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Before the  
UNITED STATES SENTENCING COMMISSION  
Public Meeting  
Thursday, June 30, 2011  
Leonidas Ralph Mecham Conference Center  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle  
Washington, D.C. 20002-8002

The meeting was convened, pursuant to notice, at  
1:01 p.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 P R O C E E D I N G S

2 (1:01 p.m.)

3 CHAIR SARIS: The meeting is called to  
4 order. The first order of business is a vote to  
5 adopt the [April 6, 2011], public meeting minutes.  
6 Is there a motion to do so?

7 VICE CHAIR CARR: So moved.

8 VICE CHAIR JACKSON: Also move.

9 CHAIR SARIS: Is there a second?

10 COMMISSIONER HINOJOSA: Second.

11 CHAIR SARIS: Any discussion?

12 (No response.)

13 CHAIR SARIS: Now we need a vote on the  
14 motion. All in favor, say aye.

15 (Chorus of ayes.)

16 CHAIR SARIS: Any opposed?

17 (No response.)

18 CHAIR SARIS: The motion carries.

19 Now we move on to the matter before the  
20 Commission today.

21 So good afternoon to everyone, and thank  
22 you all for coming to this important meeting

1 regarding crack retroactivity. Today's public  
2 meeting has been called to vote on whether to apply  
3 retroactively the Commission's proposed permanent  
4 amendment implementing the Fair Sentencing Act of  
5 2010.

6 Let me begin with the statute. By statute  
7 the Commission is required to review and revise the  
8 operation of the sentencing guidelines and ensure  
9 their conformance with federal statutes.

10 By statute, the Commission also is  
11 required to consider applying retroactively changes  
12 to the guidelines that lower penalties. Because of  
13 the importance of finality of judgments and the  
14 burdens placed on the judicial system when a change  
15 to the guidelines is applied retroactively, the  
16 Commission takes this duty very seriously and does  
17 not come to a decision on retroactivity lightly.

18 You will hear more extensively from me and  
19 from my colleagues about the deliberative process  
20 that the Commission followed leading to today's vote.  
21 But before the motion regarding retroactivity is  
22 raised, I want to make some comments on today's

1 proceedings and the process that will follow.

2 First, I want to make it clear that we are  
3 voting today on the retroactivity of the guidelines  
4 only. The Commission cannot make the Fair Sentencing  
5 Act itself retroactive. Therefore, if there is an  
6 affirmative vote, not every federal crack defendant  
7 in custody would see a benefit from retroactivity  
8 because the old statutory mandatory minimums will  
9 still apply.

10 Second, if the Commission decides to give  
11 retroactive effect to the Fair Sentencing amendment  
12 today, it does not become effective immediately, but  
13 becomes effective on the date set by the Commission  
14 provided that the amendment itself is not disapproved  
15 by Congress. That effective date is November 1st,  
16 2011. Consideration by the courts of retroactivity  
17 motions would not be proper before such time.

18 And third, if there were an affirmative  
19 vote on retroactivity, that does not mean that  
20 defendants are free to leave prison immediately. Nor  
21 does an affirmative vote on retroactivity, if there  
22 is one, mean the end of the process. Every defendant

1     who believes he is eligible for retroactivity must  
2     have his case considered by a federal judge who will  
3     ultimately decide to what extent, if any, a  
4     modification of sentence is warranted. That decision  
5     will be directed by the statutory limitations on  
6     sentence modification proceedings, the policy  
7     statement covering retroactivity, and the court's  
8     analysis of the statutory factors.

9             And let me emphasize that federal judges  
10     would be required to consider the defendant's risk to  
11     public safety as part of their overall consideration  
12     of a defendant's motion for a reduced sentence.

13             Today is a very important historic day for  
14     the Commission in national sentencing policy as a  
15     whole. The Commission has long worked on this issue.  
16     I had everybody gather all the reports, the four  
17     reports that we have written on the subject: 1995,  
18     1997, 2002, and 2007.

19             We commissioners have spent the last month  
20     since the hearing reading letters – I think over  
21     43,500 – and the testimony and reviewing the new  
22     issues raised by the Supreme Court, appellate, and

1 district case law.

2 Our excellent staff has literally been  
3 working around the clock, and the Commission is  
4 grateful to everyone – probably all of you sitting in  
5 this room – who sent in letters or testified,  
6 regardless of what your position was on the issue,  
7 because we want to hear from everyone when we make  
8 these important decisions. Your views help us make  
9 better decisions.

10 There is much more to do, and we look  
11 forward to working with all of you on the many issues  
12 before us. As I said, my colleagues and I will have  
13 more remarks.

14 So now I would like to get the meeting  
15 started with our general counsel and the first order  
16 of business. Mr. Cohen?

17 MR. COHEN: Thank you, Judge.

18 Before you is a proposed amendment that  
19 amends 1B1.10, which is the policy statement  
20 governing retroactivity, in four ways:

21 First, the proposed amendment would expand  
22 the listing in 1B1.10(c) to include Parts A and C of

1 Amendment 750 as an amendment that may be considered  
2 for retroactive application. In response to the Fair  
3 Sentencing Act of 2010, Part A of Amendment 750  
4 amended the Drug Quantity Table in 2D1.1 for crack  
5 cocaine and made related revisions to Application  
6 Note [10 to] 2D1.1. Part C deleted the cross reference  
7 in 2D2.1(b) under which an offender who possessed more  
8 than five grams of crack cocaine was sentenced under  
9 2D1.1.

10 Second, the proposed amendment amends  
11 1B1.10 to change the limitations that apply in cases  
12 in which the term of imprisonment was less than the  
13 minimum of the applicable guideline range at the time  
14 of sentencing. Under the proposed amendment, the  
15 general limitation in subsection (b)(2)(A) continues  
16 to be that the court shall not reduce the defendant's  
17 term of imprisonment to a term that is less than the  
18 minimum of the amended guideline range. The proposed  
19 amendment restricts the exception in subsection  
20 (b)(2)(B) to cases involving a government motion to  
21 reflect the defendant's substantial assistance to  
22 authorities. For those cases, a reduction comparably

1 less than the amended guideline range may be  
2 appropriate.

3 Third, the proposed amendment amends the  
4 commentary to 1B1 to address an application issue.  
5 Circuits have conflicting interpretations about when,  
6 if at all, the court applies the departure provision  
7 before determining the "applicable guideline range"  
8 for purposes of 1B1.10. Consistent with the three-  
9 step approach adopted by Amendment 741, and reflected  
10 in 1B1.1, the proposed amendment clarifies that the  
11 applicable guideline range referred to in 1B1.10 is  
12 the guideline range determined pursuant to 1B1.1(a),  
13 which is determined before consideration of any  
14 departure provision in the *Guidelines Manual* or any  
15 variance.

16 Fourth, the proposed amendment adds an  
17 Application Note to 1B1.10 to specify that,  
18 consistent with subsection (a) of 1B1.11, the court  
19 shall use the version of 1B1.10 that is in effect on  
20 the date on which the court reduces the defendant's  
21 term of imprisonment as provided by 18 U.S.C.  
22 3582(c)(2).

1           And finally, the proposed amendment adds  
2     commentary to 1B1.10 to refer to the Supreme Court  
3     case, *Dillon v. U.S.*

4           A motion to promulgate the proposed  
5     amendment would be in order with an effective date of  
6     November 1, 2011, which is the same effective date as  
7     the underlying amendment itself, Amendment 750, and  
8     granting staff technical and conforming amendment  
9     authority.

10           CHAIR SARIS: Thank you, Mr. Cohen. Is  
11     there a motion?

12           VICE CHAIR CARR: I so move.

13           CHAIR SARIS: Is there a second?

14           VICE CHAIR JACKSON: I second.

15           CHAIR SARIS: Is there discussion on the  
16     motion?

17           (No response.)

18           CHAIR SARIS: I will ask at this point  
19     Ms. Sheon, the staff director, to call the roll.

20           MS. SHEON: Thank you, Chair Saris. On  
21     the motion as described by General Counsel Cohen,  
22     Vice Chair Carr.

1 VICE CHAIR CARR: Aye.

2 MS. SHEON: Vice Chair Jackson.

3 VICE CHAIR JACKSON: Yes.

4 MS. SHEON: Commissioner Hinojosa.

5 COMMISSIONER HINOJOSA: Aye.

6 MS. SHEON: Commissioner Howell.

7 COMMISSIONER HOWELL: Yes.

8 MS. SHEON: Commissioner Friedrich.

9 COMMISSIONER FRIEDRICH: Aye.

10 MS. SHEON: Chair Saris.

11 CHAIR SARIS: Aye.

12 MS. SHEON: The motion passes unanimously.

13 CHAIR SARIS: Thank you. Now at this

14 point, does any commissioner want to make a

15 statement? Ms. Jackson – Commissioner Jackson.

16 VICE CHAIR JACKSON: In the Sentencing

17 Reform Act of 1984, Congress not only created the

18 United States Sentencing Commission, it also required

19 the Commission to consider retroactive application of

20 guideline penalty reductions.

21 Title 28, 994(u) of the United States

22 Code is not ambiguous. It states:

1            "If the Commission reduces the term of  
2 imprisonment recommended in the guidelines applicable  
3 to a particular offense or category of offenses, it  
4 shall specify in what circumstances and by what  
5 amount the sentences of prisoners serving terms of  
6 imprisonment for the offense may be reduced."

7            There is a similar degree of  
8 definitiveness in the Fair Sentencing Act of 2010.  
9 In that statute, Congress reduced the statutory  
10 mandatory minimum penalty thresholds applicable to  
11 federal crack cocaine offenses, among other things.  
12 And, rather than permit the Commission to consider  
13 whether or not to make corresponding guideline  
14 penalty reductions in the ordinary course of its  
15 amendment cycle, Congress ordered the Commission to  
16 make conforming penalty reductions in the guidelines  
17 that pertain to crack cocaine, quote, "as soon as  
18 practicable."

19            We are here today because the Commission  
20 did just that. It has fulfilled its statutory duty  
21 under the Fair Sentencing Act to reduce the term of  
22 imprisonment recommended in the guidelines applicable

1 to crack cocaine offenses, and it now must consider  
2 whether those guideline changes should be eligible  
3 for retroactive application under the Sentencing  
4 Reform Act.

5 Congressional silence about retroactivity  
6 in the text of the Fair Sentencing Act tells us  
7 nothing about whether the Commission is relieved of  
8 its statutory obligation to consider the  
9 retroactivity of the corresponding guideline penalty  
10 changes.

11 Congress certainly could have addressed  
12 that issue, but it did not. So now the Commission  
13 must do what the Sentencing Reform Act requires.

14 I share the conclusion of my colleagues,  
15 and of many of you here today, that Parts A and C of  
16 the guideline Amendment 750 should be subject to  
17 retroactive application. This conclusion rests on  
18 many bases. Among them: the testimony that we heard  
19 at our public hearing; the thousands of letters and  
20 pieces of written public comment that we have  
21 received on this issue; an analysis of the relevant  
22 data; and a thorough evaluation of the guideline

1 amendment in light of the established criteria by  
2 which the Commission makes retroactivity  
3 determinations.

4 In my view, each of these criteria is  
5 fully satisfied. The crack cocaine guideline penalty  
6 reduction is not some minor adjustment designed to  
7 facilitate efficient guideline operation, but it  
8 reflects a statutory change that is unquestionably  
9 rooted in fundamental fairness.

10 The Commission first identified the myriad  
11 problems with a mandatory minimum statute that  
12 penalizes crack cocaine offenders 100 times more  
13 severely than offenders who traffic in powder  
14 cocaine in a report to Congress in 1995. And today  
15 there is no federal sentencing provision that is more  
16 closely identified with unwarranted disparity and  
17 perceived systemic unfairness than the 100:1  
18 crack/powder penalty distinction.

19 Congress's clear purpose in enacting the  
20 Fair Sentencing Act and in requiring the Commission  
21 to make immediate conforming reductions in the  
22 guidelines was to address this fair sentencing issue.

1           The Commission also estimates that a  
2           substantial number of affected crack cocaine  
3           offenders could see a significant change in their  
4           sentences. And to a person – the federal officials who  
5           testified at our hearing about their experience with  
6           having administered the applications for retroactive  
7           penalty reductions before, after the crack cocaine  
8           guideline was reduced in 2007, said that these  
9           guideline changes, if made retroactive, would not be  
10          particularly burdensome.

11           It also bears repeating that there is  
12          nothing automatic about a guideline change that has  
13          been made eligible for retroactive application under  
14          1B1.10. In each eligible case, a federal judge must  
15          determine the appropriateness of a sentence reduction  
16          for that particular defendant, adjusting the sentence  
17          only if warranted and if the risk to public safety is  
18          minimal.

19           And judges have proven that they are up to  
20          this task. Indeed, more than 35 percent of the  
21          motions for retroactive application of the 2007 crack  
22          amendment were denied.

1           Sure, many offenders will ask. But we  
2 know from experience that not all will receive  
3 reduced penalties when the circumstances of their  
4 cases are reviewed and the retroactivity analysis is  
5 applied.

6           This, in my view, is precisely why the  
7 Justice Department's position on retroactivity need  
8 not be sustained. In this context, there is simply  
9 no need to employ imperfect proxies for dangerousness  
10 when an actual judge with an actual case can make  
11 that call.

12           And so, as you can see, my vote today does  
13 not resemble any caricature of a policymaker intent  
14 on freeing violent felons without authorization and  
15 against congressional will. Rather, it is well  
16 supported and fully consistent with the Sentencing  
17 Reform Act, the Fair Sentencing Act, prior  
18 experience, and common sense.

19           The Commission has the statutory authority  
20 to permit retroactive guideline penalty reductions,  
21 and presumably Congress provided that authority to be  
22 used if ever the day should come when the

1 retroactive application of a guideline penalty  
2 reduction furthers our societal interests in  
3 equitable sentencing and the avoidance of unwarranted  
4 disparity.

5 This is that day.

6 Parts A and C of the guideline amendment  
7 that the Commission promulgated under the Fair  
8 Sentencing Act addresses a sentencing inequity that  
9 the Commission has known about and cared about for  
10 years. Indeed, even before any of the currently  
11 incarcerated crack offenders who would be eligible  
12 for a retroactive benefit received their sentences.

13 For the past 25 years, the 100:1  
14 crack/powder disparity has cast a long and persistent  
15 shadow. It has spawned clouds of controversy and an  
16 aura of unfairness that has shrouded nearly every  
17 federal crack cocaine sentence that was handed down  
18 pursuant to that law.

19 In my view, now that Congress has taken  
20 steps to clear the air by making significant downward  
21 adjustments to the mandatory statutory penalties for  
22 crack cocaine offenses, there is no excuse for

1 insisting that those who are serving excessive  
2 sentences under the long-disputed and now discredited  
3 prior guideline must carry on as though none of this  
4 has happened.

5 I believe that the Commission has no  
6 choice but to make this right. Our failure to do so  
7 would harm not only those serving sentences pursuant  
8 to the prior guideline penalty, but all who believe  
9 in equal application of the laws and the fundamental  
10 fairness of our criminal justice system.

11 The decision we make today, which comes  
12 more than 16 years after the Commission's first  
13 report to Congress on crack cocaine, reminds me in  
14 many respects of an oft-quoted statement from the  
15 late Dr. Martin Luther King, Jr. He said:

16 "The arc of the moral universe is long,  
17 but it bends toward justice."

18 Today the Commission completes the arc  
19 that began with its first recognition of the inherent  
20 unfairness of the 100:1 crack/powder disparity all  
21 those years ago. I say justice demands this result.

22 CHAIR SARIS: Thank you. Judge Howell.

1           COMMISSIONER HOWELL: Yes. It is always a  
2 challenge to follow Commissioner Jackson.

3           (Laughter.)

4           COMMISSIONER HOWELL: And her poetry, but  
5 I do want to explain my strong support for  
6 retroactive application of Parts A and C of the  
7 permanent amendment that we sent to Congress on May  
8 1st to implement the Fair Sentencing Act.

9           But before I get to those two parts of the  
10 amendment that reduce guideline sentences for crack  
11 offenses in accord with the reduced penalties in the  
12 Fair Sentencing Act, I did want to spend just a  
13 moment talking about Part B of the amendment which  
14 incorporates into the guidelines for all drug  
15 offenders, not just crack offenders, certain  
16 aggravating and mitigating factors that is not a part  
17 of the amendment that the Commission is applying  
18 retroactive effect for. And I did want to spend just  
19 a moment addressing why that is.

20           The aggravating and mitigating factors in  
21 Part B of the amendment would, to my mind – and I  
22 think shared by my colleagues on the Commission –

1 would involve time-consuming and administratively  
2 difficult-to-apply factors for courts to look at on a  
3 retroactive basis. These are new factors, both  
4 aggravating and mitigating, that were not formerly  
5 considered by judges as part of the original  
6 guideline calculations, and consideration now, if we  
7 were to consider making that Part B of the amendment  
8 retroactive, would likely require courts to engage in  
9 new fact-finding with the concomitant need for  
10 hearings, and possibly litigation over whether  
11 application of the aggravating factors in particular  
12 would be warranted. And this process to my mind  
13 would just be administratively burdensome to the  
14 point of impracticality.

15 Certainly we got no testimony from anybody  
16 suggesting otherwise. That is by far in contrast to  
17 Parts A and C of the amendment which we are, by our  
18 vote today, voting for retroactivity in their  
19 application because we do not believe that,  
20 administratively, that those would be unmanageable  
21 for the courts. And to the contrary, we think that  
22 courts will be able to perfectly manage retroactive

1 application of those two parts of the amendment.

2 I don't want to repeat the history that  
3 Commissioner Jackson referred to, but I do want to  
4 say that the Sentencing Commission has for many years  
5 said that crack sentences were too severe and unfair.  
6 Under the leadership of our former chairman, and our  
7 colleague, Commissioner Ricardo Hinojosa, we did  
8 something about it in 2007 by reducing guideline  
9 penalties for crack by two levels, and then making  
10 that guideline change retroactive in 2008.

11 Judge Hinojosa deserves a lot of credit  
12 for that.

13 When Congress subsequently passed the Fair  
14 Sentencing Act making much more significant  
15 reductions in crack penalties than we were ever able  
16 to, this Commission acted promptly in 2010 under the  
17 leadership of our former chairman, Judge Bill  
18 Sessions, to enact temporary guideline amendments to  
19 implement the new law and reduce guideline sentencing  
20 ranges for crack offenses.

21 Our new chairman, Judge Patti Saris, has  
22 ably led us through this debate on the permanent

1 amendment, and the consideration that we have given  
2 today to making that amendment retroactive. And I  
3 thank her, too, for her able leadership.

4 I note these past actions by the  
5 Commission to recognize that the work of many  
6 commissioners, both past and present, including the  
7 reports that both Judge Saris and Commissioner  
8 Jackson mentioned, has led us to the vote that we  
9 take today. It is the culmination of many years of  
10 Commission research, data collection, analysis, and  
11 reports that persuaded us that the steps we took in  
12 2007, 2008, 2010, and today are the right ones.

13 What is noteworthy in this history is  
14 that, no matter the makeup of this bipartisan  
15 Commission, we have been able to come to a unified  
16 position on this issue – just as we do today.

17 The Commission's work helped persuade  
18 Congress that reducing crack penalties was the right  
19 policy and the right thing to do. In making this  
20 decision, we have heeded the input we have received  
21 both for and against retroactive application of the  
22 amendment, and taken careful stock of our statutory

1 authority to make retroactive guideline amendments  
2 that reduce sentencing ranges.

3           We have specifically considered  
4 carefully the letters received from Members of  
5 Congress, some of whom have urged retroactive  
6 application of the guideline amendment, and others  
7 who have not. Those members who have cautioned  
8 against retroactive application have eloquently  
9 stated that silence by Congress on the issue of  
10 retroactivity in the Fair Sentencing Act should be a  
11 signal enough that we exceed our authority and  
12 violate congressional intent by making the amendment  
13 retroactive under any circumstances. And I want to  
14 take a moment to address this issue.

15           The Commission has over its history used  
16 its authority under 28 U.S.C. 994(u) infrequently to  
17 [make] retroactive guideline amendments that reduce  
18 sentencing ranges. This is because the finality of  
19 judgments is an important principle in our judicial  
20 system and we require good reasons to disturb final  
21 judgments.

22           Indeed, while the vast majority of the 750

1 amendments to the guidelines over the last 25 years  
2 and over my tenure on the Commission have been to  
3 increase guideline penalties, approximately 100 have  
4 reduced penalties. Yet only 28 of the guideline-  
5 reducing amendments have been made retroactive over  
6 the history of the Commission.

7           The Commission's authority to make  
8 guideline-reducing amendments retroactive is  
9 consistent with the purposes and duties laid out  
10 for us by Congress in our organic statute. Congress  
11 have [given] us both lofty goals and practical goals.

12           Among the lofty goals, Congress directed us  
13 to update and issue amendments to the guidelines that  
14 reflect, to the extent practicable, advancements in  
15 knowledge of human behavior as it relates to the  
16 criminal justice process.

17           Practical goals included directions to the  
18 Commission to examine the capacity of prison  
19 facilities when we promulgate guideline amendments,  
20 and in fact Congress directed us to formulate the  
21 guidelines to minimize the likelihood that the  
22 federal prison population will exceed the capacity of

1 the federal prisons. And we are now at over 35  
2 percent over-capacity in our federal prisons.

3 While Congress was silent in the Fair  
4 Sentencing Act about retroactive application of the  
5 statutory changes made in the new law, the Congress  
6 has given the Commission very clear direction both  
7 that we must consider retroactive application of the  
8 guideline-reducing amendments, as Commissioner  
9 Jackson pointed out, and that as part of that  
10 consideration we must take into account the purposes  
11 of sentencing set out in the Sentencing Reform Act,  
12 and our other statutory responsibilities both lofty  
13 and practical.

14 Among the purposes of sentencing that we  
15 must try to achieve are fairness, proportionality,  
16 and avoiding unwarranted sentencing disparities. And  
17 to my mind, retroactive application of Parts A and  
18 [C] of our guidelines – FSA guideline amendment helps  
19 to achieve those purposes of the Sentencing Reform  
20 Act.

21 I share the view of the Congressional  
22 Black Caucus that retroactive application of the Fair

1 Sentencing Act guideline changes would help address  
2 racial disparities and excessive sentences for crack  
3 offenders and undo a long history of injustice in  
4 federal sentencing.

5 To those who have concerns about our  
6 agenda on this Commission, let me assure you that  
7 this Commission has no agenda other than to fulfill  
8 our statutory duties to the best of our ability, and  
9 we do so with our amazing staff.

10 I appreciate the concern that reducing the  
11 sentences of crack offenders may send the wrong  
12 signal about being tough on crime, but this just has  
13 no basis in fact. Even with reduced sentences, most  
14 crack offenders will still serve on average over ten  
15 years. Over a decade in prison is a tough sentence  
16 no matter how you measure it, and crack offenders  
17 will still serve tougher sentences than offenders  
18 convicted of dealing the same amount of powder  
19 cocaine, about 18 times tougher.

20 In the end, I am very proud of the work of  
21 this Commission and I am very proud to support  
22 retroactive application of Parts A and [C] of our

1 FSA guideline –

2 VICE CHAIR CARR: A and C?

3 COMMISSIONER HOWELL: A and C, sorry.

4 CHAIR SARIS: The record stands corrected.

5 Commissioner Friedrich. Thank you, Judge Howell.

6 COMMISSIONER FRIEDRICH: My vote today in  
7 favor of giving retroactive effect to Amendment 750  
8 is based on the Fair Sentencing Act of 2010, the  
9 legal standards governing retroactivity, the  
10 Commission's precedents and data, as well as the  
11 public comment that the Commission has received to  
12 date, including the Criminal Law Committee's  
13 testimony in support of retroactivity.

14 Some in Congress have argued that the  
15 Commission does not have the authority to give  
16 retroactive effect to Amendment 750 because the Fair  
17 Sentencing Act is silent with regard to  
18 retroactivity. I agree that the savings statute  
19 precludes retroactive application of a statute unless  
20 Congress states a clear intent otherwise, and  
21 Congress has expressed no such intent here. However,

1 the Fair Sentencing Act must be read in conjunction  
2 with the Commission's organic statute, and in  
3 particular 28 U.S.C. 994(u), which requires the  
4 Commission to consider retroactivity with respect to  
5 any guideline amendment that reduces the term of  
6 imprisonment, even where, as here, that amendment is  
7 based on legislation that is silent with regard to  
8 retroactivity.

9 Consistent with 1B1.10 of the guidelines  
10 and 28 U.S.C. 994(u), the Commission traditionally  
11 has considered three factors in determining whether  
12 to give retroactive effect to a guideline that  
13 reduces the term of imprisonment. These factors,  
14 while not exclusive, include the purpose of the  
15 amendment, the magnitude of the change as a result of  
16 the amendment, and the administrative burdens  
17 associated with retroactivity. A weighing of these  
18 factors leads me to conclude, on balance, that  
19 Amendment 750 should be given retroactive effect.

20 The purpose of Amendment 750 is to  
21 implement the Fair Sentencing Act. Among other  
22 things, the Act amended the drug quantity thresholds

1 that apply to the five and ten-year mandatory minimum  
2 penalties such that the ratio of powder to crack  
3 cocaine for offenses committed on or after August 3rd  
4 of 2010 is now 18:1, reduced from 100:1 for offenses  
5 committed prior to August 3rd of 2010. This change in  
6 ratio is consistent with the Commission's recent  
7 recommendations to Congress.

8           When promulgating a guideline amendment  
9 pursuant to legislation, the role of the Commission  
10 is to implement Congress's statutory directives  
11 faithfully. In the Fair Sentencing Act, Congress  
12 directed the Commission to "promulgate the  
13 guidelines, policy statements, or amendments  
14 provided for in this Act . . ." and to "make  
15 conforming amendments to the guidelines as the  
16 Commission determines necessary to achieve  
17 consistency with other guideline provisions and  
18 applicable law." The purpose, as reflected in the  
19 title itself, is to restore fairness in cocaine  
20 sentencing.

21           The Commission implemented these  
22 congressional directives through Amendment 750.

1           In summary, the amendment incorporates the  
2 18:1 drug quantity ratio at every offense level on  
3 the Drug Quantity Table in 2D1.1 of the guidelines;  
4 it adds a number of new aggravating and mitigating  
5 factors to 2D1.1; and it deletes the guidelines  
6 cross-reference which required courts to sentence  
7 defendants who possess more than five grams of crack  
8 cocaine to at least five years in prison.

9           The fact that Congress did not express a  
10 clear intent to give retroactive effect to the new  
11 statutory mandatory minimum penalties and other  
12 provisions of the Act is a factor that weighs  
13 heavily, in my view, against retroactivity. However,  
14 this factor is not dispositive with respect to the  
15 issue of whether the Commission's guideline amendment  
16 should be given retroactive effect. Amendment 750  
17 substantially lowers guideline penalties; therefore,  
18 pursuant to 28 U.S.C. 994(u), the Commission now must  
19 decide whether to give retroactive effect to any  
20 portion of Amendment 750.

21           Despite the fact that the Fair Sentencing  
22 Act is silent with respect to guideline

1 retroactivity, I favor giving retroactive effect to  
2 the amendment because doing so will conform the  
3 guideline penalties that apply to crack offenses to  
4 those that apply to other controlled substance  
5 offenses; it will ensure that crack offenders are  
6 treated consistently under the guidelines; and it  
7 will restore a greater degree of fairness in cocaine  
8 sentencing. For more than 15 years the Commission,  
9 as well as Members of Congress and other stakeholders,  
10 have argued that crack penalties based on the 100:1  
11 drug quantity ratio are unfair and undermine key  
12 objectives of the Sentencing Reform Act. Giving  
13 retroactive effect to Amendment 750 will help remedy  
14 this injustice. I also support retroactivity because  
15 I believe that the other two factors that the  
16 Commission must consider – the magnitude of the  
17 change, and the administrative burdens associated  
18 with retroactivity – weigh in favor of giving  
19 retroactive effect to Amendment 750.

20 To be clear, the Commission's decision  
21 today in no way alters the statutory mandatory  
22 minimum penalties in the Fair Sentencing Act. The

23

1 mandatory minimum penalties that apply to crack  
2 offenders who committed crimes before August 3rd,  
3 2010, remain in effect.

4           With respect to the magnitude of the  
5 change, the Commission estimates that approximately  
6 12,000 offenders will be eligible for possible  
7 sentencing reductions of approximately 23 percent on  
8 average. These estimates are substantial and  
9 comparable to those associated with the Commission's  
10 2007 amendment. The estimated savings to the Bureau  
11 of Prisons are considerable.

12           With respect to the administrative burdens  
13 on the federal courts, concerns expressed in 2007  
14 have diminished significantly as a result of the  
15 Supreme Court's decision last term in *Dillon v.*  
16 *United States*. In that case, the Court affirmed the  
17 Commission's view as expressed in 1B1.10, that  
18 3582(c)(2) proceedings are not full-scale  
19 resentencings.

20

1           As Judge Reggie Walton made clear in his  
2 testimony on behalf of the Criminal Law Committee of  
3 the Judicial Conference, judges, probation officers,  
4 and litigants ably implemented the 2007 amendment,  
5 notwithstanding the considerable resources expended.  
6 The Commission estimates that the number of crack  
7 Offenders who will be eligible for a potential  
8 reduction in sentence will be substantially less  
9 than the number of offenders who were eligible in  
10 2007.

11           And as in 2007, the Commission anticipates  
12 that the vast majority of the anticipated 3582(c)  
13 motions can be handled on the papers, without the  
14 need for hearings or the presence of defendants.

15           However, to minimize the need for judicial  
16 factfinding, the Commission votes today to limit  
17 retroactive application of Amendment 750 to Parts A  
18 and C. In addition, the Commission amends 1B1.10 to  
19 preclude sentencing reductions below the amended  
20 guideline range except in those cases in which the  
21 offender has received a substantial assistance  
22 reduction, based on a government motion filed pursuant  
23 to 5K1.1 of the guidelines, 18 U.S.C. 3553(e), or

1 Rule 35 of the Federal Rules of Criminal Procedure.  
2 These bright-line rules will set clear limits  
3 that will minimize and simplify any future  
4 litigation.

5 The Department of Justice supports  
6 retroactive application of Amendment 750, but has  
7 urged the Commission to bar certain classes of  
8 offenders, namely those who fall within criminal  
9 history categories IV, V, and VI, and those who have  
10 received firearm enhancements. While I share the  
11 concerns voiced by the department, as well as Members  
12 of Congress, regarding public safety, relevant  
13 sentencing data counsels against categorically  
14 excluding those offenders who fall within these  
15 categories.

16 In 2007, the Commission did not impose any  
17 such limits on retroactivity, and instead amended  
18 1B1.10 to mandate that judges consider public safety  
19 in deciding whether to exercise their discretionary  
20 authority. Data related to the implementation of the  
21 2007 crack amendment reveals that judges exercised  
22 their discretion pursuant to 1B1.10 to deny 3582(c)

1 motions on the merits on public safety grounds.

2 Recently the Commission completed a three-year

3 recidivism study in which it compared the recidivism

4 rates of crack offenders who were released early

5 as a result of the Commission's 2007 crack

6 amendment, to those of similarly situated crack

7 offenders who served their entire sentences. The

8 study found no statistically significant difference

9 between the recidivism rates of these two groups.

10 Crack offenders who fall within criminal

11 history categories IV, V, or VI, and those who receive

12 firearm enhancements are subject to significantly

13 higher penalties at their initial sentencings.

14 Any reduction in sentence that these offenders

15 may receive as a result of Amendment 750 will in no

16 way negate the extra prison time they are required

17 to serve as a result of such aggravating factors.

18 Regardless of Amendment 750, offenders in these

19 categories will continue to serve longer prison

20 terms than other crack offenders.

21 To be sure, certain offenders in the

22 categories that the Department of Justice has

1 identified pose a significant threat to public  
2 safety and should not be released prematurely.  
3 As 1B1.10 makes clear, reductions in sentence  
4 pursuant to 3582(c) are not automatic. Federal  
5 judges are expected to exercise their discretionary  
6 authority to deny reductions to those offenders  
7 who pose a risk to public safety. Indeed, 1B1.10  
8 requires judges to consider the risks to the public  
9 in each and every case.

10           It is important to note that the  
11 Commission's decision today to give retroactive  
12 effect to Amendment 750 will not take effect until  
13 November 1st of this year. This four-month delay  
14 will give Congress ample time to review Amendment 750,  
15 and potentially disapprove of the Commission's  
16 retroactivity decision. It will also give the courts,  
17 the Department of Justice, and the federal defenders  
18 time to implement procedures that will lead to sound  
19 and efficient 3582(c) proceedings.

20           CHAIR SARIS: Thank you very much. Lest

1     you think we seated ourselves women and men, that  
2     just plays out that way seniority-wise. But on the  
3     theory of ladies before gentlemen, we now turn to the  
4     gentlemen.

5                     Commissioner Carr.

6                     VICE CHAIR CARR: In light of the  
7     Commission's historical position with respect to  
8     crack sentencing, and considering Congress's purpose  
9     and effect in changing decades of unfair crack  
10    mandatory sentencing policy, I think it would be  
11    incongruous, if not unconscionable, if we failed to  
12    make this amendment retroactive. And I don't want to  
13    repeat the things that have been said, most of which  
14    I agree with, but I do want to re-emphasize a few  
15    things.

16                    Our estimation is that the average  
17    sentence served by those crack defendants that will  
18    benefit from a reduction in sentence will still be in  
19    excess of ten years. Bureau of Prisons is currently  
20    at 37 percent over-capacity. That 37 percent over-  
21    capacity doesn't only create undesirable conditions  
22    for prisoners, but also for corrections staff. And

1 the Bureau of Prisons predicts that as things are  
2 going, even with new prisons coming on line, that the  
3 net effect year after year for the next several years  
4 is going to be an increase of several thousand  
5 prisoners a year.

6 We have to take into account prison impact  
7 when we do our work. And the Bureau of Prisons also  
8 estimates that over the next five years, as a result  
9 of us making this amendment retroactive, the Bureau  
10 of Prisons could save in excess of \$200 million while  
11 we are helping to alleviate somewhat prison  
12 overcrowding.

13 I also want to emphasize that, while we  
14 have to consider what the Bureau of Prisons' impact  
15 is going to be, our decision today is based on  
16 fundamental fairness.

17 CHAIR SARIS: Thank you. Judge Hinojosa?

18 COMMISSIONER HINOJOSA: Thank you. First  
19 of all I would like to say, although not as eloquent  
20 as everyone else has been, my vote counts as much as  
21 everyone else's in favor of this amendment. And I  
22 would also be remiss if I didn't mention the three

1 chairs who have not been mentioned who have worked on  
2 this matter: Judge Conaboy and Judge Murphy all  
3 continued their work, and certainly worked extremely  
4 hard with regards to the crack cocaine issue. And  
5 Judge Wilkins recently wrote us a letter in favor of  
6 retroactivity. So that means every single chair of  
7 this Commission who is presently the chair or who has  
8 been the chair has been in favor of this particular  
9 retroactivity.

10 As has already been stated, Title 28 U.S.  
11 Code 994(u) requires the Commission to determine  
12 when there has been a reduction in a guideline as to  
13 whether to make it retroactive, and to what extent,  
14 and under what circumstances judges should be able to  
15 do that.

16 As has already been stated more than once,  
17 1B1.10 presently indicates that there are, among  
18 other factors, three that the Commission will always  
19 consider: the purpose of the amendment; the  
20 magnitude of the change; and the difficulty in  
21 applying the amendment retroactively.

22 As has already been stated also, in 2007

1 we changed the guidelines and made those retroactive.

2 It has been clear to me, as I am sure to the other  
3 Commissioners, that we have continued to hear  
4 comments from judges, practitioners, and others who  
5 are interested in the criminal justice system that  
6 actually retroactivity worked well, and it was a much  
7 more simple process than individuals might have  
8 thought it would have been.

9 One of the important things we decided at  
10 the time we voted with regards to the 2007 amendments  
11 becoming retroactive, was that we would conduct a study  
12 as to the recidivism rates of individuals who were  
13 freed and received lesser sentences as a result of  
14 the retroactivity.

15 The results that we have received as a  
16 result of those studies show that there really is no  
17 difference between the recidivism rates of the  
18 individuals who had a reduced sentence as opposed to  
19 those who had served the entire lengthier sentences.  
20 It is also important, when we look at those  
21 percentages of recidivism, to realize that when  
22 recidivism rates are relied upon and the percentages,

1 many times those include arrests which have not  
2 turned into convictions yet, as well as some  
3 technical violations that would not necessarily be to  
4 the level of a conviction coming as a result of them.

5           The Fair Sentencing Act: a bipartisan  
6 act. It is important for us to realize that it gave  
7 the Commission emergency amendment authority, which  
8 doesn't come with regards to every act that is passed  
9 by Congress. Obviously they felt it was important  
10 for the Commission to act, and to act quickly. The  
11 present amendment that we have sent to Congress,  
12 which comes into effect on November 1st unless  
13 Congress acts to the contrary, requires the  
14 Commission's determination as to retroactivity.

15           It is important for us to also realize  
16 that the Commission in all of its decisions – whether  
17 it is new guidelines, amendments to guidelines, or  
18 retroactivity issues – always receives comments from  
19 all segments of individuals and organizations that  
20 are interested in the criminal justice system. And  
21 we certainly received it with regards to this  
22 particular issue.

1           We have heard from Members of Congress who  
2     have different views as to what we should do with  
3     regards to this particular issue. We have heard from  
4     the Justice Department, which is the Executive  
5     Branch. We have heard from the judiciary. And we  
6     have heard from the general public, as well as from  
7     the public defenders, as well as individuals who  
8     practice as defense attorneys in the criminal justice  
9     system.

10           It then becomes the role of the Sentencing  
11    Commission to make the determination, after having  
12    carefully reviewed all of those comments, in many  
13    ways as judges do every single time they sentence an  
14    individual, as to what the right thing to do is.

15           Based on the decision of the Commission,  
16    it does not mean that any comment has been ignored or  
17    has not been taken seriously. Quite to the contrary.  
18    Just as judges do when they receive comments in the  
19    courtroom and have received evidence with regards to  
20    a particular matter, every single piece of comment  
21    and every single letter of comment, as well as  
22    testimony, has been considered, and the Commission

1 has come unanimously to this decision.

2 It is also important for us to bear in  
3 mind that all the Commission does is make certain  
4 defendants eligible for a reduction in sentence.

5 (A cell phone ring is heard.)

6 COMMISSIONER HINOJOSA: I think we are  
7 hearing from some of them right now.

8 (Laughter.)

9 COMMISSIONER HINOJOSA: And they seem to  
10 be very happy about it. However, it is also  
11 important to realize that the decision will continue  
12 to be in the hands of the judges. They will continue  
13 to make these decisions on an individual basis. They  
14 are directed with regards to the guidelines  
15 themselves to determine whether reduction is  
16 appropriate, and to what extent it is appropriate  
17 within the limits that are set in 1B1.10.

18 With regards to those who say, well,  
19 criminal history categories, use of a firearm in  
20 possession, or relevant conduct purposes, that there  
21 should be distinctions. It is also very important  
22 for us to bear in mind that the guidelines have taken

1 that into consideration. Individuals with higher  
2 criminal history category scores have been sentenced  
3 to higher sentences. Individuals where a firearm may  
4 have been involved have been sentenced to higher  
5 sentences. All of these aggravating factors have  
6 already been considered with regards to the sentences  
7 that have been handed down.

8 In closing, I would like to say that the  
9 Sentencing Reform Act of 1984, for those of us who  
10 were on the bench before the Sentencing Reform Act of  
11 1984 went into effect in 1987, was a bipartisan piece  
12 of legislation that attempted to create a more fair  
13 system, that avoided unwarranted disparity, that  
14 provided more transparency, and that set one system  
15 at the national level.

16 Senators Kennedy, Hatch, and Thurmond  
17 were some of those individuals who worked awfully  
18 hard for a more fair system. I am naming them, but  
19 there were many others who performed that task. One  
20 of the things provided in the Sentencing Reform Act  
21 of 1984 was the creation of the United States  
22 Sentencing Commission, a bipartisan Commission that

1 was set up to take the sentencing policy decisions  
2 out of the political process, out of the hands of  
3 just the prosecutor and out of the hands of just the  
4 defense attorney.

5           The purpose of the Act was to set the  
6 policy, the sentencing policies of the United States  
7 with regards to the determination of guidelines and  
8 guidance to be given to individual judges, with  
9 regards to individual cases, at a national level by  
10 an independent agency within the judiciary, which was  
11 supposed to act outside of the political process and  
12 outside of the influence of just one side or the  
13 other in the courtroom.

14           The Commission since its creation has done  
15 that. Today the Commission has done that with  
16 regards to its statutory duty with regards to the  
17 decision as to how to proceed with regards to  
18 retroactivity on a particular statute. And I think  
19 it is fair to say that the Commission, in making its  
20 decision, has acted outside of the political process  
21 and outside of just the request of the defense  
22 attorneys, and outside of the request of just the

1 prosecution side of any case, but rather has acted in  
2 its belief that the independent judges will make  
3 their individual decisions with regards to a  
4 particular case and whether it is the right thing to  
5 do in that particular situation. And also, the  
6 decision has been made by each one of the members of  
7 this Commission based on the consideration of all of  
8 the principles that need to be considered with  
9 regards to retroactive application, and has been made  
10 certainly on my part – and I certainly believe with  
11 regards to on the part of every other commissioner –  
12 based on the fact that this is the just, the fair,  
13 and the right thing to do.

14 CHAIR SARIS: Thank you, Judge Hinojosa.  
15 Commissioner Wroblewski?

16 COMMISSIONER WROBLEWSKI: Thank you very  
17 much, Judge Saris, for yielding, and thank you very  
18 much for your leadership. I think it is fair to say  
19 that it has been a very busy six months since you  
20 first became chair.

21 We have addressed together as a Commission  
22 a variety of very, very important issues ranging from

1 health care fraud, to firearms violence, and many,  
2 many others as well. You have guided the Commission  
3 adeptly, and you have brought us to this day and this  
4 very important issue of federal cocaine sentencing  
5 policy.

6 Many of my colleagues have mentioned  
7 different people who have participated in the  
8 consideration of federal cocaine sentencing policy.

9 I think it is important to recognize all of the  
10 people who have been involved in this issue over the  
11 last 17 years.

12 There is no way that I could possibly – and  
13 I won't – try to name all of them, but suffice it to  
14 say that Members of Congress current and past, former  
15 members of this Commission, the Judicial Conference,  
16 the Commission staff, advocacy groups, and many, many  
17 others have all participated in the consideration of  
18 this issue.

19 I did hear from Judge Conaboy just the  
20 other day and remember well his chairmanship in the  
21 1990s when the Commission issued its first report on  
22 federal cocaine sentencing policy, a report that

1 remains the seminal report on this issue.

2 I also want to mention the thousands of  
3 assistant United States attorneys, assistant federal  
4 public defenders, probation officers, and judges who  
5 work every day in federal courts across the country,  
6 and who will be called upon to implement what the  
7 Commission has voted to do today.

8 All of these men and women take their  
9 responsibilities very seriously, and I know that they  
10 will faithfully execute the law and their duty to the  
11 best of their abilities.

12 In particular I do want to mention my  
13 colleagues in the U.S. attorneys' offices from coast  
14 to coast who go to work every day with two things  
15 front and center in their mind: to keep our  
16 communities safe and to do justice.

17 We owe great thanks to the entire federal  
18 court community, and we all have the great good  
19 fortune of working with remarkable professionals  
20 across the court family.

21 As many others have said already today,  
22 the Fair Sentencing Act is an historic piece of

1       legislation. It addressed what we think is the  
2       single most important issue affecting trust and  
3       confidence in the federal criminal justice system.  
4       It was passed on a bipartisan basis after many years  
5       of debate, and was very long overdue.

6                About one month ago, the Attorney General  
7       testified in person before this Commission in support  
8       of retroactive application of the guideline amendment  
9       implementing the Fair Sentencing Act. He spoke about  
10      his personal experience, about the importance of this  
11      issue to him and to the cause of justice – and I won't  
12      go over all the reasons why the department supports  
13      retroactive application of this amendment. We are  
14      grateful to the Commission for considering the views  
15      of the Department of Justice. And as the Attorney  
16      General stated a month ago, we think retroactivity is  
17      an important step forward for the cause of justice.

18               After today's vote will come many months  
19      of implementation, and we think it is very, very  
20      important – it is imperative – that the Commission help  
21      facilitate the implementation of retroactivity. And  
22      we appreciate the discussions that the Commission has

1 already had and the planning that the Commission and  
2 the staff have already done.

3 We pledge to you our support in seeing  
4 that retroactivity is done in an efficient way and  
5 that ensures that courts get the information they  
6 need to make informed decisions on the thousands of  
7 sentence modification requests that are certain to be  
8 filed.

9 We are committed to implementing this  
10 decision to achieve the twin goals of public safety  
11 and justice. In his testimony, the Attorney General  
12 indicated some of our public safety concerns around  
13 retroactivity, and we need to do all we can to ensure  
14 that the thousands of case-by-case retroactivity  
15 determinations are indeed robust, and that thoughtful  
16 decisions are made in every single case.

17 As we have noted often, violent crime  
18 rates across the country are at generational lows.  
19 Part of the reason for that is tough sentencing  
20 policy. We continue to believe in the necessity of  
21 strong sentencing policy, and we look forward to  
22 examining important systemic issues facing federal

1 sentencing and corrections policy with the Commission  
2 over the coming months. But tough sentencing policy  
3 can also be fair sentencing policy, and we think that  
4 the Fair Sentencing Act and the Commission's actions  
5 implementing the Act are consistent with both tough  
6 and fair sentencing.

7 Thank you again, Judge Saris, for  
8 considering our views and for your leadership.

9 CHAIR SARIS: Thank you, very much.

10 So it is with enormous pride that I  
11 preside today as chair at this historic moment. The  
12 United States Sentencing Commission, as you have  
13 heard, is a bipartisan body. We were nominated by  
14 the President and confirmed by the Senate, and we  
15 consist of judges, and former prosecutors, and former  
16 defense attorneys, and we have worked very hard over  
17 the last months to come to today's decision, and vote  
18 unanimously to make the amendment to the United  
19 States sentencing guidelines that reduced penalties  
20 for selling and possessing crack cocaine retroactive.

21 As you have heard, this amendment reduces  
22 the average sentence for crack distribution by about

1 37 months. The average sentence will drop from about  
2 164 to 127 months. The purpose of the amendment is  
3 to fix a fundamental unfairness in our criminal  
4 justice system.

5           It its report to Congress in 1997, as you  
6 have heard there were many reports, after extensive  
7 research, the Commission recognized that sentences  
8 for crack cocaine were unfairly high and unjust.  
9 Why? Because they reached below the level of mid-  
10 level and serious traffickers and instead they  
11 applied to low-level street dealers. An overwhelming  
12 majority of crack cocaine offenders are African  
13 American, and because of the unwarranted disparity in  
14 sentencing and because it has affected prisoners for  
15 over 14 years, we believe retroactivity is fair and  
16 consistent with the purpose of the Fair Sentencing  
17 Act of 2010.

18           As passed, this vote on retroactivity will  
19 permit an estimated 12,040 prisoners over more than a  
20 30-year period – not at once – over a 30-year period,  
21 to petition a court for early release.

22           As many as 2,000 prisoners might be

1 eligible to file a petition in court in the first  
2 year. Remember, though, before any prisoner is  
3 released, the court has an obligation to consider  
4 whether release will create a risk to public  
5 safety.

6 Certainly there were disagreements at our  
7 hearings and during testimony about the precise form  
8 that retroactivity should take. However,  
9 retroactivity in some form has been supported by, as  
10 you've just heard: the Attorney General of the United  
11 States; the Criminal Law Committee of the Judicial  
12 Conference, which represents the federal judges;  
13 Senators Leahy, Durbin, Franken, [and] Coons;  
14 Congressman Bobby Scott; many members of the  
15 Congressional Black Caucus; the American Bar  
16 Association; Families Against Mandatory Minimums,  
17 FAMM; and many, many other advocacy groups.

18 For over 15 years the Commission has  
19 advocated that Congress should reduce the crack  
20 penalties to rectify the fundamental unfairness of  
21 punishing crack cocaine 100 times more seriously than  
22 powder. A broad bipartisan coalition in Congress led

1 by Senator Dick Durbin of Illinois and Senator Jeff  
2 Sessions of Alabama worked to pass the new law in the  
3 Senate, and Representatives Scott and Conyers took  
4 the lead to get the new law passed under suspension  
5 of the rules in the House.

6 Of course not all prisoners will be  
7 entitled to this reduction. Why?

8 First, prisoners who at their initial  
9 sentencing received a departure or variance below the  
10 equivalent of the guideline range established by the  
11 statute will not be entitled to any further  
12 reductions unless they received departures for  
13 substantial assistance. Based on its data, the  
14 Commission estimates that over 750 prisoners already  
15 received reductions below the proposed new guideline  
16 range as a result of these departures and variances.

17 Second, career offenders – by which I mean  
18 people who already have a very serious criminal  
19 record – will not generally get the reduction.

20 Third, as earlier stated, many prisoners  
21 will be bound by statutory minimums set under the  
22 previous statute.

1           At the hearing, the proposed retroactive  
2 application of the amendment reducing crack penalties  
3 did prompt some criticism. It prompted  
4 understandable criticism by, I think they described  
5 themselves as, the boots-on-the ground law  
6 enforcement community, and by some caring Members of  
7 Congress like Congressman Lamar Smith and Senators  
8 Grassley and Sessions.

9           Their concern is that the early release of  
10 crack offenders will create a threat to public  
11 safety. The Commission has weighed these thoughtful  
12 criticisms with care, but we ultimately decided that  
13 these policy concerns did not prevail based upon the  
14 data and our own past experience. And let me  
15 explain.

16           In 2007 the Commission reduced the  
17 guideline penalties for crack cocaine offenses by two  
18 levels, under Chairman Hinojosa, to signal the  
19 Commission's concern that crack penalties were too  
20 high. It voted to give retroactivity to that  
21 amendment beginning March 3rd, 2008. And during that  
22 process involving a much larger number of petitioners

1 than today – 25,000 back then – judges rejected as many  
2 as 604 petitions from those prisoners who had those  
3 high public safety risks. They were rejected.

4           Indeed, half of the denials were in the  
5 highest criminal history category. So judges were  
6 careful. A three-year study of the recidivism rates  
7 demonstrates that the rates of prisoners released  
8 early were indeed a little lower than those released  
9 under their initially imposed sentence.

10           And of course while any recidivism is  
11 unacceptable, the risk is mitigated because judges  
12 have the right to reject any prisoners who pose too  
13 high a public safety risk. For example, those  
14 prisoners who have disciplinary problems in prison.

15           The Commission does recognize the need for  
16 finality and certainty in punishment, and those are  
17 important goals. And we know that retroactivity  
18 should be rare. We heard concerns from the United  
19 States attorneys' offices, deep-felt concerns, and  
20 from some senators and congressmen about the  
21 resources needed to implement retroactivity.

22           We appreciate and acknowledge those

1 concerns raised about the use of resources,  
2 particularly in this tough economy. However, the  
3 Commission heard testimony that retroactive  
4 application of the 2007 amendment which involved, as  
5 I just mentioned, a much larger pool of potentially  
6 eligible offenders, did not overly burden or tax the  
7 criminal justice resources. In fact, I was the head  
8 of my liaison team in Boston and I can say that from  
9 personal experience.

10 The testimony received by the Commission  
11 and my own experience suggests that the process went  
12 extremely smoothly, partly because of the  
13 dedicated – or largely because of the dedicated work  
14 of the assistant U.S. attorneys and assistant public  
15 defenders and panel attorneys, and the Commission, as  
16 well as the hard work of the judges and probation  
17 officers, and the Commission is confident that  
18 retroactivity of the Fair Sentencing Act amendment  
19 will proceed similarly.

20 We believe that the clarity of our policy  
21 statement, the Commission training, and our past  
22 experience will ensure minimal disruption this time,

1 as well. We have received the commitment from all  
2 the actors in the criminal justice system to work  
3 collaboratively on making sure that the amendment  
4 applies to only the appropriate prisoners.

5 Finally, at the hearings on [the proposed  
6 amendment and] retroactivity, the Bureau of Prisons  
7 reported that a year of incarceration costs about  
8 \$27,000 per prisoner, and that the prisons are  
9 over-crowded, as Commissioner Carr said, by about 37  
10 percent.

11 Over five years the BOP estimates that it  
12 will save \$240 million. While cost savings alone  
13 should not be the reason for retroactivity, they  
14 should be taken into account in the decision.

15 This was a difficult decision, but we on  
16 the Commission have been in the forefront of this  
17 effort to address the fundamental unfairness in  
18 society created by the crack/powder disparity.

19 As Chair Wilkins – former Chair Wilkins  
20 said, he sent us a letter – he was the first chair of  
21 the United States Sentencing Commission – I think I  
22 looked upstairs under his picture 18 – 1985 –

23 (Laughter.)

1           CHAIR SARIS:    - not that long ago - to 1994  
2   he said:  "If the law was unfair going forward, it was  
3   unfair for those already sentenced under it."

4           Today's vote ensures that the purpose of  
5   the Fair Sentencing Act is met, justice is served,  
6   and the goals of sentencing furthered.  I look  
7   forward now to working with everyone, with the  
8   criminal justice community - and you all represent all  
9   corners of that - to address other critical sentencing  
10  issues facing the nation.

11           Thank you.

12           COMMISSIONER HINOJOSA:  On behalf of all of  
13  us, I think it is appropriate for us to thank you, Chair  
14  Saris, for the work that you have done with regards  
15  to getting us prepared to take this vote, as well as  
16  working with our staff director, Judy Sheon, and  
17  everybody on the staff to make sure that we had all  
18  the information that we needed to make this decision.  
19  And we very much appreciate your leadership with  
20  regards to this whole process.

21           CHAIR SARIS:  Thank you, very much.  So  
22  thank you to everyone.  Are there any other comments?

1 (No response.)

2 CHAIR SARIS: And with that, is there a  
3 motion to adjourn?

4 COMMISSIONER HINOJOSA: I move that we  
5 adjourn.

6 VICE CHAIR CARR: I second.

7 CHAIR SARIS: All right, all in favor?

8 (Chorus of ayes.)

9 CHAIR SARIS: Opposed?

10 (No response.)

11 CHAIR SARIS: Thank you.

12 (Applause.)

13 (Whereupon, at 2:06 p.m., Thursday, June  
14 30, 2011, the meeting was adjourned.)

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