

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

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.)

15

16

17

18

19

20

21

22