Tyler, deputy
3 director of national affairs in Washington, D.C.
4 Office of the Drug Policy Alliance. Previously she
5 worked as a research director for the Justice Policy
6 Institute, and as a sentencing advocate collaborating
7 with public defenders in Washington, D.C., and
8 Fairfax, Virginia.

9 Welcome. Ms. Stewart?

10 MS. STEWART: Thank you. Good afternoon.

11 Yes, everyone I hope knows I'm Julie
12 Stewart, and the president and founder of Families
13 Against Mandatory Minimums. But I have not had the
14 pleasure yet of testifying in front of you,
15 Chairwoman, or I don't believe also you, Ketanji
16 Jackson. So it is a delight to be here. Thank you.
17 The work you do is incredibly important to all of the
18 people that support FAMM.

19 Four years ago I testified at a similar
20 hearing about the so-called crack-minus-2
21 retroactivity, and at that time a woman named De-Ann
22 Coffman was with me, and some of you saw her

23

1 testimony.

2 I think that it is always important if we
3 can bring someone whose life your work has personally
4 affected to come and testify before you. And so
5 De-Ann did an excellent job, and I know that Natasha
6 will do as well. It is important for you to see that
7 your work has real bearing on individual lives.

8 You did the right thing in 2007 by voting
9 to make the amendment retroactive. I am confident
10 that you are going to do that again. Your moral
11 leadership really made it possible for Natasha to be
12 here today, because without your vote for
13 retroactivity she would still be in prison for about
14 another year.

15 She does represent so many of the 16,500
16 people that have benefitted, or will benefit from
17 retroactivity, and I want you to be able to hear her
18 story and what she has done with the extra years of
19 freedom you have given her.

20 In addition to Natasha, there are about
21 two dozen FAMM members here who have come from quite
22 distances – Chicago, New Hampshire, North Carolina.

23

1 They have come today to help you remember and see who
2 your policies affect.

3 I would like, with your permission, Madam
4 Chair, to ask them to stand and just identify
5 themselves.

6 (Many audience members stand.)

7 MS. STEWART: These individuals, by their
8 presence alone, can testify more powerfully than I
9 can as to why the Commission must apply the new crack
10 amendment retroactively and without restrictions.

11 Thank you so much. You can sit down.

12 I know it has been a long day and a lot of
13 people have already told you what I would like to
14 tell you, so I am not going to tell you the same
15 thing. But I can probably – you can probably guess
16 that we do support retroactivity without
17 restrictions.

18 But I do want to say a couple of things.
19 First, I don't want to belittle or minimize the
20 legitimate concerns of public safety that we all
21 share, but I do want to put those concerns in
22 perspective.

23

1 For one thing, four years ago when I
2 testified in support of making crack-minus-2
3 retroactive, the Fraternal Order of Police testified
4 that retroactivity would, quote, "inflict a great
5 harm on many innocent Americans and drive up crime
6 rates."

7 They said, with great certainty, that
8 those who would benefit from retroactivity were,
9 quote, "far more likely to reoffend."

10 These predictions – the predictions coming
11 from the Mukasey Justice Department were even more
12 frightening. Of course now today we know better than
13 that. The Commission recently released its
14 retroactivity report which showed that – or recidivism
15 report, which showed that the release rate – the
16 recidivism rate for those released early because of
17 crack-minus-2 retroactivity was actually a little
18 lower than those in the control groups.

19 So we know that retroactivity for people
20 who have a crack offense is not going to result in
21 violence across the country.

22 The second thing I would like to mention,

23

1 especially in light of what has been discussed here
2 today, is the definition of "violence." I think that
3 as one of the carve-outs that the Department of
4 Justice is recommending is that those with a gun bump
5 or a weapons enhancement not be eligible for
6 retroactivity.

7 I just want to point out that Natasha is
8 an example of who would be considered a "violent
9 offender." Her husband had two legally registered
10 firearms that were in the house with the drugs. So
11 when they were arrested, the guns were found. She
12 received a two-level gun bump in her presentence
13 report and in her final sentence, which means that
14 she is considered "violent."

15 If those carve-outs had been part of your
16 2007 retroactivity policy, she would not be sitting
17 here today; she would still be in prison. So I just
18 say that because I think it is very easy to throw the
19 word "violent" around, and we picture the worst-case
20 scenario, when in fact as we well know there are a
21 lot of people who are convicted under conspiracy laws
22 that get a two-level gun bump for a gun that the co-

23

1 defendant may have had. And she is a perfect example
2 of that.

3 So we certainly think that adding special
4 restrictions on the courts considering crack
5 defendants who have been sentenced to unduly harsh
6 terms will undo the good will that your work to
7 mitigate racial disparity in sentencing has fostered.
8 I understand that the Department of Justice pretty
9 much split the baby, and there was I'm sure some
10 politics behind that, but you don't have to.

11 So I would just like to close by saying
12 that again you have done fantastic work here. For so
13 many years I have worked with this Commission and
14 previous Commissions on this very issue of crack
15 cocaine reform. I probably have done this for 17
16 years, and I feel like we are so close to the end,
17 and I am very, very hopeful that on behalf of
18 Natasha, and the people who are here today with loved
19 ones in prison, and the 30-some-thousand letters you
20 received, the people who wrote those, the 14,500
21 people we communicate with on E-mail in prisons,
22 which is a fantastic way now to get information to

23

1 them, that you will make the right decision yet again
2 and that these people will be able to benefit from
3 the retroactivity that they are deserving of.

4 Thank you.

5 MS. DARRINGTON: Is it on? Hello? Good
6 afternoon. My name is Natasha Darrington and I would
7 like to thank you for the opportunity to testify.

8 Today you are asking me whether the new
9 crack guidelines should be made retroactive? My
10 answer is a resounding "yes."

11 In 2007 the Commission voted to make the
12 crack-minus-2 guideline changes retroactive. I am
13 only sitting here today before you because of that
14 decision. I am a direct beneficiary of that vote for
15 justice.

16 If the Commission had rejected
17 retroactivity, I would still be in prison until next
18 year. Today I am here to thank you in person and to
19 tell you how retroactivity can transform lives.

20 I hope that you can take some comfort in
21 knowing how well I am doing, what coming home early
22 has meant to me and my family, and what it would mean

23

1 for the women I left behind.

2 In 1997 I was sentenced to 15 years and eight
3 months for my involvement in a crack cocaine offense.
4 I was 37 years old. People in my community were
5 shocked by my sentence. I was devastated. I was a
6 first-time offender who had never spent a day in
7 prison. At that time, there was a 100:1 disparity
8 between crack and powder cocaine sentences.

9 This disparity has come under fire from
10 the public and the Commission. It was notorious as
11 one of the most racially discriminatory laws on the
12 books. Sadly, I came to know that law's devastating
13 impact personally and deeply. More tragically so did
14 my family.

15 My four children, who were 10, 12, 15, and
16 17 when I went to prison 14 years ago, are all adults
17 now. In one way they were lucky. They didn't have
18 to go into foster care. They stayed with my father
19 until he passed away, and then with my husband's
20 family.

21 But I wasn't there to help them grow up.
22 I missed their birthdays, high school graduations, I

23

1 missed the birth of my first grandchild. I missed
2 the funerals of both of my parents. I missed the
3 chance to comfort my children when their grandparents
4 died.

5 My children and I are close. Every day I
6 served in prison, my family served it with me. My
7 children and I had many a soggy pillow over those
8 years. I became involved with FAMM early in my
9 incarceration. I closely followed their efforts to
10 change crack cocaine sentencing laws. When the
11 Commission created the crack-minus-2 changes in 2007,
12 I mailed you all a letter with the picture of my
13 grandson visiting me in prison, and I urged you to
14 make the changes retroactive.

15 The day the Commission voted for
16 retroactivity, my daughter Kamille heard the news in
17 her upper division writing class at Fresno State.
18 She, her professors, and her classmates had been
19 discussing the unjust crack laws for some time
20 because they knew I was in prison for them. When
21 they learned that the changes had been made
22 retroactive, all the students and Kamille's professor

23

1 began yelling and cheering. Kamille began shouting,
2 "My Mom is coming home! My Mom is coming home!"

3 When I heard the news in prison, the women
4 around me were excited and nervous, anxious to see if
5 they would benefit. They lined up at the phones to
6 call their attorneys. Women who were in prison for
7 other drug offenses said that even though they
8 wouldn't benefit from the changes, they were glad
9 that the Commission had done something to make the
10 system fairer.

11 Retroactivity gave the rest of the women
12 hope. I cannot tell you how much it meant for us to
13 know that the Commission cared enough not only to
14 reduce unjust sentences, but also to leave no one
15 left behind who would benefit.

16 I call March 3rd, 2008, my new year's day.
17 After nearly 11 years in prison, I was going home to
18 my children. I was released one day before Kamille's
19 23rd birthday. She said it was the best birthday
20 present she had ever received.

21 The following year I was able to hold her
22 hand when she went into surgery for her appendix,
23

1 also on her birthday. My life no longer revolves
2 around the events that I missed, but the events that
3 I am able to be a part of. I was present for the
4 birth of my second grandchild. My grandmother's 96th
5 birthday. And later her funeral.

6 I was present for Thanksgiving dinner with
7 my sister. I was present for Kamille's graduation
8 when she received her bachelor's. And I'll be
9 present when she receives her master's. I will be
10 present for my son's graduation. I will also be
11 present for my own graduation next year. And when I
12 receive my bachelor's degree in business
13 administration, I will be going right into my MBA
14 program.

15 My dream is to start my own photography
16 business. None of this would have been possible if
17 the Commission had done what was easy instead of what
18 was right in 2007. I would still be in prison today,
19 still missing out and being missed.

20 On the day that I heard about the vote for
21 retroactivity, some of the prison guards gathered us
22 together and told us we would not benefit from the

23

1 Commission's changes. For some, the guards were
2 right. Even for many who did benefit, they still had
3 years, or decades left to serve.

4 To this day, I feel that most of these
5 women pose no threat to the community. They are
6 kind, compassionate, and have something to offer
7 society. Is the system fairer now than it was three
8 years ago? Yes. Even the people I left behind think
9 so. But for too many, it isn't fair enough.

10 Today I ask the Commission to repeat
11 history. Fairer, more just laws shouldn't apply only
12 to some people; they should apply to all people.
13 Please do the right thing and make these crack
14 guideline changes retroactive.

15 Thank you.

16 CHAIR SARIS: Thank you. Ms. Taifa.

17 MS. TAIFA: Thank you. Judge Saris and
18 distinguished members of this esteemed Commission:

19 Thank you for the opportunity to testify
20 in support of retroactivity. My name is Nkechi
21 Taifa. I serve as senior policy analyst for the Open
22 Society Policy Center, and I also convene the
23

1 Washington-based policy network, the Justice
2 Roundtable, a coalition of over 50 organizations
3 working to reform federal criminal justice policy,
4 several of whom have testified today.

5 Since 2006, the 20th anniversary of the
6 Anti-Drug Abuse Act of 1986, the Justice Roundtable
7 has been at the epicenter of advocacy efforts to
8 completely eliminate the 100:1 quantity ratio in
9 sentencing between crack and powder cocaine.

10 As an advocate supporting crack cocaine
11 sentencing reform since 1993 when the Sentencing
12 Commission first began to reach out to the public for
13 comment on the issue, I am honored to testify before
14 the Commission once again this time in support of the
15 retroactive application of the Fair Sentencing Act
16 guideline amendment.

17 On behalf of the Justice Roundtable, I
18 applaud this Commission for its tenacity for nearly
19 20 years, through different commissioners,
20 administrations, and Congresses in doing everything
21 within its statutory power to end the irrational,
22 unwarranted, and racially discriminatory disparity

23

1 between crack and powder cocaine.

2 We hope at the conclusion of this hearing
3 that the Commission will once again act within its
4 power and make the Fair Sentencing Act guideline
5 amendment retroactive.

6 Commissioners, it has indeed been a long
7 day, and you have heard a lot of testimony. So
8 rather than rehash much of what has already been
9 discussed, I would like to begin by focusing my
10 remarks a bit more personally. And as I do, I ask
11 that you sit back for a moment and relax, and close
12 your eyes if you wish, okay, and listen with your
13 hearts.

14 Now I know this is not conventional in an
15 official public hearing setting, but bear with me for
16 just a moment and take a deep breath. And I want you
17 to visualize a long, hot day in August. Let's just
18 say it was 2008, August 3rd to be exact. And three
19 people who had never been arrested in their lives,
20 had never committed any violent acts at all, were
21 arrested for possession with intent to distribute five
22 grams of crack cocaine – the weight of a couple of

23

1 sugar packs.

2 They were each sentenced by Judge
3 Draconian to a mandatory minimum sentence of five
4 years in prison. And let's just say that the names
5 of these three first-time, non-violent offenders were
6 Patti, William, and Beryl.

7 Now visualize it being two years later,
8 August 3rd, 2010, to be exact, another long, hot
9 summer day, and three additional people – Ricardo,
10 Ketanji, and Dabney, and let's not forget about
11 Jonathan as well, okay – were arrested for the exact
12 same –

13 COMMISSIONER HINOJOSA: He's the leader.

14 (Laughter.)

15 MS. TAIFA: – crime, possession with
16 intent to distribute five grams of crack cocaine, but
17 because Congress had just recognized that crack
18 cocaine sentencing was unfair, they were sentenced by
19 the exact same Judge Draconian not to five years in
20 prison but to probation.

21 How would you feel if you were Patti,
22 William, and Beryl, the first three to be sentenced?

23

1 Now close your eyes and answer this question in your
2 mind. Should a sentence be based on whether or not
3 an individual was, quote/unquote, "lucky" enough to
4 commit a crime August 3rd, 2010, the effective date
5 of the Fair Sentencing Act, as opposed to years, or
6 months, weeks, or even the day before?

7 Commissioners, you have heard how the
8 three factors from the background guidance
9 overwhelmingly favor retroactive application of the
10 Fair Sentencing guideline amendment.

11 First, that the purpose of the Act was to
12 correct the flawed, unwarranted 100:1 sentencing
13 scheme and to lessen its racially discriminatory
14 impact.

15 Second, you have heard that the change in
16 the guideline range is significant, and supports
17 retroactivity with 12,040 people being eligible for
18 retroactive relief with roughly three years shaved
19 off of their sentences.

20 And third, you have heard how retroactive
21 application of the Fair Sentencing Act guideline
22 amendment would not be unduly burdensome on judicial
23

1 resources; that throughout the years amendments have
2 been promulgated adjusting the guidelines for
3 particular drug offenses, and in each case the
4 Commission has made these amendments retroactive,
5 whether it be LSD, marijuana, oxycodone, or the
6 crack-minus-2 reduction to the sentencing guidelines.
7 It was shown to be a relatively smooth process and
8 not involving difficult calculations.

9 You have heard all of that. And you are
10 beginning to hear the voices of those impacted. You
11 heard from Pat Nolan. You just now heard from
12 Natasha. And I want to continue that with the pleas
13 of two additional people who wanted me to share with
14 you today as well, that of Kemba Smith and Roderick
15 Piggee, whose parents arduously testified before the
16 Commission during the early years of the crack
17 cocaine reform seeking justice and relief for their
18 children's sentences under the 100:1 quantity ratio
19 regime.

20 Both are currently members of society,
21 very very productive. Kemba, whose case became the
22 poster child of the crack disparity, received

23

1 clemency after six years. And Roger, who co-founded
2 the first organization to solely focus on eliminating
3 the crack cocaine disparity, served a minimum of 17.5
4 year sentence – the maximum. Excuse me, he served the
5 maximum.

6 Kemba wanted you to know that it is
7 imperative that the Commission apply the Fair
8 Sentencing Act retroactively. She was sentenced to
9 24-1/2 years in the same Eastern District of Virginia
10 which today has the highest number of people who will
11 be eligible for a sentence reduction if the amendment
12 were made retroactive.

13 Kemba Smith implores this Commission to
14 look at how unfair the disparity has been, and
15 concludes that it will continue to be a grave
16 injustice for offenders who will be affected, and
17 their families, to know that we have been fighting so
18 hard for them to gain relief, only for them to not
19 benefit from the change at all.

20 Rod Piggee stresses that cocaine is cocaine
21 is cocaine. Without powder, he says, you can never,
22 ever, ever get to crack. He wants the Commission to

23

1 understand that from the standpoint of a prisoner,
2 long and unjust prison terms only make one bitter.
3 Retroactivity, he states, would not only right some
4 wrongs, it would also save the country tons of money
5 by giving individual relief from unjust, lengthy
6 prison terms that were never fair in the first place.

7 And I saw Lawrence Garrison in the back
8 there, also, who I think benefitted from the 2007
9 crack-minus-2 reduction as well. These are very,
10 very real people with very, very real cases.

11 But to expound on Mr. Piggee's statement,
12 the Bureau of Prisons currently incarcerates over
13 200,000 people at a price tag of \$6 billion, a 700
14 percent increase in population over the past 30
15 years, and a 1700 percent increase in spending.

16 With the entire nation focused on the
17 economy, one area with clear savings is the criminal
18 justice system – in particular sentencing reform.
19 These astronomical costs to taxpayers can be curbed
20 with the retroactivity of the Fair Sentencing Act
21 guideline amendment.

22 As I bring my oral remarks to a close, it

23

1 is important to note that retroactivity is not a get-
2 out-of-jail-free card. And retroactive release will
3 not burden communities. The courts will
4 systematically review all applications for sentence
5 adjustment, and the release of prisoners will be
6 gradual across the country, staggered over a 30-year
7 time period.

8 Many people serving sentences for
9 non-violent drug offenses are spending the majority of
10 their adult lives behind bars for the commission, in
11 many instances, of victimless crimes. They have
12 incurred lengthy sentences, now agreed by lawmakers
13 to be unjust, inconsistent, unfair, and biased. They
14 have been watching developments throughout the years.
15 These incarcerated individuals cheered the
16 Commission's 1995 *Special Report to Congress* which
17 recommended the complete elimination of the 100:1
18 ratio.

19 The ensuing 1997, 2002, 2007 reports which
20 consistently called for reform provided them with
21 additional hope for change. Prisoners were ecstatic
22 by the Commission's study, *Fifteen Years of Guidelines*
23

1 *Sentencing*, which recognized that, quote, revising
2 the sentencing disparity between crack and powder
3 cocaine would better reduce the gap in sentencing
4 between Blacks and Whites than any other single
5 policy change, dramatically improving the fairness of
6 the federal sentencing system.

7 Some enjoyed relief with the 2007 crack-
8 minus-2 guideline reduction with its retroactive
9 application. And finally, the currently incarcerated
10 saw a light at the end of the tunnel with the passage
11 of the Fair Sentencing Act. It is important to note
12 that the Commission has never denied retroactive
13 application of any drug guideline amendment.

14 Based on this past practice, for people
15 currently incarcerated such as the fictitious Patti,
16 William, and Beryl, not to benefit from the changes
17 in the law which benefitted Ricardo, Ketanji, and
18 Dabney, changes which ironically were inspired by the
19 egregiousness of the sentences of the first three,
20 would be cruel and unusual. Cruel, because of
21 fundamental unfairness, and unusual, again because
22 the Commission has never denied retroactive

23

1 application of drug guideline amendments.

2 Therefore, it is only right that the
3 Commission apply the guideline amendment
4 retroactively, eliminating any disparate sentencing
5 treatment between current prisoners and those newly
6 sentenced. The luck of the draw is not sound policy,
7 but inconsistent, unfair, and biased. The Commission
8 must follow its established practice and apply the
9 new guidelines retroactively.

10 If the disparity is wrong today, it was
11 wrong yesterday. Everyone should have the benefit of
12 today's better judgment.

13 Thank you for this opportunity to testify.

14 CHAIR SARIS: Thank you. Ms. Tyler.

15 MS. TYLER: Good afternoon, Madam Chair,
16 Vice Chairs, and Commissioners.

17 I am Jasmine Tyler – is this on?

18 CHAIR SARIS: No.

19 MS. TYLER: Sorry about that. Good
20 afternoon, Madam Chair, Vice Chairs, and
21 Commissioners.

22 I am Jasmine Tyler, deputy director of
23

1 national affairs for the Drug Policy Alliance here in
2 D.C. I am also the daughter of a former federal
3 prisoner.

4 Thanks sincerely for allowing me to be
5 here to share our thoughts on this very important
6 issue. While my Dad is no longer with us, I speak
7 for him and those he left behind who are still
8 incarcerated for low-level drug offenses, and for
9 their family members.

10 In a cruel twist of fate, the top of our
11 press releases say, "For Immediate Release. Contact
12 Jasmine Tyler."

13 Many people have misinterpreted this
14 statement to mean -

15 (Laughter.)

16 MS. TYLER: - please get my loved one out
17 of prison immediately.

18 CHAIR SARIS: I guess we should be careful
19 on our press releases, too.

20 (Laughter.)

21 MS. TYLER: I have to unfortunately tell
22 them that I can't help them, and it breaks my heart

23

1 every time I have to do so. Many of these calls are
2 very, very tearful calls.

3 It is also very timely that the Commission
4 is holding this hearing today, as this month marks
5 the 40th anniversary, if one can call it that, of the
6 War on Drugs, a war that has cost over a trillion
7 dollars and directly and indirectly harmed millions
8 of lives.

9 The Drug Policy Alliance, the nation's
10 leading organization promoting new drug policies, is
11 grounded in health, science, human rights, and
12 compassion and fully support retroactive application
13 of the Fair Sentencing amendment without restriction
14 and urge you to do so as soon as possible.

15 I will now elaborate on why you should do
16 that, but I will deviate from my testimony a little
17 bit first.

18 Over the past 20 years in four separate
19 reports, as Nkechi mentioned, the Commission has
20 repeatedly requested that Congress raise the
21 threshold quantities for crack cocaine triggers that
22 trigger the five- and ten-year mandatory minimums in order

23

1 to ease the unconscionable racial disparities in
2 sentencing, mitigate the harsh treatment of lower
3 level crack offenders who are on the periphery of the
4 drug trade, and better focus the prosecution of
5 serious drug traffickers.

6 Congress explicitly recognized that the
7 sentences handed down under the previous regime were
8 manifestly unfair and had egregious side effects.
9 Failing to provide retroactive effect to this
10 amendment would frustrate the intent of the Fair
11 Sentencing Act to reduce the over-incarceration of
12 low-level offenders.

13 In the Commission's own analysis of the
14 impact of this amendment, you found that 3,100
15 individuals serving time for crack cocaine offenses
16 would be eligible for release in the first year
17 alone. Indeed, the vast majority of people who would
18 be affected by retroactive policy have been sentenced
19 since 1995, the year the Commission first made its
20 recommendation to Congress to reform the sentencing
21 scheme.

22 Failing to make this amendment retroactive
23

1 would arbitrarily deny relief to more than 12,000
2 individuals whom Congress and the Commission have
3 finally acknowledged should not have been sentenced
4 so harshly in the first place.

5 Perhaps most importantly, though, denying
6 retroactive application would exacerbate the racial
7 disparities associated with crack cocaine sentencing
8 policy since 85 percent of those individuals eligible
9 for a reduction are African American.

10 The mass incarceration of the African
11 American community in which the crack sentencing
12 structure plays a huge role has become so pronounced
13 that many claim the drug war functions as an
14 institutional system of social control in communities
15 of color, tantamount to the Jim Crow era.

16 In fact, Michelle Alexander, civil rights
17 attorney, professor, and the author of *The New Jim*
18 *Crow: Mass Incarceration in the Age of Color*
19 *Blindness*, has found that the U.S. government
20 currently supervises, through imprisonment,
21 probation, or parole, more African American men than
22 were enslaved in 1850.

23

1 Imagine for a second that the Civil Rights
2 Act of 1964 had upheld segregation in existing
3 schools, and only mandated integration for new
4 schools being built. Imagine that discrimination was
5 only prohibited in new bathrooms or water fountains,
6 while maintaining separate but equal standards in all
7 those already in operation.

8 Once these racial injustices are
9 identified, they must be eradicated in all of their
10 forms, and the Fair Sentencing Act and the crack
11 cocaine sentencing disparity is no different.

12 Second, the amendment is a good candidate
13 for retroactive application because it will have
14 significant impact on prisoners. The Commission has
15 estimated that if the changes in the amendment were
16 applied to currently incarcerated individuals, it
17 would reduce the sentence for over 12,000 people by
18 approximately 37 months. That is a savings of over
19 \$75,000 per person for taxpayers.

20 This would considerably benefit the Bureau
21 of Prisons, which is hurting for money and currently
22 operating over its rated capacity. It is also

23

1 important to note that drug offenders make up more
2 than half of the Bureau of Prisons population.

3 This is especially – I'm sorry. Reaching
4 the maximum operating capacity for the Bureau of
5 Prisons should be the ceiling, not the floor, and
6 greater care should be taken to ensure that the
7 prison beds are being occupied by those who truly do
8 compromise public safety.

9 It is very important to note, in light of
10 the recent Supreme Court decision that found prison
11 overcrowding in California is so severe that it has
12 been deemed an Eighth Amendment violation against
13 cruel and unusual punishment.

14 Furthermore, retroactivity would not
15 result in the mass and chaotic release of eligible
16 offenders. The most significant impact of the
17 amendment would be seen in the first year when 34
18 percent of individuals who are eligible would be
19 released. But the remainder of those who are
20 eligible, their sentences would be reduced gradually
21 over a period of more than 30 years.

22 Third, retroactive application of the
23

1 amendment will not be difficult to administer, as
2 district courts would simply be able to use the
3 modified Drug Quantity Table to derive new sentences
4 using the previously determined quantities in the
5 record.

6 The simplicity of this implementation
7 would not pose an undue burden on the court system,
8 as only three court districts would be presented with
9 100 or more eligible defendants in the first year of
10 implementation.

11 Since 1993, the Commission has promulgated
12 amendments that have had the effect of lower
13 sentences for particular drug offenses, and in each
14 instance has made that amendment retroactive. This
15 is true for LSD, marijuana, oxycodone, and crack. In
16 the 28 months after the crack-minus-2 retroactivity
17 decision, approximately 24,000 applications were
18 processed, of which 16,000 individuals benefitted
19 from early release.

20 In the 1995 decision to change the
21 marijuana plant calculation, the Commission
22 articulated the need to enhance fairness and

23

1 consistency in their decision to do so.

2 These examples serve as strong evidence
3 that retroactive application to the Fair Sentencing
4 Act guideline amendment can be effected without undue
5 difficulty or expenditure of resources.

6 And fourth, criminological research on
7 recidivism has not found major differences in the
8 degree of reoffending by the time served in prison,
9 and major studies, including one by the Department of
10 Justice, suggests that longer prison terms do not
11 reduce recidivism and may in fact be
12 counterproductive.

13 In fact, evidence is beginning to surface
14 that imprisonment may actually worsen rates of
15 recidivism among drug offenders, especially when
16 compared with probation and other alternative
17 interventions.

18 Scholarly research has generally concluded
19 that increased penalties for drug crimes has had
20 little if any effect on criminal behavior.

21 Many of those who become eligible for
22 sentence reductions will have served, or continue to

23

1 serve, lengthy prison terms and would also therefore
2 have aged out of major crime-prone years by the time
3 they are released. As research shows, criminal
4 activity peaks among individuals in their teenage
5 years and then markedly decreases.

6 In conclusion, the retroactive application
7 of the Fair Sentencing Act is absolutely necessary in
8 order to facilitate a just application of the Act.

9 It will best mitigate the problems of over-
10 incarceration and racial disparity in sentencing that
11 were created, maintained, and continue to exist under
12 the decades-old crack cocaine sentencing regime, and
13 also improve order and safety in the Bureau of
14 Prisons.

15 The Fair Sentencing Act application should
16 not be arbitrarily restricted to those who are
17 arrested and sentenced after the enactment of the
18 Fair Sentencing Act. It makes no sense to deny
19 relief to thousands of defendants whose sentence the
20 Commission has consistently condemned for the past 17
21 years.

22 Instead, the Commission should seize this
23

1 opportunity to undo some of the harm that has been
2 wrought by more than two decades of unduly harsh
3 sentencing structure.

4 For these reasons, the Drug Policy
5 Alliance urges you to adopt retroactivity of your
6 promulgated amendment. In other words, "For
7 Immediate Release, Contact the Sentencing
8 Commission."

9 (Laughter.)

10 CHAIR SARIS: Thank you. Do you have a
11 question?

12 VICE CHAIR JACKSON: Yes. Ms. Stewart and
13 those of you who represent similar organizations,
14 thank you for continually reminding us of the real
15 people who are affected by our policy decisions.

16 One of the concerns that was raised
17 previously was about communication to inmates, to
18 families, so as to stem any concerns about
19 unrealistic expectations when we talk about these
20 retroactivity determinations.

21 You mentioned that FARM has some 14,000
22 E-mails that you carry - E-mail communications with

23

1 inmates, and I'm just wondering if you could talk a
2 little bit about FAMM's role in communicating with
3 inmates perhaps in light of what happened in 2007 and
4 what plans you would have if the Commission did vote
5 for retroactivity?

6 MS. STEWART: Sure. We've always worked
7 very closely with the Bureau of Prisons to coordinate
8 information so that they know what we're sending in
9 and that they're okay with it, and so that there's no
10 confusion.

11 And one of the things that I think FAMM
12 has done very well for two decades – this is our 20th
13 year – is provide accurate information to prisoners,
14 and so that they aren't getting – the rumors get
15 dispelled, and the truth gets disseminated.

16 The wonderful advantage we have now over
17 2007 is the E-mail access in federal prisons. I
18 believe if Tom Kane were still here he could tell us,
19 but I think every prison now has E-mail access, every
20 federal prison.

21 So the 14,500 people we have now that we
22 can communicate with directly, it grows every month

23

1 by 400 or so. So it makes it possible for us to send
2 in information directly to the prisoners, which they
3 widely spread about whatever happens. And so it is
4 very easy for us to quickly and accurately get them
5 the straight scoop. And that makes it so easy.

6 And again, we would talk to the BOP about,
7 you know, what they are going to recommend so that we
8 can help spread the way that they want the prisoners
9 to apply for retroactivity were it to be passed.

10 MS. TAIFA: Can I just add to that for a
11 moment? I just remembered, and Julie I know you
12 remember too, back when the crime bill of 1994 added
13 the provision for the Commission to study the issue,
14 prisoners across the country were watching the House
15 debate and all like that on C-Span and they
16 misinterpreted. They thought it was saying that they
17 could get out. And when it was found out that it was
18 just a study, there was just vast mayhem in the
19 prisons precisely because of the lack of information,
20 the fact that the communication was not properly sent
21 out.

22 So I think it is good that you are looking
23

1 at this issue now so that there won't be any
2 misunderstandings.

3 COMMISSIONER HINOJOSA: Ms. Darrington,
4 one of the proposals from the Justice Department is
5 that we exclude someone that may have had a weapon.
6 And in your case, Ms. Stewart mentioned, and you
7 mentioned, possibly the issue of a weapon in your
8 case. That was the enhancement that was put for
9 personal possession? Or because it was involved by
10 some co-defendant? And it wasn't clear to me whether
11 the Justice Department's view was the person had to
12 be in actual possession or constructive possession
13 themselves, as opposed to somebody else in the
14 conspiracy.

15 MS. DARRINGTON: No. The two-point
16 enhancement was because it was found with drugs, and
17 so they considered them to be together.

18 COMMISSIONER HINOJOSA: And were you
19 sentenced before safety valve?

20 MS. DARRINGTON: No.

21 COMMISSIONER HINOJOSA: Did that apply in
22 your case, or not?

23

1 MS. DARRINGTON: No.

2 MS. STEWART: Because of the gun.

3 COMMISSIONER HINOJOSA: Well, but if
4 you're not personally in possession of the gun,
5 safety valve would still apply. If you didn't have
6 actual constructive possession yourself -

7 MS. DARRINGTON: No, I didn't, but they
8 just put it together because I was a co-defendant in
9 the conspiracy. And so whatever the head person was
10 responsible for, everybody in the conspiracy also
11 became responsible for that.

12 COMMISSIONER HINOJOSA: Right. I
13 understand that. But you didn't qualify for safety
14 valve because of that?

15 MS. DARRINGTON: They said I didn't, that
16 I wouldn't qualify for it.

17 COMMISSIONER HINOJOSA: Did you have a
18 trial, or did you -

19 MS. DARRINGTON: I went to trial.

20 COMMISSIONER HINOJOSA: I was just trying
21 to figure out how that fits with regard - it wasn't
22 clear to me, and I should have asked the question

23

1 this morning when the Justice Department testified,
2 whether it had to be the defendant themselves' actual
3 or constructive possession as opposed to the
4 enhancement applying because somebody else may have
5 had it.

6 MS. DARRINGTON: I wasn't even in the
7 vicinity of any of that, and they said I didn't
8 qualify for anything.

9 CHAIR SARIS: I had a question for
10 Ms. Tyler. So you refer to the failed war on drugs.
11 And we heard from a witness this morning who seemed
12 to say: I'm all in favor of retroactivity, but
13 actually there's been some success here, that some of
14 these laws are actually deterring, you know, stopping
15 people from using cocaine, and crack.

16 So I am just trying to understand why you
17 felt it was failed, and whether or not you have
18 specific proposals in mind as to, apart from
19 retroactivity, what you think would it would do to
20 focus attention from low-level offenders to drug
21 kingpins, which is how you've worded it here.

22 MS. TYLER: Well first I think that we

23

1 should incorporate more of a health perspective into
2 our drug laws. And so that would mean that lower -
3 typically, current lower level individuals would be
4 carved out because in a process in which they are
5 assessed, they wouldn't have to go straight to prison
6 if we could have more alternatives available. And I
7 don't just mean drug courts, because there are
8 challenges with drug courts.

9 The needs of individuals who have
10 substance abuse issues and who may be involved in
11 these drug trafficking networks only to meet their
12 own needs, or to meet the needs, their economical
13 needs, would be automatically carved out. And that
14 is one of the problems with the way our drug
15 enforcement is focused. It has been focused very
16 heavily on the low- and the low-hanging fruit, the
17 easy arrests and the easy prosecutions as opposed to
18 the investigations that take enormous amounts of time
19 to uncover these intricate trafficking networks.

20 If we look to a country like Portugal that
21 has decriminalized possession of drugs up to a ten
22 days' supply, you will see that they have had immense

23

1 impact on their public health problems. Their HIV
2 rate, infection rates, have decreased. The use of
3 treatment has largely increased. The drug use rates
4 for their teens has decreased, because teachers have
5 even said they're able to have much more honest and
6 open conversations with teens and explain to them the
7 opportunities that are available.

8 Drug seizures have actually also gone up
9 in Portugal. And so I would say that it's because
10 they're doing much more smarter policing, as opposed
11 to focusing again like we are on the low-hanging
12 fruit.

13 CHAIR SARIS: Would you agree with Mr.
14 Hutchinson, I guess it was, who said that there's
15 been a decrease in drug addiction in the last 30
16 years?

17 MS. TYLER: Well I think those numbers are
18 difficult to uncover. Because first of all, many of
19 those studies are done by government agencies who are
20 calling individuals and asking: Do you use drugs?
21 Very few people will admit to anything like that, so
22 those numbers are skewed, first of all.

23

1 And second of all, they are taken out of
2 context because they are typically obtained in an
3 instant in a person's life, as opposed to taken into
4 account in the totality of that person's experience.

5 CHAIR SARIS: So you disagree?

6 MS. TYLER: I do disagree with
7 Mr. Hutchinson's testimony this morning.

8 CHAIR SARIS: So a lot of the people who
9 might get released, in your view, just still need to
10 be monitored on supervised release, or drug addiction
11 programs, and all that sort of thing? In other
12 words, supervised release should be a concern?

13 MS. TYLER: Well I believe that people
14 should have structure when they come home, and there
15 should be re-entry opportunities for them to make
16 their transition much more productive and effective
17 for them so that they are not, you know, in a
18 position where they're going to re-offend either by
19 using drugs, or by being involved in other criminal
20 activity.

21 CHAIR SARIS: So by "failed," you mean
22 essentially we haven't made any difference? You

23

1 would take an opposite point of view?

2 MS. TYLER: Well I would say we have made
3 very little difference. And in fact, in many cases
4 we've created much more harm than good. And that is
5 certainly the case with respect to syringe exchange
6 funding, and the spread of HIV/AIDS, and Hepatitis C.
7 It is certainly the case with respect to overdose
8 fatalities, which are the second leading cause of
9 accidental death in the United States. And it is
10 certainly the case with respect to our drug
11 sentencing laws and the extreme mass incarceration of
12 particularly low-level non-violent offenders who are
13 generally people of color.

14 CHAIR SARIS: Thank you.

15 COMMISSIONER HOWELL: Before I get to my
16 question, I just wanted to join in the thanks to all
17 of you, and the other witnesses who have testified
18 here today. But in addition all of the groups who
19 have taken the reports of the Commission as issued
20 over the years on this issue and really I think
21 carried the ball across the line in Congress in ways
22 that this Commission doesn't have - really can't do.

23

1 So we can make recommendations, but to
2 really make sure people in Congress hear it, it is
3 really community groups who really deserve enormous
4 credit for the situation we are in now, which is a
5 much happier situation than before.

6 But the question I had was sort of falling
7 along the lines of Ketanji, Commissioner Jackson's
8 questions about sort of planning and the future.
9 With our crack-minus-2 amendment, we gave great
10 consideration to implementation periods and the
11 effective date.

12 Should we decide to make the FSA
13 implementation amendment retroactive, should we give
14 a similar kind of consideration to a delayed
15 effective date? Or do you think that because of the
16 timing of our consideration now is different that we
17 don't have to have the same kind of concern?

18 Have you thought about that particular
19 issue with respect to the decision was have to make
20 on retroactivity?

21 MS. STEWART: No. However, could it be
22 done before November 1st? No, right? Retroactivity

23

1 couldn't apply before – it could?

2 COMMISSIONER HOWELL: No, it couldn't.

3 MS. STEWART: That's what I mean. So that
4 is a long time I think. And so I don't think beyond
5 November 1st there needs to be any delay, if that's
6 the question.

7 COMMISSIONER HOWELL: So because of the
8 timing of our decision now, you think we don't –

9 MS. STEWART: Right.

10 COMMISSIONER HOWELL: – have to have a
11 similar kind of consideration of a delay in the
12 effective date?

13 MS. STEWART: I think that's right. Now I
14 realize that the LSD and marijuana changes affected
15 far fewer people, but those were done on November
16 1st. Retroactivity took effect the same day as the
17 change.

18 COMMISSIONER HOWELL: Does anybody else
19 have an opinion about that?

20 (No response.)

21 COMMISSIONER HOWELL: Okay. Thank you.

22 CHAIR SARIS: Anything else?

23

1 (No response.)

2 CHAIR SARIS: Well thank you very much.

3 The last panel of the day kept us going. I had a
4 little bit of a chill when I heard about the
5 fictitious Patti going to jail.

6 (Laughter.)

7 CHAIR SARIS: That kept me up. But thank
8 you very much once again for all that you do to
9 promote fairness. Thank you.

10 MS. STEWART: Thank you for what you're
11 doing.

12 CHAIR SARIS: Thank you. We're recessed.

13 (Whereupon, at 3:08 p.m., Wednesday, June
14 1, 2011, the hearing was adjourned.)

15

16

17

18

19

20

21