

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON RETROACTIVITY

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WEDNESDAY
JULY 16, 2025

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The Commission met in the Commissioners' Conference Room of the Thurgood Marshall Federal Judiciary Building at 9:30 a.m. EDT, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT

CARLTON W. REEVES, Chair

LAURA E. MATE, Vice Chair

SCOTT A.C. MEISLER, Ex Officio, U.S. Office of
the Attorney General

CLAIRE MURRAY, Vice Chair

LUIS FELIPE RESTREPO, Vice Chair, United States
Court of Appeals Judge, Third Circuit

CANDICE WONG, Commissioner

1 ALSO PRESENT

2 ELIZABETH BLACKWOOD, National Sentencing
3 Resource Counsel, Federal Public and
4 Community Defenders

5 EDMOND E-MIN CHANG, U.S. District Judge,
6 Northern District of Illinois, Chair,
7 Criminal Law Committee

8 MEGAN A. HEALY, Appellate Chief, U.S. Attorney
9 for the District of North Dakota

10 JAMI JOHNSON, Member, Tribal Issues Advisory
11 Group

12 CHRISTOPHER QUASEBARTH, Chair, Victims Advisory
13 Group

14 LAURA ROFFO, First Circuit Representative,
15 Probation Officers Advisory Group

16 SUSAN WALSH, Second Circuit Representative,
17 Practitioners Advisory Group

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:37 a.m.)

3 CHAIRMAN REEVES: Good morning. I am the
4 chair of the United States Sentencing Commission,
5 Carlton W. Reeves, and I welcome you all to this
6 hearing.

7 I thank each of you for joining us, whether
8 you're in this room with us or attending by live
9 stream.

10 I have the honor of opening this hearing
11 with my fellow commissioners. To my left, we have
12 Vice Chair Claire Murray.

13 To her left, we have Vice Chair Laura Mate.

14 And we have, whoa, and we have Scott Meisler, the
15 Ex Officio from the Department of Justice.

16 To my right is Vice Chair Luis Felipe
17 Restrepo and Commissioner Candace Wong. We're also
18 joined by commission employees, of course, some of
19 whom are in this room but many of whom are not.

20 They've done the research. They've
21 drafted the policies. They have prepared us. They
22 have set up this room.

1 And they have done so much else. And they
2 do so much else all the time. So on behalf of the
3 commissioners, ladies and gentlemen, and the
4 public, I want to thank each of our agencies, staff,
5 and employees for the amazing work that you do every
6 single day.

7 We are here today, ladies and gentlemen,
8 because in April, the Commission adopted a series
9 of amendments to the sentencing guidelines that will
10 change how sentences are applied in the future.

11 Now, the Commission is considering whether
12 people sentenced in the past should benefit from
13 some of the rules that will apply in the future.

14 To help us make that decision about that
15 choice, what we call retroactivity, we will be
16 hearing today from panels that will provide will
17 us with a wide diversity perspective.

18 Panelists, thank you all for being here.

19 We've read your written submissions, and we
20 appreciate those.

21 Your time will begin when this light turns
22 green. Some light around there will turn green.

1 You'll have one minute when the light turns
2 yellow and no time, ladies and gentlemen, when it
3 turns red.

4 If I cut you off, please understand that
5 I am not being rude. That's the last thing I ever
6 want to be called, as we have so much to cover today.

7 And our work will continue tomorrow and
8 Friday. And so we have a limited time to hear from
9 everyone.

10 So for our audio system to work well, you
11 will need to speak closely into the microphones.

12 Lean in.

13 When all panelists have finished speaking,
14 the commissioners may ask you questions. I am
15 certain they will do so.

16 Thank you for joining us. I look forward
17 to a very productive hearing.

18 Our first panel will consist of Ms. Megan
19 A. Healy. She is representing the Executive
20 Branch's perspective on retroactivity.

21 For that perspective, we will have Ms.
22 Healy who is the Appellate Chief of the United States

1 District Attorneys -- U.S. Attorneys Office for the
2 District of North Dakota.

3 Ms. Healy, I'm sorry for botching up some
4 of those things. But we are ready when you are,
5 ma'am. Thank you.

6 MS. HEALY: Good morning and thank you,
7 Chair Reeves, and Commissioners for having me here
8 today to discuss the Department of Justice's
9 perspective on the retroactive application of the
10 physically restrained, intervening arrest,
11 mitigating role cap, and special instruction
12 amendments.

13 The Commission has long recognized a
14 presumption against retroactivity, and none of
15 these amendments overcome that presumption.

16 The Department appreciates the
17 considerations that motivated these amendments, but
18 as many commenters observed, these amendments do
19 not reflect a fundamental revision of the guidelines
20 or a significant reassessment of the find or
21 culpability.

22 In our written comments, the Department

1 explained why public safety, finality of sentences,
2 and the burden on courts and litigants, counsels
3 against retroactivity here.

4 A focus primarily on that last concern,
5 the burden. The capacity of courts, probation
6 officers, and litigants is not unlimited.

7 And retroactivity decisions are not
8 automatic. They require significant work by all
9 parties.

10 And experience has shown that applications
11 are not limited only to eligible offenders.

12 I personally have handled every
13 retroactivity motion for Amendment 821 for my
14 district.

15 It has taken a significant amount of my
16 time, particularly during the first half of 2024,
17 and I am still responding to Amendment 821 motions.

18 The burdens on the criminal justice system
19 are particularly compelling here, where the
20 practical challenges of assessing eligibility for
21 a reduction under these amendments would involve
22 complex eligibility determinations and may require

1 new fact finding.

2 They would divert significant resources
3 from pending cases and undermine the predictability
4 of sentences.

5 Turning to the physical restrained and the
6 intervening arrest amendments, first, these
7 amendments resolve circuit splits and reflect the
8 commission's continual fine-tuning of the
9 guidelines.

10 As the CLC also recognized, the physically
11 restrained amendment combined with the
12 corresponding changes to the otherwise used
13 enhancements does not cast out on whether using a
14 firearm to convey a specific threat or to make
15 physical contact with the victim merits enhanced
16 punishment but rather redistributes how the
17 guidelines account for that use.

18 Second, neither amendment would likely
19 result in significantly reduced sentences for
20 offenders.

21 The physically restrained amendment may
22 result in a two-level reduction for offenders in

1 certain circuits, but the courts may well exercise
2 their discretion not to reduce the sentences of
3 eligible offenders, as all of those crimes involve
4 victims held at gunpoint.

5 Third, these amendments turn on facts of
6 specific scenarios and retroactivity may require
7 new fact finding and impose significant burdens for
8 what would ultimately be minor adjustments.

9 Turning next to the mitigating role cap
10 and the special instruction. First, these
11 amendments are, in the commission's own words,
12 intended to address inconsistent application and
13 to encourage broader use of the mitigating role
14 adjustment in drug cases.

15 As the CLC noted, these amendments are
16 fine-tuning, not fundamental reformulations of the
17 guidelines.

18 Second, the commission's data indicates
19 that there is no way to estimate how many or by how
20 much sentences could be reduced.

21 The Commission promulgated both
22 amendments partly in response to data showing that

1 judges were already imposing below guideline
2 sentences in drug cases.

3 Those same lower culpability factors
4 giving rise to the amendment are already accounted
5 for in those cases, and those below guideline
6 sentences may preclude eligibility from any
7 offenders even if the amendments were made
8 retroactive.

9 Third, the burden of retroactively
10 applying the special instruction and the resulting
11 burden on the courts weigh against retroactivity.

12 The new special instruction introduces
13 novel, untested criteria that will be challenging
14 to apply on a forward looking basis.

15 For example, the balance of primary
16 function will emerge from litigation, as will
17 determining whether an offender's conduct fell
18 plainly among the lowest level of drug trafficking
19 functions.

20 That analysis becomes markedly more
21 complex on a retroactive basis where the special
22 instruction contemplates reliance on factors that

1 may well not be captured in the existing record.

2 The near unanimity among stakeholders
3 advising against retroactivity of the special
4 instruction underscores how difficult retroactive
5 application could be.

6 For these reasons, the Department
7 respectfully opposes the retroactive application
8 of each amendment.

9 As always, the Department appreciates the
10 opportunity to provide our view, and I look forward
11 to your questions.

12 VICE CHAIR RESTREPO: Thanks for being
13 here. So I'm curious as to the Department's
14 perspective of the burden issues with the mitigated
15 cap, which would impact maybe 650 people.

16 Now, granted, others would file motions.

17 But maybe 650 people would be eligible for a
18 reduction. Is that an undue burden?

19 MS. HEALY: First of all, with respect to
20 the mitigating role cap, I have two responses to
21 your question.

22 When we're applying retroactively even

1 seemingly mechanistic guidelines such as the
2 mitigating role cap, unexpected legal twists arise,
3 and it requires litigation to resolve them.

4 And that increases the burden on the court
5 because it's unanticipated at this point. For
6 example, when Amendment 782 is applied
7 retroactively, a litigation emerged to resolve the
8 intersection of that amendment and the career
9 offender and mandatory minimum guidelines.

10 But second, even when eligibility is
11 readily discernible, retroactive motions take time.

12 And the diversion of resources from
13 focusing on public safety concerns of today to
14 relitigating old cases has a real world effect on
15 the administration of justice.

16 I think the commission's data has shown
17 that even if one thinks that perhaps 650 are eligible
18 under the commission's analysis, it's likely that
19 far more than that who may be ineligible will file
20 motions based on what we've seen for the retroactive
21 application of past amendments.

22 VICE CHAIR RESTREPO: Understood, but

1 again, just focused on the mitigating role cap, the
2 analysis as to whether or not somebody is eligible
3 is fairly straightforward.

4 And has the department considered the
5 impact on BOP in terms of relieving some of the
6 pressure on BOP that's at overcapacity and
7 understaffed and underfunded?

8 And this would afford BOP an opportunity
9 to send some folks home that are considered lower
10 level offenders. Does that factor into your
11 analysis?

12 MS. HEALY: Concerns related to BOP were
13 not a listed reason for mitigating role cap
14 amendment by the Commission or to any of these
15 amendments, and --

16 VICE CHAIR RESTREPO: I understand, but
17 is that something that the department has
18 considered?

19 MS. HEALY: The department has weighed the
20 views of all the stakeholders within the department
21 when reaching our decision to oppose retroactivity
22 of all of these amendments.

1 CHAIRMAN REEVES: V.C. Mate?

2 VICE CHAIR MATE: Thank you. Thanks for
3 coming today and traveling during the summer. We
4 really appreciate the extra effort.

5 I wanted to -- you didn't mention this
6 today in your remarks, but it was in the department's
7 written comment.

8 The written comment points out that of the
9 commission's more than 800 amendments to the
10 guidelines, only approximately 30 have been made
11 retroactive.

12 And I guess my question about this is when
13 I'm looking and thinking about the commission's past
14 practice on retroactivity, it seems to me we should
15 be looking at the past ameliorative amendments, not
16 all of the amendments, but of the ameliorative ones
17 which are eligible for consideration on
18 retroactivity.

19 What has the Commission done in that
20 context? Are you aware of how many ameliorative
21 amendments have been considered for retroactivity?

22 You mentioned 30 were made retroactive. But

1 what's the denominator there?

2 MS. HEALY: I have not gone through to
3 count and divide how many are, as you say,
4 ameliorative or not.

5 But if we look at the past dozen years or
6 so, there have been just a few that the Commission
7 has identified as overcoming the presumption and
8 reflecting a fundamental reformulation of the
9 guidelines to be made retroactive.

10 And by comparison, the amendments here
11 that reflect fine-tuning, that reflect refinement
12 of the guidelines, the mitigating role cap in the
13 commission's words was intended to refine the drug
14 trafficking guideline.

15 These amendments are different in kind
16 from those that have been made retroactive in the
17 past, such as the drug minus two or the crack cocaine
18 amendments or even status points amendments from
19 a couple years ago.

20 VICE CHAIR MATE: I did like a little back
21 of the envelope, and I'm curious as to whether
22 someone has a definitive number on that, but

1 approximately 120.

2 So we're talking 30 out of roughly 120
3 ameliorative, so about 1 in 4, which clearly goes
4 beyond some of these.

5 There are certainly some that are these
6 big fundamental, but there's a range of other things
7 that have been made retroactive. So 1 in 4, would
8 that sound about right to you?

9 MS. HEALY: It may. But I wouldn't
10 necessarily -- we wouldn't qualify all of these
11 amendments as falling under that cap.

12 Some of them are, as I said, tweaking the
13 guidelines based on what the Commission has seen
14 through its research and refining the guidelines,
15 not making a fundamental reformulation of how the
16 guidelines operate or fundamental rethinking of how
17 we all looked at the guidelines.

18 VICE CHAIR MATE: Thank you.

19 CHAIRMAN REEVES: Anyone else have any
20 questions? V.C. Murray?

21 VICE CHAIR MURRAY: Thanks so much for
22 being here with us. The defender's statement,

1 which was -- it says on page six, there's a kind
2 of history of the Commission making retroactive
3 amendments and -- method of calculating basic --
4 levels. I don't know if you had a chance to look
5 at that.

6 Did the department agree with that
7 characterization? Do you guys have another view on
8 that history?

9 MS. HEALY: We do have a different view.
10 We view the mitigating role cap and the special
11 instruction amendments as about expanding the
12 mitigating role adjustments in 3(b)1.2 to how it's
13 employed in drug cases, not as a rethinking of how
14 one calculates the base offense level under 2(d)1.1.

15 For example, this is similar to the
16 commission's past amendments in which the
17 Commission expanded access to safety valve.

18 And obviously, that had an effect on the
19 offense levels calculated under 2(d)1.1, but the
20 Commission did not make those amendments
21 retroactive in referring to amendments 624 and 515.

22 And second, even amendments that

1 implemented the Fair Sentencing Act, the Commission
2 declined to make retroactive an additional
3 reduction for minimal participants with certain
4 additional criteria.

5 So there was precedent for not making the
6 mitigating role adjustment retroactive, even when
7 it affects the calculation of the offense levels
8 under 2(d)1.1.

9 COMMISSIONER WONG: Ms. Healy, you
10 mentioned the safety valve amendments just now as
11 in a similar vein, the department views them in a
12 similar vein.

13 What are some other amendments that were
14 not made retroactive that you might consider very
15 similar or analogous? What's kind of a good
16 reference point?

17 MS. HEALY: It's a bit difficult to answer
18 because so many of them are similar. I would guess
19 I would look to the commission's amendment last
20 year, putting in a place a stipulation for how
21 parties could stipulate to offense levels, which
22 would relieve in theory defendants from minimum

1 mandatories.

2 And that wasn't something that the
3 Commission decided to make retroactive. So that's
4 one that comes to mind, and that was more of the
5 rethinking of how to reach a base offense level than
6 these amendments are.

7 COMMISSIONER WONG: Thank you.

8 CHAIRMAN REEVES: One of the commenters,
9 I think it was PAG that mentioned about the
10 fundamental nature of the Commission having found
11 that there might be a need to do a mitigating role
12 cap, I think it was PAG who says past practices or
13 past findings that are no longer useful, those
14 persons who are serving sentences under that are
15 serving sentences that we now believe might not be
16 appropriate.

17 And I guess, what might be the Department's
18 response to that? And then I'll have a follow up
19 question.

20 MS. HEALY: Just to clarify, Chair Reeves,
21 are you thinking particularly of the special
22 instruction or only the mitigating role cap or the

1 combination of the two?

2 CHAIRMAN REEVES: Combination, and the
3 mitigating role cap.

4 MS. HEALY: Okay. With respect to the
5 special instruction, and the ongoing forward basis,
6 the special instruction and the mitigating role cap
7 are linked together.

8 The special instruction, the purpose of
9 it is to provide a clear definition of minor
10 participant or minimal participant in the context
11 specifically of drug cases.

12 The Commission is telling courts this is
13 how we view this adjustment in drug cases. And the
14 Commission told us that the purpose of that
15 amendment was to address inconsistent application
16 and to encourage broader use of it on a going forward
17 basis.

18 That's not a fundamental rethinking of
19 that someone with a mitigating role should receive
20 a reduction, but more rethinking how we assess that
21 reduction.

22 Data does suggest that defendants in past

1 cases have already received below guideline
2 sentences based on their role in the offense.

3 Judges have been well able to individually
4 analyze each case and provide reductions for those
5 who have a lower role in the offense, a mitigating
6 role in the offense.

7 And that is one thing that is already
8 accounted for in those sentences. The special
9 instruction, as I noted in my opening statements,
10 is also challenging to apply on a going forward
11 basis.

12 And it is heavily -- and the amendment
13 says, it is heavily dependent on the facts of the
14 case.

15 This is different than past retroactivity
16 amendments such as status points or drug minus two
17 where you can look at the PSR and make the change.

18 And complications may arrive but for most
19 cases, you'll be able to figure it out pretty
20 quickly. That's not this case.

21 Here, we'll have to reassess an offender's
22 function in the offense under new criteria.

1 And third, the fact that the Commission
2 hasn't been able to estimate the impact on offenders
3 or on the burdens to the court's system counsels
4 against retroactivity of these amendments here.

5 There's a lot of unknowns attendant with
6 these amendments. And that's why the Commission
7 should caution against and decide against
8 retroactivity without knowing how many offenders
9 could benefit from this and by how much.

10 I think the CLC noted that the pool of
11 individuals who may seek relief is very large. And
12 it would take the court's system a lot of time to
13 figure out who is eligible, who is not, given the
14 uncertainty around how these amendments will apply
15 even on a going forward basis.

16 CHAIRMAN REEVES: And part of the numbers,
17 to follow up with Judge Restrepo, indicated it was
18 about the universe of cases is either between 650
19 and 1,000 or something, we believe, not to mention
20 anyone has a right to petition the court for relief.

21 So we all get those cases all the time.

22 But if it's 650 cases, if that is the universe of

1 cases, it's 94 districts, so that would be less than
2 seven cases per district.

3 And obviously, many districts probably
4 won't even have any cases. Is that a fair
5 statement?

6 MS. HEALY: I think the Commission has
7 narrowed it down to 650, but I think it's realistic
8 that anyone of the 3,600-3,700 offenders who
9 received a mitigating role adjustment would come
10 back in to try to seek relief.

11 And so I think it's broader than -- I think
12 a realistic number is broader than 650 that the
13 Commission has found might be eligible.

14 But going back to why the Commission should
15 not make the mitigating role cap retroactive, for
16 the reasons I stated in response to Judge Restrepo's
17 comment, but also, the Commission has recognized
18 for a long time a presumption against retroactivity.

19 The purpose of this amendment is to refine
20 the drug trafficking guideline. This isn't the
21 same in kind as amendments the Commission has made
22 retroactive, such as the drugs minus two, which

1 reflected a rethinking of how to calculate based
2 off of levels across the board.

3 CHAIRMAN REEVES: And with respect to
4 retroactivity, if we were to vote to do it, would
5 a reasonable delay of making it applicable, would
6 that help BOP or the probation office or whomever
7 it is that might need the space to implement it?

8 MS. HEALY: Yes. The Department did ask
9 that the Commission provide a reasonable delay for
10 the effectiveness of any retroactive guidelines.

11 So, yes, we would ask for a reasonable
12 delay to afford time for us to put processes in
13 place.

14 CHAIRMAN REEVES: And finally, I realize
15 that you mentioned the 821 cases that you're solely
16 responsible for handling in your district.

17 That's a matter of choosing how to allocate
18 resources in the office. And I'll just say, one
19 of the things that we are seeing as district judges
20 all over the country is every 922 case, every 922G,
21 A through whatever it is, or 1-82 or whatever it
22 is, we are now getting motions to dismiss

1 indictments for all levels of persons who have
2 felons in possessions or persons who are not
3 otherwise eligible to maintain firearms.

4 And it was an open and shut case for us
5 for years. But now, we're being inundated with all
6 these motions.

7 And the court has to respond. So do AUSAs
8 have to respond. So it's just a matter of
9 allocating resources in many districts, right?

10 MS. HEALY: It is. I think this is a
11 little different in that the challenges that you're
12 speaking of, Chair Reeves, have emerged around the
13 country as defendants challenging on the front end
14 their charges.

15 And that's something that's going to
16 happen in the nature of criminal litigation. This
17 is different.

18 And when we're looking at applying
19 retroactively a change that we know is coming. So
20 I think it's a little bit different in kind.

21 But you're correct. Your premise is that
22 we've all had to allocate resources, and this is

1 having me do all of them is how my office chose to
2 allocate our resources for efficiency's sake.

3 But me taking all of them does have a
4 real-world effect on my colleagues in that I would
5 otherwise have used some of that time to take appeals
6 from them to lesser their load so they could focus
7 on their district court cases.

8 So it is, correct, it is an allocation of
9 resources, but it does have a broader effect.

10 CHAIRMAN REEVES: Thank you so much.
11 Please, anyone else have any questions? Thank you
12 so much. I hope it's cooler in North Dakota than
13 it is here.

14 Okay. But thank you so much for coming.
15 We appreciate you.

16 COMMISSIONER WONG: Thank you so much.
17 I appreciate it.

18 CHAIRMAN REEVES: The panel will provide
19 us the perspectives from the Federal Public
20 Defender. To provide that perspective, we have
21 Elizabeth Blackwood who serves as National
22 Sentencing Resource Counsel for the Federal Public

1 and Community Defenders.

2 Ms. Blackwood, we are ready when you are.

3 MS. BLACKWOOD: Thank you for the
4 opportunity to speak today about retroactivity.
5 Defenders support retroactivity for all four
6 amendments.

7 For 12 years, I worked as an Assistant
8 Federal Public Defender in the Western District of
9 North Carolina primarily in our trial unit.

10 During that time, the trial commission
11 made two monumental amendments retroactive,
12 Amendment 750 regarding the 101 crack powder
13 disparity, and Amendment 782, Drugs Minus Two.

14 For each of those amendments, I reviewed
15 cases and filed motions with the court. I welcomed
16 the manageable but additional work, since it
17 provided much needed hope and optimism for our
18 clients who are languishing in prison serving
19 sentences we all knew were too long.

20 I also worked for four years at the
21 National Association for Criminal Defense Lawyers
22 as Director of the First Step Act Resource Center

1 where, among other responsibilities, I worked in
2 tandem with the defenders to recruit and train pro
3 bono attorneys to handle First Step Act Crack
4 retroactivity cases in the two districts at a
5 federal defender office and reduction in sentence
6 cases nationally.

7 With the present amendments, defenders
8 support retroactivity for all four, but I will focus
9 my opening remarks on the two drug amendments, the
10 mitigating role cap amendment and the 3(b)1.2
11 expansion.

12 The principles underlying these changes
13 represent the culmination of the commission's
14 extensive research and outreach and data collection
15 around 2(d)1.1.

16 After this extensive work, the Commission
17 ultimately promulgated two role related drug
18 amendments.

19 In enacting these amendments, the
20 Commission said explicitly that 2(d)1.1 and 3(b)1.2
21 do not adequately account for the lower culpability
22 of individuals performing low level functions in

1 drug trafficking offenses.

2 These reasons are striking because by its
3 action, the Commission is attempting to right two
4 long standing fundamental wrongs at once.

5 The first wrong is that 2(d)1.1 elevates
6 drug type and quantity above actual culpability and
7 role, resulting in sentences greater than necessary
8 to accomplish purposes of sentencing.

9 For decades, commentators across the
10 political spectrum have rightly criticized how 2(d)
11 1.1's focus on drug weight and quantity has led to
12 individuals involved in low-level trafficking being
13 punished as if they work in the pens.

14 And not only are they punished more
15 harshly, but because their low level positions make
16 them easy to find and prosecute, they are the people
17 most likely to be sentenced.

18 The high number of these overly long drug
19 sentences contributed to the explosion in the number
20 of people incarcerated in federal prisons while that
21 same prison system continues to be in crisis.

22 Retroactivity would take a significant

1 step towards alleviating damage caused by this
2 unfair system by lowering overly punitive sentences
3 and low level drug cases by reducing the prison
4 population which promotes the commission's
5 objective 28 USC 994(g) to minimize the likelihood
6 that the federal prison population will exceed the
7 capacity of federal prisons.

8 The second wrong that these amendments
9 help ameliorate is the long standing failure of
10 courts to appropriately apply the mitigating role
11 reduction under 3(b)1.2 for individuals convicted
12 of low level drug trafficking.

13 Despite the commission's explicit past
14 efforts to encourage courts to apply this role
15 reduction more robustly, data shows the courts have
16 not done so.

17 Retroactivity is a step towards rectifying
18 the failure of sentencing courts to correctly
19 interpret and apply the mitigating role reduction
20 as the Commission intended.

21 While certain stakeholders have argued
22 that the purpose of these amendments is not

1 significant, we strongly disagree.

2 These amendments represent a paradigm
3 shift in federal drug sentencing, requiring courts,
4 some for the first time, to contend with an
5 individual's actual role in the drug offense rather
6 than relying on drug type and quantity as proxies
7 for culpability.

8 This is a targeted and profound structural
9 change to how many court sentence low level
10 functionaries can stand to substantially reduce
11 sentences for those individuals in drug cases.

12 Given the significant purposes of these
13 amendments, as well as the commission's past efforts
14 to ameliorate the influence of larger drug
15 quantities on sentences for the least culpable
16 individuals in drug cases, efforts that courts have
17 failed to implement as the Commission intended, it
18 makes sense for the Commission to vote for
19 retroactivity for these drug amendments today.

20 To briefly touch on the commission's other
21 criteria, the impact of those drug amendments also
22 supports retroactivity.

1 The mitigating role cap amendment impacts
2 650 individuals and the amendment expanding 3(b)1.2
3 impacts thousands.

4 The straightforward operation of applying
5 the reduction and mitigating role cap amendment
6 weighs heavily in supporting retroactivity.

7 It would require no fact finding and make
8 it very easy to administer.

9 The amendment expanding 3(b)1.2 is
10 different, and we acknowledge that it would be more
11 difficult.

12 But it is entirely manageable given the
13 institutional knowledge and retroactivity systems
14 developed over the years.

15 The purpose of the ameliorative drug
16 amendments far outweighs the workload. And above
17 all else, it is important to remember that the most
18 significant reason to make these amendments
19 retroactive is that they affect the lives of real
20 people, our clients and their families and their
21 communities.

22 I'm grateful for the opportunity to share

1 the defenders' views with the commission, and I
2 welcome any questions.

3 CHAIRMAN REEVES: Thank you, Ms.
4 Blackwood. I'll turn to my colleagues.

5 VICE CHAIR RESTREPO: Thanks for being
6 here.

7 MS. BLACKWOOD: Thank you.

8 VICE CHAIR RESTREPO: You mentioned that
9 the mitigating role cap would require minimal if
10 any fact finding. Can you just walk me through that
11 process? And can it be done on the papers without
12 an evidentiary hearing?

13 MS. BLACKWOOD: Yes. The mitigating role
14 cap amendment is going to be very easy to implement.
15 It would really require two questions.

16 We have to -- we'll be getting the list
17 of eligible people from the commission, look through
18 our own lists, some people may call.

19 But all we have to do is look and see, did
20 this person get a mitigating role cap reduction
21 under 2(d)1.185 at their initial sentencing? And
22 does the new amendment apply?

1 So that's usually someone who is a basic
2 level 30 or 32. And that's it. It's really going
3 to be one of the I think simpler amendments that
4 the Commission has had, that's really akin to Drugs
5 Minus Two. So I think --

6 VICE CHAIR RESTREPO: All that
7 information is contained in pre-sentence report?

8 MS. BLACKWOOD: Yes. If there is a
9 reduction under 2(d)1.185, it will be in the
10 pre-sentence report. I haven't had many chances
11 to have that reduction in the cases, and I've handled
12 a lot of drug cases because I'm unfortunately in
13 one of the districts where they didn't apply the
14 role reduction.

15 But when I did get it, we'd always be
16 directly in the calculation for the guidelines.
17 So we would see it.

18 It's very easy to find apparent. It would
19 be in every single case. The purpose of the
20 mitigating role cap amendment, the impact and the
21 administrability are -- they're very -- they check
22 all the boxes.

1 I mean, it's really -- the purpose is very
2 significant. It's dealing with the unfairness of
3 2(d)1.1.

4 The impact is meaningful but manageable.
5 And it will be extremely easy to implement. And
6 as I think you all touched on earlier, the maximum
7 number of cases a district would have would be around
8 74, but most of them are going to have one or maybe
9 no cases.

10 So it's going to be, I mean, compared to
11 what we have dealt with such greater amendments,
12 drugs minus two and the crack motions for 750, so
13 this will be much more easy to implement.

14 If a judge, after he or she reviews this
15 motion, determines that I already baked this into
16 the equation in the original sentencing, the judge
17 is under no obligation to grant any relief, is that
18 correct?

19 MS. BLACKWOOD: That's correct. If the
20 judge felt that their original sentence that he or
21 she gave was the appropriate one, it is under no
22 obligation.

1 I will note that there was also
2 post-sentencing conduct that the courts can take
3 a look at.

4 So there might be other factors of the
5 court that we consider that might cause it to give
6 a -- make it weigh more heavily in favor of a
7 reduction even if it did feel that the role of
8 reduction was appropriate initially.

9 But, yes, it's up to the court to determine
10 whether and by how much under 3582(c)2 to actually
11 make the role reduction, and that's the second part
12 of this process.

13 CHAIRMAN REEVES: V.C. Mate?

14 VICE CHAIR MATE: Thank you. Thank you
15 for joining us today. We appreciate your
16 testimony.

17 I'm going to switch gears a little bit.

18 Physical restraint provision. And some
19 commenters have raised concerns about additional
20 fact finding being necessary to the context of those
21 reference motions.

22 But you, the defenders, didn't seem as

1 concerned about that. And I was curious as to why
2 that you're not concerned about any additional fact
3 finding there.

4 MS. BLACKWOOD: For the physical
5 restraint reduction, we think that the factors that
6 would be the courts would need to look at for this
7 reduction are going to be in if not the pre-sentence
8 report then would be discussed at sentencing
9 hearings.

10 And it will be in the record. We don't
11 think it will be -- I think it would be an aberration
12 that this information would not be in there.

13 And that is because I've handled quite a
14 few 2(b)3.1 cases which we've talked to a number
15 of defenders in other offices, and these are the
16 factors that are always focused on heavily, whether
17 or not there was a weapon, what happened with the
18 victims in the case.

19 It is probation. We'll always put it in
20 the pre-sentence report. It will be in the factual
21 basis. It will be in the statement of relevant
22 conduct.

1 And then it's usually argued at great
2 length at sentencing hearings as well. I mean, it's
3 something the government would argue extensively,
4 and if we felt the facts were mitigating, we would
5 certainly be arguing that as well in the sentencing
6 hearing.

7 So this is a situation where I just -- it
8 seems extraordinarily unlikely that this
9 information would not be on the papers in the record
10 from the original sentencing hearing, because it
11 just goes directly to the nature of the offense.

12 So it's quintessential 3553(a) argument.

13 CHAIRMAN REEVES: Yes, Commissioner
14 Meisner?

15 MR. MEISLER: All right. Thanks for
16 being here. Just a follow up on that, on physical
17 restraint. I wanted to ask you about what I think
18 is footnote 71 of your submission, then.

19 So physical restraint, the interesting
20 part about that, I think, is that we have potentially
21 a minus two, but in some circuits, at least, some
22 of the same conduct may have gotten a plus five as

1 brandishing, and now I think going forward under
2 the guidelines, we get a plus six as otherwise used.

3 As I read your submission, you cast doubt
4 on the notion that a court adjudicating at 3532(c)
5 motion could consider the extra bump.

6 But I wanted to just kind of flesh out with
7 you, is that at the eligibility stage? And I guess
8 would you acknowledge that a court could consider
9 that interplay if it found eligibility but then was
10 trying to figure out the second stage, whether to
11 exercise its discretion?

12 MS. BLACKWOOD: We think at the
13 eligibility stage, they're ex post-facto issues
14 with considering the higher, the six level increase,
15 but certainly something the courts can consider
16 under the 3553(a) analysis.

17 I mean, we know under conceptional, the
18 court can consider anything, and it certainly could
19 consider that.

20 So it could be a possibility that the court
21 in these rare cases or these small percentage of
22 these cases that the court would only agree that

1 a one level reduction is appropriate.

2 And two points or a couple points to that,
3 as I mentioned earlier, maybe the court only felt
4 one level is appropriate for that reduction and that
5 specific circumstance, but again, there's
6 post-sentencing conduct and other factors the court
7 may look at that may still cause it to get the full
8 reduction based on the 3553(a) analysis.

9 The second point is that a one level
10 reduction isn't -- we've had that before. We've
11 had that with the drug cases with 782 when the
12 operation of career offender would only allow our
13 clients to have one level reductions.

14 And those one level reductions are
15 significant, particularly under 2(b)3.1 which can
16 have such high offense levels with the application
17 of specific offense characteristics.

18 So a one level reduction can be a year or
19 two of someone's life. So in those rare cases, if
20 the court were only to give one level reduction,
21 we still think that would be significant and we don't
22 think that's a reason not to consider retroactivity.

1 Because the majority of people would
2 likely be eligible for the two point, to the two
3 level reductions, or at least a good percentage of
4 them would be.

5 And the court can always take into
6 consideration other factors as well. Thanks.

7 CHAIRMAN REEVES: V.C. Restrepo?

8 VICE CHAIR RESTREPO: You've referenced
9 BOP in your testimony, so is the impact a retroactive
10 amendment would have on the BOP something we can
11 or should consider?

12 And if we can and should consider it, what
13 authority do we have to do so?

14 MS. BLACKWOOD: So, absolutely, we think
15 under 994(g) this is one of the policy principles,
16 the mandates of Congress to the Sentencing
17 Commission to consider overcapacity in federal
18 prisons.

19 And there's been a tremendous amount of
20 reporting recently just about how dire the situation
21 is in federal prisons right now with understaffing,
22 individuals being placed in lockdowns for weeks at

1 a time because there's not enough staff to take care
2 of them.

3 So we've discussed this at length in our
4 comment, but it's a very difficult situation.

5 So the Commission has specific mandate
6 from Congress to consider these issues with Bureau
7 of Prisons when determining retroactivity, and
8 retroactivity is particularly appropriate to
9 immediately deal with those issues.

10 And the Commission specifically relied on
11 this factor, overcapacity of prisons and 994(g)
12 specifically when it made Amendment 782, the Drugs
13 Minus Two Amendment, retroactive.

14 That was one of the explicit reasons for
15 retroactivity in that case. So we think that
16 applies with all of these amendments as well, that
17 this would be an extraordinarily appropriate basis
18 for retroactivity for all of these amendments.

19 CHAIRMAN REEVES: I have a couple of
20 questions. With respect to the physical restraint,
21 obviously, courts and circuits could reasonably
22 disagree, and have disagreed about how that ought

1 to be construed.

2 But I guess, if there is a situation where
3 persons in different geographic areas of the country
4 have received different sentences, what is our
5 obligation to make sure that there is no more
6 disparity between sentencing? Or do we have an
7 obligation to do that?

8 MS. BLACKWOOD: Yes. So preventing
9 unwarranted disparities is another mandate from
10 Congress to the Sentencing Commission.

11 And when there are these circuit splits
12 that are created, particularly very significant
13 ones like we've seen with physical restraint, the
14 geographical disparity issue does come into play
15 and we do think the Commission is in the best
16 position to resolve it.

17 We know the Supreme Court doesn't
18 typically take on these circuit split issues related
19 to guidelines, so that is why it's really in the
20 best interest for the Commission to resolve it and
21 to apply retroactively.

22 Because it's so -- it also gets to fairness

1 issues because what could be more unfair than to
2 be sentenced in the western district of North
3 Carolina to a much higher sentence than you would
4 be getting in the southern district of California?

5 And then there's another issue that I think
6 is kind of specific to this amendment, and that is
7 that the circuit split as I understand it has been
8 going on since the '90s.

9 This has been a longstanding issue. And
10 what we have is five circuits who read -- the
11 amendment was unclear to such a degree that they
12 all read it as the Commission has determined to be
13 incorrectly.

14 And as a result for decades, individuals
15 have been sentenced too high in those circuits.
16 And so I think fairness would dictate and it would
17 be the appropriate thing to do for the Commission
18 to give those individuals who have been -- who have
19 been sentenced incorrectly over the course of
20 decades due to the lack of clarity in this amendment.

21 So I think that goes to some fairness
22 issues that are somewhat specific to this particular

1 amendment that it has such a deep and long circuit
2 split resulting in sentences that the Commission
3 has now determined are too high.

4 CHAIRMAN REEVES: Apply that geographic
5 sort of looking at things geographically, I don't
6 know, I can't remember if your submission or others,
7 do they show whether or not, going back to mitigating
8 role, whether that has been applied, we're talking
9 about 650 cases now, maybe 1,036 or so, are there
10 circuits or districts that -- do we show a geographic
11 distribution as to where that might have been
12 applied more or less than other places?

13 MS. BLACKWOOD: So this is the mitigating
14 role?

15 CHAIRMAN REEVES: Yes.

16 MS. BLACKWOOD: So mitigating role cap,
17 or are we talking about 3(b)1.2 special instruction?

18 CHAIRMAN REEVES: And mitigating role
19 cap.

20 MS. BLACKWOOD: Yes, I mean, I think to
21 some degree. I mean, we have the breakdown of
22 districts where we are seeing that they would be

1 -- they would be getting this production.

2 So I think, yes, those are districts where,
3 I mean, I don't know, I don't think we have the
4 breakdown on where exactly where it's been applied
5 and not, because you'd have to look at the full
6 number of cases.

7 So that's a bit of a difficult question
8 for me to answer. So I don't think I have the answer
9 to that one, but I could follow up if I can figure
10 it out.

11 CHAIRMAN REEVES: No problem. Thank you.

12 Yes?

13 COMMISSIONER WONG: I understand the
14 letter to -- that you submitted to end with kind
15 of a broader argument anticipating, you say
16 anticipating arguments with some stakeholders to
17 tread lightly to preserve the value finality.

18 So there's a section of the letter that
19 addresses finality and says, as I understand it,
20 essentially Congress has recently enacted pieces
21 of legislation that undid final sentences, and
22 finality might not have the same purchase that it

1 had in the past.

2 How do you defenders assess kind of the
3 value finality for victims? Some of these
4 amendments do impact victims, obviously.

5 And how do you assess that? And do you
6 think that is an appropriate basis to differentiate
7 kind of the value of finality?

8 MS. BLACKWOOD: I think it's the first
9 point I would make, is that with the drug amendments,
10 we don't typically see a number of victims.

11 I mean, it occasionally does come up, but
12 I don't believe I've ever had victims in court
13 through drug cases.

14 And that's more significant, the numbers
15 of people that would be impacted would be through
16 those drug amendments.

17 So I think where we would see it primarily
18 would be with the physical restraint. And public
19 safety issues regarding victims, that's something
20 that certainly the Commission can consider but also
21 I think courts take into consideration very
22 specifically.

1 Maybe 1.1.10 has courts deal with public
2 safety. Victims are always notified before
3 retroactivity motions.

4 And so you are able to weigh in. But I
5 think it's also important to note that victims
6 aren't a monolith.

7 They aren't all the same. They're not
8 always having the same use of what should happen
9 in sentencing hearings.

10 And I think we can just look to the earlier
11 hearings we had in this court, excuse me, in this
12 commission room, on earlier this year where we had
13 the President of FAM who has been a victim but did
14 not want retribution.

15 She wanted fairness and justice. And we
16 had a federal defender from the Eastern District
17 of Michigan who also did not want excessive
18 punishment.

19 I just don't know if we can sort of assume
20 that all victims want the same thing. But to the
21 extent that individual victims do want you to speak
22 about what has occurred, they are always informed

1 during retroactivity motions.

2 And I know the courts would always take
3 into consideration your opinions as well. But
4 maybe more to the point, I don't think that the
5 victim issues were quite as significant with the
6 drug amendments that we have here.

7 CHAIRMAN REEVES: Any further questions
8 from this witness? Ms. Blackwood, thank you so very
9 much for being with us today.

10 (Pause.)

11 CHAIRMAN REEVES: Our third group of
12 panelists will provide us with perspectives about
13 commissions advisory groups.

14 First, we will hear from Susan Walsh, the
15 Second Circuit Representative of the Practitioners
16 Advisory Group, PAG, and a part of Vladek, Raskin,
17 and Clark P.C.

18 Second, we will hear from Ms. Laura Roffo,
19 the First Circuit Representative of the Probation
20 Officers' Advisory Group and a supervisory
21 probation officer in the District of New Hampshire.

22 Third, we will hear from Jami Johnson, a

1 member of our Tribal Issues Advisory Group, TIAG,
2 an enrolled member of the Choctaw Nation of
3 Oklahoma, and an Assistant Federal Public Defender
4 for the District of Arizona.

5 Finally, we'll hear from our friend
6 Christopher Quasebarth who serves as the chair of
7 the commissioners' Victims Advisory Group, and as
8 a senior staff attorney for the Maryland Crime
9 Victims Resource Center.

10 Ms. Walsh, thank you. We're ready to hear
11 from you whenever you're ready.

12 MS. WALSH: Thank you, very much.
13 Members of the commission, it is my pleasure to be
14 here before you on behalf of the Practitioners
15 Advisory Group.

16 The PAG always welcomes the opportunity
17 to provide testimony. And I would first like to
18 address our position on the criteria for
19 retroactivity.

20 The PAG recommends that the Commission
21 eliminate the current criteria set forth in the
22 background commentary of 1(b)1.10 and amend the

1 commission's rules of practice and procedure to make
2 amendments presumptively retroactive instead of
3 perspective.

4 In the PAG's view, presumptive
5 retroactivity gives weight to the very purpose of
6 the guideline amendments, which is the application
7 of more fair and just sentencing guidelines.

8 It is this position that we find to be the
9 most principled and coherent with respect to
10 amending guidelines that the Commission has come
11 to find may not have been properly applied or
12 understood in under current community norms.

13 Prospective you results in sentencing
14 disparities because the timing of sentences
15 dictates the length of the sentence.

16 And a uniform, retroactive approach will
17 more broadly apply reform that is meant to promote
18 fairness and proportionality.

19 The public comments submitted about
20 retroactivity shows two areas of concern with
21 respect to broader retroactive application,
22 administrative burdens and diminishing the finality

1 and predictability.

2 We acknowledge at the PAG that these are
3 appropriate concerns. But in our view, neither
4 outweighs the promotion of fairness, the promotion
5 of fairness that retroactive application would
6 bring.

7 Prospective application does not reduce
8 the administrative burdens on any of the actors.

9 As Your Honor as noted, as the public comments from
10 the Department of Justice have noted,
11 understandably, people apply when there are
12 amendments.

13 They apply for relief of the courts when
14 there's an amendment to sentencing guidelines,
15 whether or not they meet the criteria or otherwise.

16 There is an administrative cost when there
17 are amendments to the guidelines. And the players
18 and the stakeholders have risen to the occasion and
19 met that burden.

20 But by having a presumption of prospective
21 application alone does not eliminate individuals
22 who are incarcerated from seeking relief.

1 And so the administrative burden will be
2 there regardless, and the stakeholders have to rise
3 to the occasion again.

4 That's noted in Footnote 11 to the
5 Department of Justice's executive decision is
6 retroactivity of Amendment 821, for example, where
7 emotions were denied and then granted by ratio of
8 2 to 1 and upwards of 70 percent of people that
9 applied were denied for ineligibility.

10 So the perspective for retroactive
11 application does not deter those from seeking relief
12 and does not reduce the administrative burdens on
13 the stakeholders.

14 The analysis of the current amendment, for
15 example, on the mitigating role cap suggests that
16 650 incarcerated individuals would be impacted for
17 upwards or on average of 12 months is a prime
18 example.

19 This is significant jail time and a
20 significant number of people. If you're in,
21 particularly, if you're within the 650.

22 But the analysis does not evaluate how many

1 ineligible folks will apply for relief, and therein
2 is the administrative burden and why that should
3 not outweigh the fundamental fairness of the
4 amendments that the Commission has recognized need
5 to be amended for ameliorated affect, or that the
6 promise of finality should not outweigh retroactive
7 application because fairness in application of the
8 law is in the balance.

9 If an unfair metric was applied at the time
10 of sentencing, at the time that sentencing guideline
11 amendments exist to promote and correct the more
12 fair sentence and structure, finally, the
13 retroactive application does not guarantee a
14 reduction, as we know.

15 And courts will still retain the power to
16 determine whether a reduction is appropriate and
17 if the finality of the original sentence and other
18 factors outweigh the purpose of the amendment in
19 an individual case, the court can decide not to apply
20 the reduction.

21 But presumptive retroactivity allows
22 courts to engage in that analysis without the added

1 administration of determining whether or not the
2 amendment is retroactive.

3 If there is an administrative burden or
4 if finality is not always guaranteed, there are
5 sacrifices, these are sacrifices, worthy of the
6 price for increased justice.

7 PAG supports obviously the retroactive
8 application of these amendments given our position
9 on retroactivity in general.

10 Practitioner Advisory Group's position is
11 the fairness in the application and equality and
12 the correction of inequities in the past does not
13 turn on the turn of the calendar page.

14 And that's why we urge the Commission to
15 consider the presumption of prospective versus
16 retroactive application going forward. Thank you.

17 CHAIRMAN REEVES: Thank you, Ms. Walsh.
18 Ms. Roffo?

19 MS. ROFFO: -- on the issue of
20 retroactivity? POAG carefully considered the
21 factors in 1(b)1.10 when weighing in on
22 retroactivity. I will begin by addressing the

1 amendments that resolve circuit conflicts.

2 POAG does not support a retroactive
3 application of the amended physically restrained
4 enhancement, an amended tended to resolve a circuit
5 split and promote consistency going forward rather
6 than address a fundamental unfairness.

7 The pool of defendants who might benefit
8 from retroactivity is relatively small at just over
9 1,000.

10 Hundreds of these defendant's reduction
11 might be limited because of the interplay between
12 physically restrained and otherwise used.

13 POAG anticipates confusion over the
14 interplay of these two provisions, and we may be
15 in the unusual situation for moving one enhancement
16 while adding another, a dynamic likely to raise
17 legal challenges.

18 This amendment may be difficult to apply
19 retroactively, as there may be reports in which the
20 circumstances surrounding the restraint are not
21 sufficiently set forth to apply to clarified
22 standard.

1 This means additional fact finding and the
2 information needed may no longer be available. Or
3 it may require reinterviewing victims or have
4 victims testify, disrupting any closure they may
5 have attained.

6 With respect to intervening arrest, POAG
7 does not support a retroactive application of this
8 amendment, which we view to be another amendment
9 intended to resolve a circuit but rather to address
10 a fundamental unfairness.

11 The Commission was unable to estimate how
12 many defendants would be impacted by this amendment
13 and to what extent defendants' criminal history
14 scores would be impacted.

15 The overwhelming majority of our
16 defendants do have some criminal history, so the
17 volume of motions filed could be overwhelming, yet
18 the impact of the amendment on those who are eligible
19 for relief will likely be minimal, since offenses
20 underlying traffic stops often receive zero to one
21 criminal history point.

22 POAG believes it will be difficult to

1 determine if a defendant is impacted by this
2 amendment without reviewing his or her entire
3 criminal history.

4 This will be cumbersome and time
5 consuming. It will present logistical challenges
6 and possible disparity as jurisdictions vary in
7 their record retention practices.

8 Some districts may need to access records
9 again, and some agencies may no longer have these
10 records.

11 We may also have defendants' whose
12 criminal history category does not change, but whose
13 criminal history points do.

14 While 1(b)1.10 would exclude these cases
15 from considering, there are districts in which
16 defendants will file and the courts will hear,
17 motions to lower their criminal history points
18 because of a potential impact on BOP classification.

19 With respect to mitigating role, since the
20 amendment at 2.(d)1.1(a)5 simply increases a
21 pre-existing reduction, it should be the most
22 straightforward and retroactive application.

1 However, many members of POAG have
2 observed that courts already frequently vary when
3 faced with 2(d)1.1 base offense levels they deem
4 to be too high.

5 Especially for defendants they believe
6 have not received an adequate reduction for their
7 role.

8 This makes a technically straightforward
9 amendment difficult to implement retroactively as
10 it will likely be difficult to figure out whether
11 and to what extent the court sentence already
12 reflected this.

13 The Commission has estimated that
14 approximately 650 defendants may be eligible for
15 this reduction.

16 That is a very small percentage of those
17 who receive mitigating role who are in turn a small
18 percentage of those sentenced under 2(d)1.1.

19 POAG's experience with prior
20 retroactivity events suggest far more defendants
21 will file for relief than are eligible for it,
22 including many who are clearly ineligible.

1 POAG is concerned about the volume of
2 petitions that will be filed. Furthermore, while
3 POAG appreciates that any amount of time in prison
4 is significant to those serving it, the vast
5 majority of persons eligible for reduction of
6 sentence will be looking at one to two levels rather
7 than three or more.

8 POAG is concerned that the expansion of
9 mitigating role through the function test will
10 complicate things further.

11 It will open the floodgates to defendants
12 who did not initially receive a role adjustment
13 whether or not the function test amendment is made
14 retroactive as well.

15 With respect to that amendment, as to
16 function, the number of defendants who could be
17 impacted by retroactivity is difficult to
18 ascertain.

19 What we do know is that 94 percent of the
20 almost 60,000 defendants incarcerated for drug
21 trafficking offense did not get a mitigating role
22 adjustment, meaning the pool of defendants for whom

1 analysis may be needed could be enormous.

2 This amendment will be complicated to
3 apply retroactively, as the defendant's role needs
4 to be reevaluated through an entirely new lens.

5 There will be situations in which factors
6 relevant to this analysis will not have been vetted
7 fully, resulting in additional fact finding.

8 Also because this is a new concept, the
9 reduction will likely result in litigation over what
10 circumstances fit the new standard.

11 For instance, what are user level
12 quantities? What if the person sending and
13 receiving messages is a dispatcher for an entire
14 network of couriers?

15 What is a courier? And what if we
16 previously used that term too casually because it
17 did not carry so much weight?

18 Some members of POAB noted that the courts
19 have long recognized that mitigating role does not
20 capture as many defendants as it should, and have
21 frequently varied to account for some of the factors
22 that will now be considered.

1 It will be difficult, however, to
2 determine whether and to what extent this may have
3 been done. Post-Booker, judges have had the
4 freedom to consider the factors the guidelines did
5 not account for or did not account for to the degree
6 they felt was appropriate.

7 Those include factors that we are
8 discussing today. POAG appreciates the
9 commissioners always looking to refine and improve
10 the guidelines through amendments.

11 However, we strongly urge the Commission
12 to refrain from rendering these amendments
13 retroactively. Thank you.

14 CHAIRMAN REEVES: Thank you, Ms. Roffo.
15 Ms. Johnson?

16 MS. JOHNSON: Thank you, Chair Reeves, and
17 members of the Commission. Thank you for inviting
18 me today to speak on behalf of the Tribal Issues
19 Advisory Group.

20 TIAG is, as we noted in our letter, pleased
21 to support the retroactive application of the
22 mitigating role cap, which we view as a matter of

1 fundamental fairness and is consistent with TIAG's
2 position that drug sentences in general or the drug
3 guidelines in general have gotten misaligned with
4 the expressed through the data views of the judges
5 who are sentencing in these cases.

6 And so we view this as rectifying a
7 fundamental unfairness for those defendants who
8 might have been sentenced by a judge, whatever their
9 opinions about the guidelines might have chosen to
10 take a more differential view about the guidelines
11 and who were the guidelines to be amended would be
12 happy to sentence the defendant to a lower sentence.

13 TIAG used this sentence as -- the
14 retroactive application of this portion of the drug
15 amendment as very administrable.

16 Like our witness earlier today, I also,
17 I handled all of the Amendment 821 reductions in
18 the entire District of Arizona.

19 I did it while carrying a full case load.
20 The criminal history amendments, like this
21 amendment, were very easy to determine eligibility
22 based on the face of the documents from the

1 pre-sentence report and the statement of reasons.

2 And this potential application would be
3 even more administrable in that with respect to
4 Amendment 821, it was necessary in every case to
5 obtain the PSR and the statement of response because
6 it was impossible to tell what someone's criminal
7 history was without those documents.

8 In this case, because we've heard from
9 other stakeholders that there are concerns about
10 people who will file who are not eligible and the
11 burden that places on the court system, in this case,
12 many of the people who file and are not eligible,
13 their lack of eligibility will be obvious without
14 even needing to obtain the pre-sentence report.

15 For example, if somebody who was convicted
16 of illegal re-entry, or bank robbery, applies for
17 retroactive application of the drug amendment, it
18 won't even be necessary to obtain the PSR to
19 determine that this person is not eligible.

20 Even in cases where it is necessary to
21 obtain the PSR, I would say that this probably took
22 an hour combined of everyone's time, would be my

1 best estimate, having responded to all the
2 individuals involved in this project in my district.

3 So it is a more limited number of people,
4 650, but it's very meaningful to those individuals.

5 And the magnitude of the offense is reflected in
6 the -- or magnitude of the change is reflected in
7 the data report, appears to be significant.

8 And this is what ultimately motivated TIAG
9 to support this amendment.

10 I also wanted to speak a little bit about
11 the physical restraint enhancement. TIAG also
12 supports the retroactive application of this
13 amendment.

14 The last time I was here, there was a
15 question about how often this arises in Indian
16 country.

17 So I did a little bit of research into the
18 data and from my experience, we do see robbery cases
19 and we see robbery cases with 924(c) in Indian
20 country.

21 But I looked at the data from the Eastern
22 and Northern Districts of Oklahoma, which were the

1 two districts impacted by the McGirt decision in
2 2020, and in the year 2018 and 2019, each of those
3 years, there were two cases opened, two robbery
4 cases opened combined in those districts in each
5 of those years.

6 And in 2021, which was the first year that
7 McGirt was fully implemented, there were 23 robbery
8 cases combined in the Eastern and Northern District
9 of Oklahoma.

10 23 is not the normal number. A lot of that
11 was McGirt backlog. But I think that it stands to
12 reason that most of that was individuals who were
13 sentenced for robbery offenses or charged with
14 robbery offenses in the state who were Indian and
15 charged in a federal court after the McGirt
16 decision.

17 So this is an issue that impacts Indian
18 country. It is also an issue that splits Indian
19 country.

20 Prior to this amendment, the 10th Circuit,
21 which has the Eastern state of Oklahoma and New
22 Mexico, Colorado, and Utah, has substantial Indian

1 country in those states, or Districts, had one rule,
2 and in the 9th Circuit, which, Arizona, Montana,
3 Washington, Nevada, had a different rule.

4 And so whether or not you received this
5 enhancement could depend on which reservation you
6 were located on or in the case of the Navajo
7 reservation, which part of the reservation you live
8 on, because most of the Navajo reservation is in
9 Arizona, but portions of it are in New Mexico.

10 And so two individuals on the reservation,
11 same reservation, same tribe, would have been
12 subject to different rules just depending on where
13 they happened to be on the reservation at the time
14 that the offense was committed.

15 And so, this is, I think for this reason,
16 TIAG would support the retroactive application of
17 the physically restrained amendment as well. Thank
18 you very much.

19 CHAIRMAN REEVES: Thank you, Ms. Johnson.
20 Mr. Quasebarth?

21 MR. QUASEBARTH: Thank you, Chair Reeves.
22 Vice Chairs, Commissioners, Victims Advisory Group

1 thanks you for this opportunity to address
2 retroactivity of these recent amendments pursuant
3 to Section 1(b)1.10.

4 We ask you to follow your practice and
5 procedure rule 4.1(a) providing generally
6 perspective only application and decline
7 retroactive application to the physical restraint
8 and the two drug amendments.

9 Charlene was a bank teller. Loved her
10 job. She loved her coworkers. Loved interactions
11 with customers and the community service she
12 provided.

13 All of that changed when Charlene was
14 robbed at her bank teller window by a man with a
15 gun who told her not to move and to give him the
16 money.

17 Afraid for her life, Charlene gave the
18 robber money from her drawer. Afterwards, Charlene
19 was afraid to go to work.

20 She was afraid that the robber would find
21 out where she lived and would harm her. Charlene
22 was frightened to meet with the prosecutor and I

1 because she did not want to relive that experience.

2 She did not want to testify because the
3 robber would know who she is. After a plea
4 conviction, she did not give a victim impact
5 statement in person because the robber would see
6 her.

7 Post-conviction proceedings brought her
8 further trauma and panic that the process again
9 would bring focus on her to the robber.

10 Robbery is a violent offense. Firearms
11 greatly increase the risk of the severity of that
12 violence.

13 And victims do not brush off the immediate
14 danger of firearms offense. Many thought that they
15 would be shot and killed at that time.

16 That memory does not fade. Victims
17 Advisory Group strongly recommends that you decline
18 retroactive application to the physically
19 restrained and answer that.

20 The crime victims violently robbed at
21 gunpoint in each of the 1,063 cases that the
22 commission's analysis estimates may be affected,

1 and there may be more victims than that, we just,
2 we don't know, there could be multiple victims in
3 each case, that analysis offers no data on the impact
4 of retroactive application on these victims.

5 Retroactive reduction of offender
6 sentences initiates victim trauma, raises safety
7 risks, and crushes the victims' sense of finality
8 in the criminal justice system.

9 This amendment's purpose is
10 clarification, resolving a reasonable
11 interpretation difference between a balance to
12 split a circuit on the term physically restrained
13 for purposes of one section and amending another
14 section to clarify application of the sixth level
15 otherwise used as a clarification amendment purpose
16 does not compel retroactive application under
17 Section 1(b).

18 Judicial Conferences Committee in
19 Criminal Law, public incumbent agrees. We also
20 agree with that committee that the magnitude of the
21 change, the difficulty in retroactive application,
22 and the impact on public safety by releasing violent

1 offenders do not warrant retroactive application.

2 The DOJ and POAG, both in their public
3 comment and in their testimony here today, likewise
4 oppose that retroactive application.

5 Please do not further traumatize victims
6 with a retroactive application of that amendment.

7
8 We also recommend that you decline
9 retroactive application to both subparts 1 and 2
10 of part A of the drug offenses.

11 The commission's analysis offers no data
12 on the number of crime victims or the type of
13 victimization for either subpart 1 or subpart 2.

14 And we realize some drug offenses won't
15 have victims. We don't have any data at all,
16 because oftentimes, drug offenses are prosecuted,
17 those types of offenses.

18 Subpart 2 analysis cannot estimate how
19 many of the 62,045 persons currently incarcerated
20 may qualify, magnitude of the change or the
21 application difficulty.

22 Without this critical information, which

1 is part of the factors that you all consider, the
2 Victims Advisory Group cannot recommend retroactive
3 application.

4 Again, the Committee on Criminal Law, the
5 Department of Justice, and POAG all agree that these
6 amendments do not meet that criteria since these
7 amendments don't meet the Section 1(b)1.10
8 criteria, and that retroactive application will
9 significantly lessen public safety and further harm
10 victims.

11 We ask you to follow the rules or the
12 practice and procedure rule, 4.1(a), and only look
13 at amendments for respective on the application and
14 deny retroactivity. Thank you very much.

15 CHAIRMAN REEVES: Thank you, Mr.
16 Quasebarth. Any questions of these witness? V.C.
17 Restrepo, you're going to start it off.

18 VICE CHAIR RESTREPO: Ms. Johnson, thanks
19 for being here. So you talked about the protocol
20 or procedure your district had when you were in
21 charge of 821 amendments.

22 Could you tell us what impact that would

1 have if we did make the mitigating cap rule
2 retroactive? I mean, how did you folks structure
3 it to minimize its impact on the various
4 stakeholders?

5 MS. JOHNSON: Sure, so we -- after the
6 Commission voted to make the amendment retroactive,
7 we had a meeting with the relevant stakeholders
8 which included a representative from the Federal
9 Public Defenders Office, a representative from the
10 United States Attorneys Office, a representative
11 from the probation office, and a representative from
12 the clerk's office.

13 And we got together and we thought, what's
14 the -- how can we minimize the amount of work
15 necessary for everyone?

16 And so, we decided our particular protocol
17 was this would be handled by -- at the U.S.
18 Attorney's Office, there was one person in Tucson
19 and one person in Phoenix.

20 At the Federal Public Defenders Office,
21 it was me for the entire state. We would get
22 together. I would send a list.

1 I would do the first cut of the evaluations
2 and see who I believed was eligible based on the
3 list that was sent from the sentencing commission.

4 And I sent them all over to the U.S.
5 Attorneys Office. They went through. They took
6 a cut of them. They sent me back a list of who they
7 agreed with, who they didn't agree with, and where
8 the parties agreed, our court, oh, and this was also
9 memorialized in one of the general orders of the
10 court, where they agreed, the probation office was
11 actually not required to respond unless ordered by
12 the court.

13 So we would put forth our case for
14 eligibility directly to the court and the probation
15 office was relieved of the obligation other than
16 to just provide us with the documents if necessary.

17 Where we disagreed, the probation office
18 would weigh in. And then for individuals who
19 applied pro se, I would take them.

20 I would review all of them. If the person
21 -- if we found at the federal public defender's
22 office that the person was -- that the person's

1 motion would benefit from supplementation by the
2 federal public defender's office, we did that.

3 If we reviewed the pro se motion and we
4 found that there was nothing to say that would be
5 helpful or advance that person's case, we filed a
6 notice saying that we were not going to supplement.

7 And at that point, the U.S. Attorneys
8 Office didn't have to respond unless ordered by the
9 court. So the U.S. Attorneys Office did not have
10 to respond in our district to any motions filed by
11 people who were not eligible unless ordered to do
12 so by the court.

13 And then the probation office would come
14 in and file generally a half a page or a one page
15 memorandum explaining generally why the probation
16 office believed this person was not eligible.

17 And it worked very well. We did about 200
18 eligible motions. Several hundred people who filed
19 pro se who were ultimately -- who had their motions
20 denied.

21 And I probably fielded 300 calls and
22 letters from people who were inquiring about their

1 eligibility. But it is -- you get in a routine.

2 It gets to be -- these cases are very
3 similar. They require a lot of fact finding and
4 they can be gone through very quickly.

5 So that was the system that we set up in
6 my district. It worked very well.

7 VICE CHAIR RESTREPO: So do you think this
8 821 amendments will be more or less cumbersome and
9 the mitigating role cap?

10 MS. JOHNSON: I think the 821 amendments
11 were more difficult because every single person who
12 filed was at least potentially eligible.

13 Because either they had no criminal
14 history or they had some criminal history. You had
15 to get the PSR. You had to find what their criminal
16 history was in the PSR.

17 This would only apply to drug defendants.

18 The eligibility or lack of eligibility would be
19 very obvious.

20 It would be one paragraph you'd be looking
21 for in the PSR. The other thing about the 821
22 amendments is there was for the people who had zero

1 criminal history points, there was also a list of
2 exclusionary criteria, and you had to go and look
3 at whether any of the exclusionary criteria applied.

4 And so it was more complicated than this
5 would be. This would probably be, if you had a stack
6 of PSRs, you could probably go through all of them
7 in an afternoon to figure out who was eligible.

8 I understand probably with some of the
9 earlier amendments when people were figuring out
10 the best system to use, it may have been a little
11 bit more difficult, but we really got it streamlined
12 in my district and we went through these are there
13 were no problems.

14 CHAIRMAN REEVES: V.C. Mate?

15 VICE CHAIR MATE: Thank you all for
16 joining us today. We really appreciate your
17 testimony. Ms. Johnson, I have a follow up on sort
18 of an administrability concept.

19 And this is about the mitigating role
20 special instruction. So one comment letter by an
21 organization that's not here today, so you get to
22 field this question, suggested that if we were

1 concerned about the administrability of the
2 retroactive application of the special instruction,
3 which I understand TIAG is, we could limit
4 retroactivity to only people who would be eligible
5 for the four level reduction.

6 That is the people at the lowest level of
7 the drug trafficking function, couriers. Because
8 this would be -- this would narrow the fact finding
9 that would have to happen to just identifying the
10 person's role which would likely be evidenced in
11 the PSR maybe.

12 I'll turn that over to you, I guess. And
13 avoid some of the other inquiries present in the
14 rest of the special instruction, like motivation
15 for the offense and the extent of compensation.

16 I'm curious about your thoughts on that.
17 Kind of partial approach to the mitigating role
18 special instruction.

19 MS. JOHNSON: Well, so TIAG didn't discuss
20 potentially narrowing instructions. So I don't
21 know that I'm authorized to speak for all of TIAG.

22 I will say that based on our discussions and

1 our general belief that the drug guidelines have
2 been out of line with the conduct, that if the
3 amendment could be changed in a way that made it
4 more administrable, that did not require individual
5 fact finding, didn't require hearings, didn't
6 require resorting to discovery documents that would
7 be in line with the use of what you said would be
8 in line with the use that TIAG has expressed in the
9 past about drug guidelines and the ways they need
10 to be ameliorated.

11 VICE CHAIR MATE: Thank you.

12 CHAIRMAN REEVES: Yes, Vice Chair Murray?

13 VICE CHAIR MURRAY: Thanks, everyone, for
14 being here. This is a question I think primarily
15 probably for the two witnesses who supported
16 retroactivity for the physically restrained
17 amendment, but I'm happy to hear from anybody who
18 has thoughts, but I wonder if you'd mind weighing
19 in on the ex post-facto discussion that Commissioner
20 Meisler had with Ms. Blackwood.

21 To me, it seems like the physically
22 restrained amendment is a coherent whole composed

1 of two parts.

2 And if you are able to sort of like apply
3 one half retroactively but not the other half, you
4 don't get the desired effect of sort of straight
5 -- making straight something that was curly.

6 So thoughts from any of you on whether or
7 not we would be able to make the whole amendment
8 retroactive or only the physically restrained part
9 and not the otherwise used part? Thanks.

10 MS. WALSH: I can speak as best as I can
11 on behalf of the PAG. I think we support
12 retroactivity as a whole in the application.

13 And I do, I agree with my colleague that
14 an enhancement or a bump up on a retroactive
15 amendment to a higher guideline level will most
16 definitely impact ex post-facto.

17 But I also do think as a real-world
18 practitioner that these are fundamentally addressed
19 in the 3553(a) analysis regardless.

20 Of course, there has to be a guidelines
21 analysis initially. But at issues as to how
22 physically restrained, if physically restrained,

1 are baked into the analysis regardless.

2 So I think parsing too closely is
3 potentially not productive. There are always going
4 to be fact patterns that are outliers and we're
5 looking to ameliorate substantial inequities, which
6 I understand are sometimes five to eight levels,
7 the difference between those two.

8 I think that's the focus of the amendment
9 should be, and if I may, in addition to addressing
10 this in particular, there's a point that I think
11 that hasn't been made, both with respect to capacity
12 of the Bureau of Prisons, and with respect to
13 finality issues, and with respect to fairness
14 issues, on the mental fairness issues, is that as
15 a practitioner and personally and as a member of
16 the PAG, the potential for a retroactive amendment
17 is a great incentive for people that are
18 incarcerated to reform, to be on good behavior, to
19 partake in rehabilitative measures that they may
20 not otherwise if finality was the overriding issue
21 and if there was no hope.

22 So it's an unquantifiable factor. I don't

1 know that there is data that will ever be available
2 to support that concept.

3 But I urge the Commission to consider that
4 factor because it is a substantial one. And to the
5 extent that individual practitioners experience is
6 relevant, we see that quite frequently now when
7 there was clemency petitions in the early 2000s,
8 now with retroactive amendments.

9 That is in the mind's eye of people that
10 are locked up, that if I'm on good behavior and if
11 I take advantage of programs, there is hope down
12 the road.

13 So I hope that you'll factor that in when
14 weighing the retroactivity of even a violent offense
15 such as robbery. Thank you.

16 MS. JOHNSON: I would say I agree with Ms.
17 Blackwood that there would be ex post-facto
18 considerations in applying a half of the amendment.

19
20 That said, I also agree that it could be
21 considered in the 3553(a) analysis. And I think
22 that it very likely would be.

1 What we have -- what we have seen
2 previously is that when we had the Drug Minus Two
3 amendment and the crack amendment, that virtually
4 all of those motions for sentence reduction were
5 granted.

6 They were typically non-violent offenses.
7 Amendment 821 was a little bit different, and we
8 did have, particularly in Arizona, which has a lot
9 of violent crime because of the reservations, we
10 had cases with pretty egregious facts.

11 And we did have, I'll say majority of the
12 motions were granted. But we did have motions to
13 deny it on 3553(a) grounds.

14 And I think that if there was a physical
15 restraint enhancement applied where a person was
16 not actually restrained but there were other
17 particularly aggravating factors, that that would
18 be something that the court could very likely take
19 into consideration.

20 And in our experience, those facts would
21 be in the PSR. They would be very easy to identify.

22 COMMISSIONER WONG: I'll follow up on

1 that. I'm not really -- just can we spell that out,
2 what that means, if there would be ex post-facto
3 concerns raised as to, hey, the guidelines now say
4 that court, you gave a five level enhancement for
5 this conduct but actually it should get six?

6 That that wouldn't be -- there would be
7 ex post-facto concerns raised with that argument,
8 but it would still filter in the 3553(a).

9 Can we spell that out? What would that
10 look like in 3553(a), then? The facts are still
11 the facts, but could the court then say, commission
12 under 3553(a), I am going to consider that the
13 Commission has now made that sixth levels when I
14 made that five?

15 Would there still be an objection by the
16 defense? Hey, you're raising -- you're making an
17 argument that should warrant ex post-facto
18 concerns.

19 Because of course, the conduct will still
20 be considered at their 3553(a), but the court
21 already did consider that sentencing.

22 And so, yes, maybe that's an aggravating

1 fact but that was an aggravating fact that was given
2 a five-point enhancement previously.

3 Can the court now say, given the
4 commission's actions under 3553(a), I'm going to
5 now make that what I viewed as aggravating, even
6 more aggravating, give it six, or something that's
7 akin to six point enhancement?

8 MS. JOHNSON: I think that ex post-facto
9 considerations would come into play if the district
10 court attempted to recalculate the guidelines. And
11 the resentencing forms that the district courts are
12 encouraged but not required to use ask for a new
13 guidelines calculation.

14 And so I think there would be an ex
15 post-facto consideration if the new guidelines
16 calculation considered a guideline that had been
17 subsequently increased.

18 That's what I mean about ex post-facto
19 consideration. If the new -- when you fill out the
20 form and it says offense level, criminal history
21 category, if the new offense level reflected a
22 change that had been made to increase a guideline.

1 That said, I think that when talking about
2 -- if that was the only justification that was given,
3 which is not anything that I've personally seen,
4 that might be an ex post-facto consideration.

5 Generally, what I have seen is this conduct
6 was very serious, the guidelines were insufficient
7 to account for the seriousness of this offense, that
8 is perhaps reflected in the views of the sentencing
9 commission in changing this guideline.

10 So in my opinion, in the 3553(a) factors,
11 this sentence was fair at the time that it was given.

12 As a practical matter, as I am sure you
13 were aware, very little explanation is required.

14 And in our experience, very little is given, which
15 is fair and reasonable given the time constraints.

16 A sentence, what we get most of the time
17 when these motions are denied or one sentence saying
18 I've considered the 3553(a) factors and I find this
19 person does not warrant as a reduction, I agree that
20 they are facially eligible and that the facts of
21 this case do not warrant a sentence reduction and
22 the Supreme Court has held that that explanation

1 is sufficient and justified.

2 So I don't know how often this would in
3 fact be litigated, but that's what I mean with the
4 3553(a) factors.

5 I think that the court certainly can
6 consider that the conduct was -- that they felt that
7 the old guidelines sufficiently captured the
8 seriousness of the conduct and that they don't want
9 to give the person a sentence reduction now.

10 CHAIRMAN REEVES: Ms. Roffo, I have a
11 question for you, and I think I might have one for
12 you, Ms. Johnson. But I believe in your submission,
13 Ms. Roffo, you indicated that in comparing all the
14 retroactive amendments that we put forward that the
15 mitigating role cap had been -- is the most
16 straightforward one to apply.

17 I believe that was in the comment of POAG.
18 Why do you say it's the most straightforward one
19 to apply?

20 MS. ROFFO: I think our submission said
21 technically the most straightforward because it's
22 a mathematical calculation.

1 However, as I think I mentioned in my
2 testimony, we do think it's going to be complicated
3 for two reasons.

4 One is many of us are seeing the courts
5 already very downward in a lot of these cases. And
6 so to try to parse out what has happened at
7 sentencing, when you have competing variance
8 factors, or not competing but multiple, when you
9 have someone who is a substance user and
10 distributing for that reason, when you have a very
11 high base offense level, the court is varying based
12 on a number of factors, which it should.

13 And so when we're doing a retroactivity
14 analysis, it's very difficult to kind of hone in
15 on whether the base offense level and how high it
16 is has already been considered and factored into
17 the sentence.

18 I think the second complication is going
19 to be that the Commission has expanded role through
20 the function test.

21 And maybe I'm speaking for myself here.

22 I think I can represent POAG where I say that we've

1 seen it over and over again, that defendants are
2 going to file motions that who are not eligible based
3 on factors that weren't made retroactive.

4 I don't blame them. I think many
5 defendants are going to file motions because they
6 would now qualify under the function test.

7 And even if the function special
8 instruction isn't made retroactive, if we have
9 another retroactive amendment that deals with role,
10 I guarantee you we're going to have a lot of filings
11 by people who now view themselves as eligible.

12 So that's going to complicate things as
13 well. And increase the number of filings that we
14 receive.

15 CHAIRMAN REEVES: But nothing stops
16 anybody from filing in all, I mean, in all our
17 districts. We see ineligible people file all the
18 time.

19 Even if we don't make these retroactive,
20 I guarantee you in some districts, in some places,
21 you're going to see a spike in the number of people
22 requesting relief based on the fact that the

1 Commission considered making it retroactive, right?

2 MS. ROFFO: That's true, but I also think
3 that there are a lot of districts in which the
4 court's going to want to hear from these defendants
5 and actually consider these motions, which then
6 requires the probation office to look at function
7 retroactively.

8 Maybe I'm speaking for my circuit, but I'm
9 pretty sure in my circuit that that may happen,
10 because I think we're already looking at those
11 factors in sentencing.

12 So I think regardless of whether someone
13 is eligible or not, I do think we're going to have
14 to do that analysis to some extent.

15 CHAIRMAN REEVES: Well, are there any
16 documents that would be accessible to the probation
17 officers and others in seeing what the district
18 court might have done previously, like the statement
19 of reasons form, like a transcript of the sentencing
20 hearing?

21 MS. ROFFO: Sure. I think it will help
22 us know if the court considered someone's role or

1 someone's function, but I don't know that we'll be
2 able to parse out to what extent that was part of
3 the reason.

4 Because like I said, I think we're -- I
5 think our judges are really thoughtful. And
6 they're thinking of so many factors when they're
7 imposing sentence.

8 And we know variance rates are high. And
9 so I think to try to hone in on what proportion of
10 that variance was due to that is going to be really
11 hard, because the statement of reasons doesn't say
12 well, how much of this variance is because of this
13 person's role, this person's function.

14 And so, while I love being in a world where
15 we can grant variances, because I think there are
16 many situation sin which it's called for, it does
17 make retroactivity exceedingly hard.

18 Not as hard as it was back in the day when
19 I first started this job, and variances were not
20 quite as common.

21 I think it's really hard to look back and
22 figure out what happened at sentencing.

1 CHAIRMAN REEVES: And the only final --
2 it's a final question. I know I only said I had
3 one.

4 MS. ROFFO: You said you were going to go
5 easy on me, too.

6 CHAIRMAN REEVES: I did say that. I did
7 say that yesterday, didn't I? You worked at least
8 a couple of different districts, and of course each
9 of those districts had to deal with the
10 retroactivity for the prior amendments, 821 or crack
11 cocaine, whatever it was.

12 Did you see any difference -- have you
13 experienced any differences in the way that might
14 be what you've done in one office that might have
15 been better than the other office?

16 MS. ROFFO: Sure. I happen to have worked
17 in districts that I think were fairly similar. I
18 think in discussions with other POAG members, I
19 think we all try to start with a list the Commission
20 has provided.

21 We try to work with the court, the clerk's
22 office, the parties, and come up with a plan.

1 I think that plan is only as good as what
2 we can plan for. And so, I don't think we can ever
3 predict the volume of filings we get.

4 And to give status point and zero point
5 offender as an example, in my district, which is
6 very small, I want to say we got as many filings
7 from defendants who were ineligible and not on the
8 list as we did who were on the list.

9 And so while we can have a plan to deal
10 with the filings we know we're going to get, or that
11 people who we believe will be eligible, it's a whole
12 different ballgame to have to address filings we
13 don't anticipate, or filings we anticipate but we
14 don't know who's going to be filing.

15 I don't know if that answered your
16 question.

17 CHAIRMAN REEVES: It did. Ms. Walsh, you
18 indicated that you -- well, some others, I think,
19 have indicated when you make these adjustments on,
20 I think it was a mitigating role, might be the
21 difference between one offense level which might
22 be six months in prison or up to maybe at most some

1 people might get a year off with a reduction.

2 And I know you've represented people who
3 -- you represent people who have been sentenced to
4 long terms and short terms in prison.

5 I just want to ask you, in talking with
6 your clients, what is that difference between
7 serving another day or another six months or another
8 year in BOP for that time that's exempt to them?

9 MS. WALSH: The difference can be between
10 being able to say goodbye to a loved one, being able
11 to welcome a baby into the world, being able to
12 qualify for a new job, being able to make a degree,
13 being able to be diagnosed with a terminal illness.

14 It can be life altering or just as simple
15 and as pure as being reuniting with supportive and
16 loving waiting family members.

17 So in my experience, no day is
18 insignificant, and it's very challenging to parse
19 six months from eight weeks, six weeks from two
20 weeks.

21 Every single day where somebody's liberty
22 is at stake, the consequences are exponential, not

1 only for the individual that's incapacitated, but
2 for all of the people whom he or she matters in the
3 world.

4 So I think that is why we see
5 understandably people making application whether
6 or not they are within the retroactive criteria or
7 otherwise.

8 One other point, if I may add to it --

9 CHAIRMAN REEVES: You may.

10 MS. WALSH: It's in terms of
11 administrability and the volume. We see some
12 judges adjourn until after November if there's been
13 an amendment that may not be made retroactive.

14 We see some judges refuse to do that, the
15 sentencing, adjourn the sentencing to do that, but
16 take it into consideration under other factors.

17 We see ineffective assistance of counsel,
18 habeas petitions, because the lawyer didn't argue
19 for an adjournment after the amendments become
20 effective.

21 So we're putting fingers in the dam if
22 we're basing all of our considerations here on

1 volume and administrability, because people who are
2 looking for relief and seeking relief from the
3 courts and that are seeking justice and fairness
4 because a cellmate comes with substantially similar
5 crime that was sentenced after me and leaves before
6 me, we have a fundamental fairness problem in our
7 system.

8 And so understandably, people are applying
9 whether or not they fit exactly what we could foresee
10 when we made the amendments.

11 And of course, all stakeholders recognize
12 how carefully the commissioner considers all of the
13 factors before they make an amendment.

14 And for those reasons, folks hang on the
15 opportunity for either a six month relief, 24 hour
16 relief, or ten year relief depending on the scale
17 of the amendment and its retroactivity.

18 CHAIRMAN REEVES: To follow one other
19 question, because this stood out in the submission
20 to me. I think you started with it.

21 Your PAGs argument is that each amendment
22 that applies or that is about to, there should be

1 a presumption to it. So I want you to --

2 MS. WALSH: Because of how carefully we
3 know that the Commission considers before it makes
4 an amendment, and because we know of how much that
5 goes into the consideration, the factors, and
6 because we know that the fundamental mission is
7 fairness and to correct disparities in how the
8 guidelines are applied across the country, we think
9 that the presumption of retroactivity to correct
10 injustices is where the emphasis should be.

11 And we shouldn't leave those people behind
12 when we as a community, as a commission, as a
13 country, decided that there are gaps in how the
14 administration of justice is being applied across
15 the country, and there's room for correction, and
16 we should bring those people with us.

17 I'm making a presumption, retroactive
18 rather than --

19 CHAIRMAN REEVES: Thank you. Thank you.
20 Any further questions? Yes.

21 VICE CHAIR RESTREPO: Ms. Roffo, I want
22 to cabin this question strictly to the mitigation

1 cap, right? And in light of my conversation with
2 Ms. Johnson, is it POAG's position that if the only
3 amendment we're considering is the cap, the
4 administrative cost or the administrability is
5 untenable, isn't that doable? It's burdensome?

6 MS. ROFFO: I would never say undoable
7 because --

8 VICE CHAIR RESTREPO: Is it excessively
9 burdensome?

10 MS. ROFFO: I think it will be. I think
11 that we will get filings by people who deem
12 themselves to be eligible in part because of the
13 evolution of role through these amendments.

14 And I do think we're going to have to
15 analyze that. I think again the bigger issue is
16 going to be figuring out whether the court already
17 considered how high those base offense levels were.

18 VICE CHAIR RESTREPO: That's a decision
19 for the court, right? Let's assume --

20 MS. ROFFO: Well --

21 VICE CHAIR RESTREPO: Yes, that's a
22 decision for the court, and only the court can make

1 that determination as to what he or she factored
2 into the equation at sentencing.

3 So if somebody's deemed eligible for an
4 audience in front of the court, it doesn't mean
5 they're going to have a reduction in their sentence.

6 But that question of what was baked into
7 the equation at sentencing, only the court can
8 answer that question.

9 MS. ROFFO: True. True. I do think that
10 in many of these -- in many of our districts, we
11 are asked to give our opinion as to what happened
12 at -- well, we may be asked to weigh in on that.

13 VICE CHAIR RESTREPO: Of course. That's
14 what courts do. They rely on probation officers
15 for their opinions. But only the court can answer
16 the question as to what was baked into the equation
17 at sentencing.

18 MS. ROFFO: Right, but I think also for
19 us, if we're talking about whether it's burdensome,
20 what strain it might put on the system, it's just
21 having the resources to deal with the filings that
22 come in.

1 VICE CHAIR RESTREPO: Again --

2 MS. ROFFO: And deal with the processing.

3 We sometimes forget about the people who are most
4 valuable in our offices is the administrative
5 support who are often the people who are forwarding
6 documents to the Bureau of Prisons, trying to get
7 these motions squared away.

8 I think there's still a lot that goes on
9 behind the scenes for any filing that we receive.

10 So that's where, when we talk about the filings
11 that go in and the resources that will be used on
12 those, I think we still have them even if ultimately
13 someone's not eligible.

14 CHAIRMAN REEVES: Oh, absolutely, yes.

15 MR. MEISLER: I think this is for Ms.
16 Johnson, but I'm welcome to hear anyone's
17 perspective on it.

18 But I'm curious, because it seems to me
19 from the people we've heard today, almost all the
20 stakeholders have viewed the two drug amendments
21 as kind of hand in hand, right?

22 They go together. They refer to each

1 other. But I think TIAG may be the only stakeholder
2 here today who separated them out, right, and said,
3 yes, you should make the mitigating role cap alone,
4 but everyone else has been -- they stand and fall
5 together, right?

6 I'm just curious if you can speak to that,
7 because obviously I found it interesting from Ms.
8 Roffo's testimony how POAG may anticipate that even
9 trying to decouple them, you really couldn't do that
10 in practice because you're going to have folks who
11 either didn't get a mitigating role adjustment the
12 first time or got less than they think they should
13 get filing, seeking the reduction there, even if
14 the Commission made only the cap reduction and not
15 the special instruction retroactive.

16 MS. JOHNSON: Sure. So as we said in our
17 letter, it really came down to administrability.

18 I don't share, respectfully, I'm sorry, I don't
19 share Ms. Roffo's concerns.

20 Ineligible people will file. Chair
21 Reeves keeps pointing out, you can't keep people
22 from filing. And absolutely, there will be people

1 who say, well, I didn't get minor role and I should
2 have. I didn't get a mitigating role.

3 It will be very obvious from the PSR
4 whether someone got a mitigating role or not. And
5 if they did not, I've always practiced in a district
6 where we did get mitigating roles applied fairly
7 broadly.

8 And I have a lot of concern about people
9 who were sentenced in districts where it was not
10 applied. But at the end of the day, they're not
11 going to be eligible for the new mitigating role
12 cap.

13 And that is an easy determination to make,
14 notwithstanding their own beliefs. I mean,
15 probably the most complicated part is going to be
16 going to have to write a three-page letter to people
17 explaining why they don't qualify, even though a
18 part of it --

19 It really was administrability as I said
20 to Ms. Mate. I believe, Vice Chair Mate, I believe
21 that if there were a way to make the other part of
22 the amendment more administrable, we would have done

1 that.

2 But I think TIAG's view is that we didn't
3 want to cut off everyone because portions of it
4 seemed not administrable given TIAG's historical
5 views of the guidelines.

6 CHAIRMAN REEVES: Any additional
7 questions from -- yes, please.

8 VICE CHAIR MURRAY: I just have a follow
9 up on Judge Restrepo's question. I think that was
10 a great question.

11 Ms. Roffo, so when is it that you would
12 delve into the reasons for the original sentencing?
13 Like would you end up doing that in every case?

14 Sorry, they are always on me for not
15 speaking close enough to the microphone. And now
16 I'm going to be very close.

17 So how often would you end up delving into
18 the reasons for the original sentencing for any
19 variances?

20 Like if you're writing a memo in every
21 case, would that be something you would do routinely
22 where you would say to the judge, like, oh, as a

1 mathematical matter, they're eligible?

2 Like it seems like there was already a
3 variance. Or is that something you would do in
4 rarities?

5 How often would that happen?

6 MS. ROFFO: I probably can't speak for all
7 of POAG here, but I know that I would routinely
8 include that in a memorandum to the court when we're
9 dealing with eligibility.

10 Because we may say on the face, this person
11 may be eligible but the court already varied and
12 we understand there was some discussion of role at
13 that point, or something like that.

14 And so, at least in my district, we would
15 weigh in on that or we would provide that information
16 or try -- we're always trying to help the court as
17 much as we can.

18 And so we really try to look at everything.

19 CHAIRMAN REEVES: Any more questions from
20 this illustrious panel? Thank you, ladies and
21 gentleman. We appreciate you.

22 At this time, ladies and gentlemen, before

1 we move to our next panel, we'll take a brief recess.

2 Thank you. We are in recess.

3 (Whereupon, the foregoing matter went off
4 the record at 11:25 a.m. and went back on the record
5 at 11:44 a.m.)

6 CHAIRMAN REEVES: The final panel I
7 believe will provide us with the Criminal Law
8 Committee's Perspective on Retroactivity.

9 As always, it is an honor to have with us
10 Judge Edmond Chang who serves as both chair of the
11 CLC and a district judge for the Northern District
12 of Illinois.

13 I have to give a special shout out to Judge
14 Chang. He was just with us in Chicago at the
15 Commission's Annual Judge's Seminar. We
16 appreciate that.

17 Thank you for making us feel at home in
18 Chicago in the Windy City, and thank you again for
19 taking your time out of your busy schedule to help
20 the Commission make the right decisions.

21 We appreciate that. On a side note, happy
22 anniversary. Yesterday was 15 years ago that Judge

1 Chang and I appeared before the Senate Judiciary
2 Committee.

3 I promise you your time here with us today
4 will not be as difficult as it was with me.

5 JUDGE CHANG: I'm going to take that to
6 the bank.

7 CHAIRMAN REEVES: So Judge Chang, we
8 appreciate you so very much, and remember, you have
9 ten minutes because you're special, okay?

10 And we thank you so much. And you can
11 start whenever you're ready.

12 JUDGE CHANG: Okay, thank you, Chair
13 Reeves, and thank you to all the Commissioners for
14 engaging with us today.

15 And, yes, special thank you to Judge
16 Reeves. It has been exactly 15 years and one day
17 since we sat together at the Senate Judiciary
18 Committee.

19 And one of the Mississippi senators
20 remarked that you were a lawyer of outstanding
21 character and integrity, and he also predicted that
22 you would be a credit to the state of Mississippi

1 and to the federal bench.

2 And that prophecy has 100 percent come true
3 in your leadership of this commission. So thank
4 you for all of your service.

5 And I always want to thank your
6 incomparable staff. Their expertise was in high
7 display in Chicago as they delivered an illuminating
8 training for judges.

9 And the choice of Chicago was an inspired
10 one. So thank you for that.

11 The Criminal Law Committee as always
12 appreciates the opportunity to comment on important
13 sentence issues before this commission and
14 important sentencing issues, it's kind of a
15 redundant phrase because everything about
16 sentencing is important because of its impact on
17 defendants and their families and their communities
18 as well as on victims and public safety.

19 So as always, the judicial conference has
20 directed the Criminal Law Committee to try to
21 promote a guideline system that is fair,
22 transparent, predictable, workable, and flexible.

1 And so we view proposed guidelines and
2 choices like retroactivity through that lens. And
3 I'll add the standard disclaimer that of course my
4 testimony is not necessarily the views of the
5 Director of the Administrative Office nor of the
6 1,000 plus judges in the entire federal judiciary.

7 Before addressing the amendments for this
8 cycle, if I can just sneak in a brief discussion
9 of retroactivity more generally, because I do think
10 it colors how then the committee has viewed the
11 prospect of retroactivity of the cycles amendment.

12 I do want to highlight the committee's
13 continued unanimous view that generally speaking,
14 we do believe that amendments of the guidelines
15 should be applied prospectively only.

16 And we think this aligns with the current
17 commission rules of practice and procedure, as well
18 as the current commentary to section 1(b)1.10, which
19 of course you are all examining.

20 The three factors, the well known factors
21 of purpose of the amendment, magnitude of the
22 change, and then difficulty in applying the

1 amendment retroactively, we believe that under the
2 criterion of purpose of the amendment that for an
3 amendment to apply retroactively, it ought to
4 address some issue of fundamental inequity or
5 fundamental unfairness.

6 And in our view, the prospect that a person
7 will be sentenced before the guideline amendment
8 in a different way than someone who is sentenced
9 after is not, by itself, without more, address a
10 fundamental inequity or unfairness.

11 It does represent, in our view, the
12 commission's ongoing duty to continue to monitor
13 the guidelines for all of those things like
14 fairness, transparency, and predictability.

15 And we think that type of difference, just
16 a before and after look, if that were the criterion
17 for retroactivity on its own, then that would
18 essentially apply to every amendment.

19 And we think it's important generally
20 speaking to have a determinant sentencing system
21 where there is finality to sentencing.

22 Of course, there are exceptions and the

1 committee has supported in the past those amendments
2 that did address a fundamental unfairness,
3 including the two crack cocaine amendments as well
4 as the Drugs Minus Two amendments, which we believe
5 addressed a change in societal views about first
6 that crack powder difference and then drug
7 sentencing generally.

8 And so we supported those retroactivity,
9 those amendments, even recognizing that of course
10 it would involve a massive number of motions, tens
11 of thousands, and enormous workload for the courts
12 and the probation officers.

13 And that is the kind of change that is
14 absolutely appropriate to apply retroactively.

15 On that point of workload, I do want to
16 point out or urge the Commission to continue to
17 consider the impact of amendments being applied
18 retroactively on the workload of the courts and the
19 probation offices.

20 And I think that's especially true in this
21 budgetary environment and where probation offices
22 specifically and the judiciary more generally is

1 in the very tight budgetary environment.

2 And it's not just a matter of handling
3 those motions presented by individuals who are
4 eligible for retroactive application.

5 Unfortunately, it's just the reality that
6 courts face. Many not meritorious motions. And
7 I think the recent criminal history amendments gave
8 a real world example of this in operation for the
9 status point amendment, 69.9 percent of the motions
10 were filed by defendants who were not eligible at
11 all.

12 And so not a matter of the motion being
13 denied on 3553 grounds or some other grounds, just
14 not eligible at all.

15 And this is based on the data reports of
16 the Commission. And then for zero pointers, it was
17 even higher.

18 It was 78.5 percent of the motions were
19 filed by defendants who just were not eligible at
20 the very threshold.

21 And our probation officers, it's not
22 surprising, filed north of 31,000 reports to judges

1 based on the criminal history amendments.

2 And so, it is just an unfortunate reality
3 that we face motions when amendments are made
4 retroactive.

5 Now turning to the four specific
6 provisions, and starting with the drug offense
7 amendments in particular, on the first criteria,
8 the purpose of the amendments, it's the committee's
9 view that the two mitigating role provisions, the
10 special instruction, and the change in the
11 mitigating role caps do not address a matter of
12 fundamental unfairness and equity that reflects a
13 change or a see change in societal views.

14 And instead, reflects the commission's
15 ongoing work in refining the guidelines over time.

16 This amendment is, we think, akin to the earlier
17 mitigating role amendments in this area.

18 In 2015, the Commission modified 3(b)1.1
19 so that there would be, in the commission's hope,
20 more application of mitigating role and that was
21 not made retroactive.

22 Now, hopefully this special instruction,

1 the message will be more clearly received by courts
2 that for mitigating role in drug cases, you're not
3 so much doing comparisons anymore, it's just, all
4 right, what's the function?

5 And if it's low level, then as the primary
6 function, you ought to give mitigating role.

7 And so, perhaps that message will be more
8 clearly received this time around. But that prior
9 amendment was not made retroactive.

10 And the same goes for when the mitigating
11 role caps were originally instituted in 2002. That
12 was not made retroactive, either.

13 So we don't think it crosses that threshold
14 of addressing a fundamental inequity or unfairness.

15 Now, on the magnitude and difficulty, the
16 other two factors for these drugs offenses, I
17 acknowledge that there is a relatively small number
18 of 650, I believe, inmates who would be eligible,
19 for the mitigating role cap amendment.

20 So setting aside the special instruction.

21 And that is a relatively small number. And our
22 concern, though, in the difficulty in applying that

1 amendment retroactively is the prospect of the
2 meritless motions.

3 And it's unfortunate to have to rely on
4 this resource burden, but it is just the reality
5 of what is likely to happen.

6 And as I said, the criminal history
7 amendments really pointed out, I mean, I personally
8 was quite surprised at the percentage of ineligible
9 motions that the court received.

10 I didn't even think it would be the
11 majority of the motions, and it turns out to be well
12 north of the majority of the motions.

13 And so, I think it's true. It is a
14 relatively small number that would be eligible, but
15 we have that concern about the meritless motions.

16 And then with regard to the special
17 instruction, that is the amendment that the
18 committee is most strongly opposed to in terms of
19 retroactivity given that there could be 53,000 or
20 so inmates who did not receive the mitigating role
21 adjustment in drug cases or did not receive the full
22 four level minimal role adjustment and they could

1 file motions on this.

2 And so, that is I think an enormous
3 workload burden, and it's something of a red flag
4 that understandably the Commission staff, quite
5 understandably, is not able to estimate the number,
6 really, that would be eligible.

7 That's a red flag, because I think that
8 shows that additional fact finding would be
9 necessary.

10 And I think by definition, additional fact
11 finding would be necessary to evaluate these
12 motions.

13 And moving on to the circuit conflict
14 provisions, because I see my red light's on so I'm
15 going to use my New York City talk to go really
16 quickly, the commission's existing retroactivity
17 criteria again, we don't believe warrant
18 retroactive application.

19 The purpose of the amendment, both of them,
20 is to resolve circuit splits where circuit judges
21 reasonably disagreed on the interpretation of the
22 text of the physical restraint and intervening

1 arrest.

2 And so, there's not a fundamental
3 unfairness or inequity I think reflected in the
4 purpose of the amendment.

5 In terms of the magnitude on physical
6 restraint, here I acknowledge that there is
7 something around 1,000 defendants who could be
8 impacted by that.

9 And although the data retroactivity report
10 of the Commission was not able to estimate the extent
11 or the magnitude of the change, it presumably would
12 be a two-level reduction, right, because that would
13 be undone.

14 I think there would be, though, and the
15 committee believes that there is significant
16 difficulty in applying this amendment
17 retroactively.

18 And so we would again have to conduct a
19 factual inquiry to see whether the physical
20 restraint enhancement first, is it based on a
21 firearm?

22 So you have to go into the pre-sentence

1 report for every one of the motions that are filed.

2 And then also, I think more importantly,
3 we may need to conduct an independent inquiry on
4 whether or not there was some other basis for the
5 physical restraint enhancement.

6 Because in those circuits that were on the
7 not losing side but the other side of the amendment,
8 if there was a firearm pointed at a victim, then
9 physical restraint applied, and there was no real
10 need to go further than that.

11 And we have a concern that we would need
12 to or the government would need to, if they wanted
13 to advocate for this, investigate, and reinterview
14 the victim on were there other physical restraints,
15 and then courts or even if the victim has already
16 said that before, there could be a factual dispute
17 whether there were physical restraints, and a
18 factual dispute that those judges did not need to
19 resolve the first time around because it is applied
20 based on the firearm itself.

21 And the committee was also influenced by
22 the notion that again by definition, the defendants

1 who would be applying for a reduction here, they
2 pointed a firearm at someone and got the physical
3 restraint inquiries.

4 So it's true that if sentenced today, they
5 would not get that plus two. But the likelihood
6 that the 3553 factors would influence whether the
7 sentence really would be reduced, I think many
8 judges would consider the fact that a firearm was
9 pointed at someone as a relevant factor in deciding
10 not to reduce someone's sentence.

11 And you compare that to physical restraint
12 including without a firearm, could include
13 instructing someone to go into a room and then
14 closing the door and locking it or barricading it
15 and compare that to having a firearm pointed at a
16 victim.

17 It does not -- this is not the kind of
18 amendment we think addresses some kind of
19 fundamental unfairness on those grounds as well.

20 And then on intervening arrests here,
21 again, it's not clear to -- the Commission was not
22 able to understandably figure out how many

1 defendants would be eligible for relief here.

2 And so I would wager, but I'm wagering that
3 it wouldn't be many that would be eligible and partly
4 because it was a circuit split.

5 So in some circuits, there would not be
6 a basis for relief, and then even in those circuits
7 that were on the other side of the amendment, that
8 there ought not be that many cases.

9 So here again, though, the committee is
10 concerned about the meritless motions that would
11 be filed and the need to then check each of those
12 and determine whether or not there was a traffic
13 stop that was an intervening arrest that then kicked
14 up the criminal history point.

15 So those are the committee's views on
16 retroactivity for this cycle. And I snuck in a
17 little bit on the general retroactivity. And I'm
18 happy to answer any questions you might have.

19 CHAIRMAN REEVES: Thank you, Mr. Chang,
20 Chair Chang. Any questions from my colleagues?

21 VICE CHAIR RESTREPO: Judge, thanks for
22 being here. It's greatly appreciated. So how is

1 the -- CJC, how are you defining, not you, but how
2 does this committee define the concept of
3 fundamental fairness?

4 JUDGE CHANG: So, yes, we draw in part,
5 not for textual purposes, because it's like
6 forbidden, from the legislative history of the
7 sentencing form act and the institution of the
8 potential retroactive application guidelines,
9 which said that these retroactive application ought
10 to be, for those instances in which there has been
11 a change, like a major change in community views,
12 about sentencing, and on a particular issue, like
13 crack powder.

14 And so, when that kind of -- that we've
15 now realized that there is a fundamental unfairness
16 with that crack powder distinction, then that is
17 the kind of amendment that ought to be -- yes.

18 VICE CHAIR RESTREPO: So if the data
19 suggested that judges across the country are varying
20 significantly, the higher the base offense level
21 goes on drug cases, isn't that a see change?

22 JUDGE CHANG: Well, I mean, I guess it

1 would depend, right, on the extent of what those
2 variances are.

3 And it would also --

4 VICE CHAIR RESTREPO: Generally trending
5 lower across the board on these drug cases. Is that
6 something that the committee has considered as a
7 see change or different perspective on these drug
8 guidelines?

9 JUDGE CHANG: Well, if, and it would be
10 hard to surface this, but maybe there is a way to
11 surface this, if the judges are sentencing well
12 below the drug guidelines range because of an
13 attitudinal change to all drug offenses, then that's
14 representative of the Drug Minus Two change that
15 happened and where we did support retroactive
16 application.

17 But we would really need to figure out,
18 I think, what is the basis for the variances? And
19 does it really apply to all drugs?

20 Are there variances in fentanyl cases and
21 heroine cases, or are they in other forms of -- I
22 mean, there's still a crack powder distinction in

1 the statutes.

2 And so, is it based on something else?

3 So I don't foreclose a possibility, of course, that
4 there would be another round of Drug Minus Two if
5 it's supported by what I think the judiciary and
6 the public was espousing at the time Drugs Minus
7 Two happened.

8 So, that's my --

9 VICE CHAIR RESTREPO: I guess the
10 committee's view is wouldn't fundamental fairness,
11 would that support the mitigating role cap
12 adjustment?

13 JUDGE CHANG: Right, the mitigating --
14 right?

15 VICE CHAIR RESTREPO: Notwithstanding any
16 empirical evidence suggesting that the numbers are
17 not in equilibrium.

18 JUDGE CHANG: Yes. Well, and I have no
19 doubt that the numbers are not equal, generally
20 speaking. But as I guess two things on that.

21 One is the fact that judges are taking into
22 account that under 3553, which I think brought down

1 the number of eligible defendants that the 650 --
2 because judges were already going even lower than
3 what the reduced range would be, I think is
4 reflective that -- and we're taking that into
5 account.

6 And so, there is I'd say unfortunately,
7 because I think of course it is our job to handle
8 motions and for probation officers and for probation
9 officers to review motions, but that is the reality
10 of our resource constraint.

11 VICE CHAIR RESTREPO: But in terms of
12 again, cabining it to just the mitigating cap, it's
13 a very straightforward analysis to whether or not
14 somebody's eligible for this reduction.

15 It's only a two step process, right, to
16 determine whether or not they're eligible. And
17 then, yes, the frivolous motions can be disposed
18 of very quickly.

19 JUDGE CHANG: Well, I think the --

20 VICE CHAIR RESTREPO: The meritless
21 motions.

22 JUDGE CHANG: So here, I think what

1 happens, so even if districts create committees of
2 federal defenders, AUSAs, and probation officers,
3 which we always encourage when there's a retroactive
4 amendment, so what are the probation officers doing?

5 So the motion is filed and they have to
6 -- they do have to check the pre-sentence report
7 to determine whether or not they had the mitigating
8 role cap in the first place.

9 But that's not enough. They need to then
10 check the JNC to make -- they look at the finding
11 section to see, well, did the judge actually grant
12 the mitigating role adjustment that the probation
13 office proposed?

14 And so hopefully there's an answer there
15 that either there were no changes or the changes
16 don't affect mitigating role.

17 And so now the probation officer knows
18 that, okay, there is a -- there was a mitigating
19 role adjustment.

20 But then the officer does have to
21 calculate, okay, so what's the new range? So then
22 they calculate the new range.

1 And then they have to look at the sentence
2 to see, all right, now is it below the new calculated
3 range, because then they're still not eligible at
4 that point.

5 So, there are multiple steps that have to
6 be taken and so when unfortunately it's multiplied
7 in the thousands, that is the overall burden.

8 I think we can guarantee that there was
9 650, we would know that only the eligible motions
10 would be filed, the resource burden of course would
11 be completely different.

12 And I've ruminated about the possibility
13 that maybe it's not the next generation of CMECF
14 or PACS 360, our system, but one would hope that
15 at some point, we can marry the technology well
16 enough that we can weed out the non-meritorious
17 motions even faster so that we can try to tamp down
18 the effect of the resource constraint on
19 retroactivity decisions because in theory, the
20 steps that I just went through, you could have if
21 we had proper data collection and CMECF maybe talks
22 to PACS 360.

1 They could do all those steps and even cite
2 here's where we're getting this information. And
3 that could mitigate the resource devotion.

4 But that may not be in the next generation
5 or the generation after that.

6 VICE CHAIR RESTREPO: Given what we have,
7 it's still a fairly straightforward, again,
8 cabining it to the mitigating cap, it's still a
9 fairly straightforward calculation.

10 There's no fact finding that has to be
11 done. And the information is in one, maybe two
12 documents.

13 JUDGE CHANG: Yes, I agree with all of
14 those things.

15 COMMISSIONER WONG: Can I --

16 CHAIRMAN REEVES: Yes, Commissioner Wong.

17 COMMISSIONER WONG: Can I follow up on
18 fundamental fairness, but maybe in a slightly
19 different tact from Judge Restrepo?

20 Is it fair to conceptualize the
21 fundamental fairness crux of inquiry as more being
22 about the delta between pre-amendment and

1 post-amendment?

2 Meaning, if there's a universe of people
3 who received different sentences, the delta between
4 those two universes is a matter of fundamental
5 fairness, the delta, that that would be a situation
6 which you would consider retroactivity, such that,
7 where I'm going with this is, if the commission's
8 rationale for passing an amendment is simply to
9 mirror reality, so you reference situations where
10 judges may be varying down, and the guidelines are
11 just simply being adjusted to actually match what
12 is already happening.

13 So there is not that sharp delta. Is a
14 commission rationale that based on data, we are
15 trying to better match what is already happening
16 on the ground, is that an indicator that this is
17 not a fundamental fairness issue?

18 JUDGE CHANG: Right. So, I mean, I think
19 it will depend on the context, right? So I think
20 if for crack powder, for crack powder distinction,
21 for example, if the reason for that delta is that
22 we had come to realize that some of the harms

1 associated with crack cocaine were not being
2 realized and that there was this racial disparity
3 as well, then that would address fundamental
4 fairness and equity.

5 And so if the delta reflects that kind of
6 change, then I do think you could put it into that
7 bucket.

8 But otherwise, just a sheer delta, I don't
9 think that by itself would reflect fundamental
10 unfairness or inequity.

11 And I think the physical restraint
12 enhancement is something of a good example here
13 where let's say we had a world where the physical
14 restraint enhancement had been plus four.

15 And so there would be a significant
16 difference, at least in the guidelines range. But
17 just because there's that difference, given the
18 nature of what is being removed from that plus four
19 of a firearm being pointed at a victim, that doesn't,
20 I don't think in the committee's view, that would
21 reflect a fundamental unfairness.

22 COMMISSIONER WONG: The absence of any

1 delta, though? Also indicate an absence of a
2 fundamental fairness concern?

3 JUDGE CHANG: I think that is hard to
4 answer because we would want to know what is driving
5 judges still to sentence at around the same number
6 of months and years.

7 And so, I think we'd need to actually know
8 that as opposed to just looking at the bare numbers
9 themselves.

10 COMMISSIONER WONG: And then just one
11 second question I had. I know when we hear about
12 the burden, sometimes it can get a little bit
13 abstract and I'm just curious if you could flesh
14 out from a court and probation office perspective
15 what tradeoffs, are there tradeoffs or is there just
16 increased workload, and what kind of tradeoffs those
17 look like?

18 JUDGE CHANG: Yes, of course. Because of
19 human limitations and the absence of time travel,
20 there is every minute that we spend, that the
21 probation officers spend on evaluating retroactive
22 amendment motion, is time taken away from writing

1 pre-sentence reports, which means delays in
2 sentencing.

3 It is time taken away from supervision of
4 those who are on supervised release. And so of
5 course, we need to devote time to help individuals
6 transition back to society for their sake and their
7 family's sake and for public safety's sake.

8 And so everything you think of in terms
9 of how important probation officers are to the
10 criminal justice system and to individuals and to
11 public safety is diminished when they spend any time
12 on these other motions.

13 And I just, and I don't -- maybe the
14 criminal history amendments was a one off, but I
15 fear it's not, that 69.9 and 78.5 percent of the
16 motions just not eligible at all.

17 And that's squared with my personal
18 experience of getting a motion and then -- and these
19 motions, by the way, they, of course they take high
20 priority.

21 Because if someone should have a reduced
22 sentence, and there's also the prospect of over

1 serving, we are elevating this to a priority.

2 And so it's very hard for me to resist when
3 I see my CMECF activity, 12:01 a.m., I get an email
4 that has every filing that's come in the day before.

5 And so I'm checking through that, and if
6 I see a motion to reduce sentence, I can't help but
7 click through that to see like, all right, what are
8 the circumstances here?

9 And many times, it is a pro se motion.
10 And so they're not citing to specific filings and
11 they are just assertions.

12 So then I'm clicking through to the PSR
13 and to the JNC. And so there is a time and
14 prioritization that happens with these motions.

15 VICE CHAIR RESTREPO: Should we take the
16 demographic impact on a certain community into
17 consideration when we're talking about fundamental
18 fairness?

19 JUDGE CHANG: I think that happened in the
20 crack powder --

21 VICE CHAIR RESTREPO: Should we do it in
22 this instance? Let's assume the mitigating role

1 cap impacted the Hispanic population at a rate of
2 about 72 percent. Does that matter?

3 JUDGE CHANG: Well, I think that then the
4 question is, but why is that happening? And so if
5 a -- the concern in crack powder I think was there
6 were assumptions being made about that cohort of
7 defendants of what harm would arise that was not
8 well founded.

9 And so that is I think of a different type
10 of fundamental unfairness than defendants who are
11 involved in offenses where you're at the 32, 34,
12 36, 38 levels.

13 And if that disparity, right, that
14 difference is not based on some kind of invidious
15 discrimination or implicit or subconscious
16 discrimination, then I don't think it's reflective
17 of fundamental unfairness.

18 So the reason why there is that disparity
19 which may not even be the right word, the reason
20 why there's that difference in the racial
21 composition of defendants who are affected by this,
22 I think is still really important.

1 CHAIRMAN REEVES: Commissioner Meisler?

2 MR. MEISLER: Judge, I was going to ask
3 you just on the circuit conflict issue, how do you
4 think we should weigh I guess kind of the numerical
5 breakdown of the circuit divisions?

6 Because you mentioned before, we have two
7 different situations before us, one where the
8 circuits were I'll just call relatively evenly
9 divided with respect to the physical restraint one,
10 and then we have the lopsided circuit conflict on
11 intervening arrest.

12 One of our other stakeholders you probably
13 didn't have the chance to hear today, I think was
14 describing how in the evenly divided situation, you
15 end up with more defendants affected because you
16 have more cases in which the Commission has
17 essentially advocated that circuit's understanding
18 of the law.

19 How does the committee think we should
20 consider those things? Is one situation more or
21 less -- lend itself more or less retroactive
22 application? Is it worse to leave people who are

1 in one outlier circuit without relief or is it the
2 flip side or neither?

3 JUDGE CHANG: Yes, thanks for the
4 question, which the committee has not deliberated
5 on. So I won't answer for the committee.

6 I think as a personal matter, you could
7 consider I think fundamental unfairness as covering
8 a situation where let's say you had an 11/1 circuit
9 split.

10 And the one actually sentenced an outside
11 number of the defendants who were affected by that
12 circuit split.

13 I think there's something to be said for
14 the fact that you -- that one circuit had -- so of
15 course not the Seventh Circuit, but one circuit had
16 an outlier view that maybe wasn't well supported
17 by the text.

18 And we're humans. We make mistakes. And
19 so, if the mistake is of a kind where it wasn't a
20 reasonable minds differ, which of course in the
21 physical restraint, that was -- circuits were
22 digging deep into dictionaries there, where you had

1 just this outlier core and we all make mistakes.

2 Judges make mistakes. And if it's the
3 kind where it wasn't a reasonable minds differ, I
4 can see how that would be part of the fundamental
5 unfairness inquiry.

6 And especially if they sentence, that one
7 circuit sentenced an outsized number of the
8 defendants affected.

9 MR. MEISLER: Thanks, Judge. We will not
10 note the circuit conflict on the intervening arrest.

11 JUDGE CHANG: Yes, please don't.

12 MR. MEISLER: The circuit is the minority
13 and may have been one that sounds like a seven, but
14 I can't recall 100 percent.

15 JUDGE CHANG: Yes, I do recall, so that's
16 why I will be very careful.

17 CHAIRMAN REEVES: Any further questions?

18 I do have one, and you were talking about the taxing
19 that sort of taxes that the probation office pays
20 when trying to figure out this stuff on mitigating
21 role or any of the -- anything on the retroactive
22 application.

1 How should we consider what our obligation
2 is under 994(g) with respect to the BOP if people
3 who deserve mitigating role and would be getting
4 lesser sentences and ultimately get out of the
5 custody of BOP, how does that -- how might -- or
6 should we consider that in trying to reduce the
7 population of the Bureau of Prisons and its
8 resources in maintaining custody over individuals
9 who arguably should not be in their custody?

10 JUDGE CHANG: Yes, I think as a textual
11 argument, that 994(g) tells you you shouldn't
12 consider BOP capacity.

13 And there, I mean, I think it is obviously
14 very much up to the Commission to exercise judgment
15 here, because that provision does refer to possibly
16 suggesting to the executive branch that they expand
17 capacity.

18 So there's that aspect of 994(g) as well.

19 But of course, there is the last sentence, I
20 believe, discusses the need to ensure that you're
21 not setting the guidelines so high that it exceeds
22 capacity.

1 So there is a balance to be struck there.

2 But, yes, I acknowledge that there is a statutory
3 basis to consider BOP and capacity.

4 And again, I think this resource issue,
5 especially with the mitigating role caps and the
6 650 eligible inmates, I think the data reports that
7 it is something like a 14.8 percent sentence
8 reduction.

9 For someone with a 20-year sentence,
10 that's three years and for someone with 15 years,
11 it's a little more than two years.

12 That's a significant amount of time. And
13 so, I absolutely acknowledge the equities on the
14 other side,, but at the same time, there's a reality
15 unfortunately that we reside in.

16 CHAIRMAN REEVES: Okay. Any additional
17 questions? Judge Chang, thank you so much for your
18 leadership in so many ways, including serving as
19 chair of the CLC and ensuring that we had great pizza
20 in Chicago. So thank you so much and safe travels
21 back home.

22 JUDGE CHANG: Thank you for having me.

1 CHAIRMAN REEVES: Thank you.

2 JUDGE CHANG: Thank you all.

3 CHAIRMAN REEVES: Ladies and gentlemen,
4 I believe this concludes our hearing on
5 retroactivity for the amendments that the
6 Commission has adopted through this past cycle.

7 Thank you for your attention, your
8 comments. I know our comment period is still open
9 on retroactivity.

10 No? Nothing? Nothing? Please. Okay.

11 Not on retroactivity. Under priorities. Okay.

12 So thank you so much for the time and attention
13 today.

14 We appreciate everyone. Thank you,
15 staff. Thank you, our panelists. This adjourns our
16 hearing. Thank you.

17 (Whereupon, the hearing in the
18 above-entitled matter was concluded at 12:21 p.m.)

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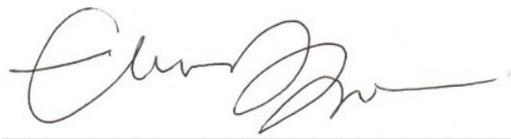
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