UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
RETROACTIVITY OF 2014 DRUG AMENDMENT

TUESDAY,
JUNE 10, 2014

The United States Sentencing Commission met in the Leonidas Ralph Mecham Conference Center, One Columbus Circle, NE, Washington, D.C., at 8:45 a.m., Patti B. Saris, Chair, presiding.

PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RICARDO H. HINOJOSA, Vice Chair
KETANJI BROWN JACKSON, Vice Chair
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, Commissioner
JONATHAN J. WROBLEWSKI, Ex Officio
ALSO PRESENT

O. QUINCY AVINGER, JR.
BOB BUSHMAN
RUSSELL BUTLER
DAVID DEBOLD
JAMES FELMAN
RICHARD FULGINITI
SARAH GANNETT
HON. IRENE M. KEELEY
J. THOMAS MANGER
JESSELYN MCCURDY
PAT NOLAN
MARY PRICE
BRANDON SAMPLE
CHARLES E. SAMUELS, JR.
KENNETH W. SUKHIA
SALLY QUILLIAN YATES
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CHAIR SARIS: Good morning.
Welcome to the Sentencing Commission's hearing on whether to make this year's amendment to the Drug Guideline retroactive.

The Commission voted unanimously in April to reduce by two levels the base offense levels associated with drug quantity for all drug types.

We are now considering whether that amendment should be applied retroactively in whole or in part.

I want to welcome our witnesses.
We begin with Judge Irene Keeley, chair of the Judicial Conference's Criminal Law Committee.

We'll hear from senior officials from the Department of Justice and other distinguished witnesses including -- can you all hear me? Yes, oh good. Usually -- one
time I was just shouting and I said, "Can you hear me?" and everyone says yes and the mike wasn't on. So it was just a little embarrassing.

Our other distinguished witnesses include defense attorneys, probation officers, law enforcement officers, policy experts and advocates who have come from all over the country to share their thoughts on this important issue.

An overarching theme for our amendment cycle has been a focus on the statute, the Sentencing Reform Act at Section 994(g). And that statute says that the guidelines, and I'm quoting, "shall be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons as determined by the Commission."

So we made it a priority to work to reverse the trends of increasing prison
populations and costs.

In line with that priority the Commission this year decided to address prison costs and over-capacity by voting unanimously in April to reduce guideline levels in the drug quantity table by two levels across all drug types.

Many factors led us to adopt this amendment. Federal prisons are 32 percent over capacity and federal prison spending exceeds $6 billion a year, making up more than one quarter of the budget of the Department of Justice.

We also considered the changes in the laws and the guidelines over the past several decades, including the addition of many enhancements that help ensure that dangerous offenders receive long sentences and the creation of the safety valve which provides a strong incentive for low-level offenders to plead and cooperate.
The Commission carefully weighed public safety concerns and based on past experience, existing statutory guideline enhancements concluded that the amendment is consistent with the goal of protecting public safety.

The Commission was informed by our study that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 crack cocaine amendment with a control group of offenders who served their full times of imprisonment. We found no statistically significant difference in the rates of recidivism for the two groups of offenders.

We also relied on testimony from the Department of Justice that the amendment is consistent with protecting public safety and advancing law enforcement initiatives.

Today we consider an issue that is
more difficult. As required by statute the Commission is now considering whether the amendment reducing the guideline levels should apply retroactively.

Our public comment period on this issue is opened until July 7. And we have already received well over 20,000 -- in my notes I have an exclamation point -- 20,000 comments. And phone calls.

We look forward to receiving many more, including many from you today. We'll carefully review these comments and the data and consider all perspectives.

The Commission in making decisions about retroactivity considers factors including the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment and the difficulty of applying the amendment retroactively as the manual sets out.

We consider these factors broadly,
looking not only at the magnitude of the change and the difficulty of applying an amendment retroactively in an individual case, but also the magnitude and difficulty for the federal criminal justice system as a whole. We hope today's witnesses will give us guidance on these factors.

We will consider whether the amendment should be applied retroactively in a limited way. Our issue for comment raised the possibility of limiting application to offenders, for example, who received a safety valve adjustment, or as another example, offenders sentenced before the Supreme Court's Booker decision. And we welcome thoughts on these as well as other possible limitations.

Our Office of Research and Data has published a report on the estimated impact should the Commission decide to make the amendment fully retroactive. The Commission
estimates that 51,141 prisoners, currently imprisoned offenders would be eligible to seek a reduction in their current sentence if the amendment were to be made retroactive.

Those offenders currently have an average sentence of 125 months. If the courts were to grant full reduction possible in each case the projected new average would be 102 months, meaning a reduction of 23 months, or 18.4 percent.

The total estimated savings from retroactive application of this year's amendment would be 83,525 bed years over time.

Of course the sentence reductions were the amendment to be made retroactive would not be automatic. Would not be automatic. Judges would have to consider each offender.

The Commission estimates that 4,571 offenders would be eligible for immediate release in November of this year.
when the amendment will go into effect. Another 8,178 would be eligible for release within the first year, though 4,787 of these offenders would have been released within the first year even if the amendment had not been made retroactive. Eight thousand five hundred and thirty-five would be eligible for release within the second year, and the numbers start to decrease from there. The impact would vary from district to district.

So, we will hear first from Judge Irene Keeley as I mentioned on behalf of the Judicial Conference. Then from Quincy Avinger of the United States Probation Office in South Carolina.

We will hear from Sally Yates, United States Attorney for the Northern District of Georgia and Director Charles Samuels of the Bureau of Prisons.

We'll hear from a panel presenting law enforcement views, a panel on
practitioners' views and after a break for lunch a panel on advocacy groups' views.

Welcome to the witnesses and to the public. I'm sure we will have a lively and productive discussion.

So now let me introduce the other members of the Commission. Seated to my immediate right is Judge Ricardo H. Hinojosa. Judge Hinojosa is the chief district judge for the Southern District of Texas and has been a district judge on that court since 1983.

He has served on the Commission since 2003. While he currently serves as a vice chair of the Commission, Judge Hinojosa also served as the chair.

Next to him is Judge Charles R. Breyer. He is a senior district judge for the Northern District of California. Judge Breyer has served as a U.S. district judge since 1998. He joined the Commission last
year and serves as a vice chair.

Next to him is Judge William H. Pryor who also joined the Commission this year. He is a United States circuit court judge for the 11th Circuit Court of Appeals appointed in 2004.

Before his appointment to the federal bench Judge Pryor served as the Attorney General for the State of Alabama.

Next to him is Rachel Barkow, our other new Commissioner who came on last year. Commissioner Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law where she focuses her teaching and research on criminal and administrative law.

She also serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

Turning now to my left is Judge Ketanji Brown Jackson. Judge Jackson was
confirmed as the United States district judge for the District of Columbia last year. She has served as a vice chair of the Commission since 2010.

Next to her is Dabney Friedrich who has served on the Commission since 2006. Immediately prior to her appointment on the Commission Commissioner Friedrich served as associate counsel at the White House. She previously served as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant United States Attorney, first for the Southern District of California and then for the Eastern District of Virginia.

And where did he go? Oh, there he is. Way over to the left is Jonathan Wroblewski. Commissioner Wroblewski is the designated ex officio member of the United States Sentencing Commission representing the Department of Justice.
Mr. Wroblewski serves as Director of the Office of Policy and Legislation in the Department's criminal division.

So, we begin with Judge Keeley whom I mentioned before is the United States District Judge for the Northern District of West Virginia, chair of the Criminal Law Committee of the Judicial Conference.

She has been a district court judge since 1992 and served as chief judge of the Northern District of West Virginia from 2001 to 2008.

We're very pleased to have you. No time limit. No lights go off. We care very much hearing your views, views of the courts and thank you for coming.

HON. KEELEY: Thank you very much, Judge Saris, and good morning to you and to the members of the Sentencing Commission.

I would first like to thank you for the opportunity to appear before you today.
on behalf of the Criminal Law Committee of the Judicial Conference of the United States.

My testimony reflects the Committee's views on the retroactive application of the proposed amendment to lower by two most of the offense levels in the drug quantity table.

I would ask that my full testimony be submitted for the record as I will focus my remarks this morning on some key topics discussed by the Committee.

As you know, on March 11, 2014 I submitted a letter to the Commission on behalf of the Committee supporting the proposed amendment which would apply prospectively to defendants sentenced on or after November 1, 2014.

In that letter I cited the Committee's longstanding position that the sentencing guidelines should be set irrespective of any mandatory minimum to
account for the full array of aggravating and
mitigating circumstances, not just the
offense of conviction.

The Committee's support for the
two-level reduction in the drug quantity
table reflected the judiciary's continued
commitment to de-linking the guidelines for
mandatory minimums.

Last week the Criminal Law
Committee discussed at length whether to
support the retroactive application of the
proposed amendment. Before our deliberations
we solicited the viewpoints of judges in many
of the districts most affected should the
amendment be applied retroactively.

We also received input from the
Administrative Office of Probation and
Pretrial Services' Chiefs Advisory Group.

In our deliberations we wrestled
with many difficult issues including how to
balance fairness and public safety, and the
reality of significant financial pressures on the judiciary and other components of the criminal justice system.

After careful thought and significant evaluation the Committee voted by a large majority to support making the proposed amendment retroactive, but only if, first, the courts are authorized to begin accepting and granting petitions on November 1, 2014.

Second, any inmate who is granted a sentence reduction would not be eligible for release until May 1, 2015.

And the Commission, third, helps coordinate a national training program that facilitates the development of procedures that conserve scarce resources and promote public safety.

As I know you are aware the Criminal Law Committee has weighed in on the question of retroactivity of sentencing
guideline amendments several times over the past 20 years. But each occurrence is unique and requires a fresh review of the purposes and impact of the retroactive application of the amendment.

Here, the driving factor for the Committee's decision was fundamental fairness. We do not believe that the date a sentence was imposed should dictate the length of imprisonment. Rather, it should be the defendant's conduct and characteristics that drive the sentence whenever possible.

The retroactive application of the amendment in this case will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future.

In formulating its position the Committee also considered that the retroactive application of the amendment will further reduce the influence of mandatory
minimums on the sentencing guidelines and in
turn reduce the disproportionate effect of
drug quantity on the sentence length.

That said, the Committee is
acutely aware of the diminishing resources of
the Probation and Pretrial Services System
and of the very significant demands that will
be imposed on that system by the retroactive
application of the amendment.

In our extensive deliberations
about whether to support the retroactive
application of the proposed amendment the
Committee carefully considered whether the
courts and the Probation and Pretrial
Services System could effectively manage the
increased workload that would result while
protecting public safety.

We are mindful that the judge
relying on the investigation of the probation
officer plays an important public safety role
when considering whether to grant petitions
for sentence reductions.

As Judge Reggie Walton stated in response to questions from the Senate Judiciary Committee in 2008 the Sentencing Commission's policy statement governing retroactive application of the guidelines explicitly directs judges to consider the sentencing factors outlined in 18 United States Code Section 3553(a) including the nature and seriousness of the danger to any person or the community that the offender might pose, and the offender's post-sentencing conduct such as institutional adjustment while in prison.

Judge Walton was confident that his fellow judges would be deliberative and thoughtful in making individualized determinations of eligibility in accordance with their mandate.

However, judges can only be deliberative and thoughtful if they are able
to rely on careful and thorough evaluations by probation officers.

These evaluations consist of recalculating the offense level, investigating the inmate’s progress and behavior while in custody, assessing whether an inmate who would be eligible for immediate release has a viable release plan, and if necessary, recommending any new conditions of supervision such as placement in a halfway house or in-home confinement that may be needed to promote effective reentry.

In addition to relying on the probation officer’s evaluations judges weighing the effect of a sentence reduction on public safety must consider the availability of supervision resources including staffing and treatment.

Unfortunately, the federal judiciary has seen a significant reduction in staffing of probation officers in recent
years. And it is unclear to us if additional resources will be made available to keep pace with any new workload.

Notably, in the Probation and Pretrial Services System staffing and workload are moving in opposite directions.

In the past 10 years staffing has declined 5 percent while the post-conviction supervision caseload has risen 19 percent.

Further complicating matters is the intensifying criminogenic profile of the offender population which has worsened in terms of prior criminal involvement, level of culpability in relation to their federal crimes and prevalence of mental health and substance abuse problems.

The release of thousands of additional offenders to supervision when the system is already dealing with diminished resources and an increasingly risky offender population raises several public safety
At our meeting last week the Committee consulted with the chair of the Chiefs Advisory Group which had surveyed fellow chiefs across the country to determine their ability to absorb the workload that could be expected if they were to manage should the amendment be made retroactive. Candidly a majority of these chiefs responded that without additional resources they would not be able to effectively carry out their duties if they saw a surge in workload next fiscal year.

The Chiefs Advisory Group noted that while many chiefs have funding available in the current fiscal year budget they are reluctant to bring on new staff until more information is available about the amount of funding they can expect to receive next year.

The chair of the Chiefs Advisory Group also reported that if there were
assurances that supplemental funding would be available next year for chiefs who would need additional staff to manage the expected workload that chiefs could begin hiring this year.

Bringing on new staff as soon as possible would help with any workload increases expected next year, especially since it may take up to six months to fill an officer position due to the requirements surrounding matters such as recruiting, testing, interviewing and completing pre-employment medical examinations and background investigations.

The Committee also heard from the chief judges of many of the districts that would be most affected should the amendment become retroactive.

The chief judges echoed the concerns raised by the chief probation officers including the concerns that the
Commission's impact analysis understates the true workload that the courts would need to manage since many inmates who would be ineligible for a reduction in their sentences would nonetheless petition the courts for relief.

The Commission's own data confirms this problem, demonstrating that 67 percent of all of the defendants who had petitions denied in connection with the 2007 crack cocaine amendment were found to be ineligible for sentence reduction under 1B1.10.

In arriving at its recommendation the Committee also revisited its past positions. In particular, its position from 2007 to support retroactivity of the crack cocaine amendment.

At that time the Committee noted, and I quote, "One possible countervailing consideration to this conclusion making the crack amendment retroactive is the
administrative burden upon the courts that
would be associated with re-sentencing crack
offenders whose sentences have previously
been determined.

"The Criminal Law Committee
believes that in evaluating such
considerations an extremely serious
administrative problem would have to exist to
justify not applying the amendment
retroactively." Unquote.

The question before the Committee
last week was whether the current fiscal
climate coupled with the sizeable workload
expected on November 1, 2014 results in an
extremely serious administrative problem that
would jeopardize public safety thus
counseling against supporting the amendment.

At first blush it would appear
that retroactivity at this time would result
in an extremely serious administrative
problem that could jeopardize public safety.
However, understanding the magnitude of this decision the Committee considered ways to avoid or to mitigate these problems and concluded that the best solution would be to give chief probation officers an assurance that they will have the resources they require and encourage them to begin hiring the staff they need to manage the expected workload.

Unfortunately, that is not an assurance that this Committee can give to the chiefs at this time. Much is still unclear about the Fiscal Year 2015 appropriation levels for the courts.

We expect to begin the new fiscal year under a continuing resolution and the interim financial plan that will determine how resources are distributed among the various court units and programs has not yet been developed.

Because we cannot guarantee that
sufficient resources will be available on November 1, the Committee has determined that the only way to mitigate the extremely serious administrative problems would be to delay the date that the amendment becomes effective until May 1, 2015, but to authorize the courts to begin accepting and granting petitions on November 1, 2014.

This delay in releasing inmates would allow the courts and probation offices across the country to, first, manage the influx of petitions and then, once the surge of petitions has been addressed, pivot available resources to deal with the increase in the number of offenders received for supervision.

In the Committee's opinion requiring the courts and probation offices to manage more than 51,000 petitions and begin supervising thousands of offenders at the same time would result in substantial
reductions in services that would jeopardize public safety.

The Committee recognizes that this delay will result in some inmates not receiving a reduction in their sentence. It presumes that many of those inmates would already be close to their release dates and are either already or will soon be designated to residential reentry centers or placed on pre-release home confinement.

In addition to recommending that no inmate should be released until May 1, 2015, the Committee would recommend that the Commission together with the Committee, the Administrative Office, Bureau of Prisons, the Department of Justice and the Federal Judicial Center develop a training program to facilitate close coordination between probation officers, Bureau of Prisons staff, Assistant United States Attorneys, assistant federal public defenders and the courts.
Similar programs were developed in connection with the 2007 amendment and proved helpful in streamlining procedures, prioritizing cases and allowing for careful evaluation of inmates' petitions.

There are several reasons why such a program would be warranted should this amendment be made retroactive.

First, this amendment could have an impact on districts that were not significantly affected by the crack retroactivity. These districts may not be prepared to manage the volume of workload associated with this amendment and a national training program will assist in their preparation.

Also, many of the staff who were responsible for overseeing the implementation of the retroactive crack amendment are no longer with the courts, including many chiefs and deputy chiefs who have since retired.
New staff, including unit executives will benefit from a program that will help them plan accordingly.

Finally, because the fiscal climate is different than it was in 2007 local procedures may need to be refined further to address changes in staffing or availability of resources. And the national program may be a useful way to exchange ideas on best practices.

In conclusion, the Committee on Criminal Law appreciates the opportunity you have provided to share its views with the Commission about this important issue.

While we support making the amendment retroactive we are concerned that the number of cases at a time of diminished resources may jeopardize public safety.

We believe that the delay in the effective date that we have recommended will help the courts and probation offices manage
the surge in workload while we try to secure additional resources.

We are also confident in the ability of judges to discern suitable candidates for sentence reductions and that through close coordination between staff and the judiciary and in the executive branch this important amendment can be implemented effectively without putting public safety at risk.

We understand the many competing views that the Commission will consider and I offer the Committee's continued assistance as you deliberate. Thank you very much.

CHAIR SARIS: Thank you. I'll open it up for questions.

I'll start. So I know that this affects different districts differently. Some have small numbers, some have big numbers.

Is there a way of sharing
resources within the judiciary as a whole?

HON. KEELEY: Directing that to probation and pretrial resources. We've looked at that question. We considered it carefully. And at this time I think the realistic answer is that's highly unlikely because of the significant staffing reductions and increasing caseloads that we have experienced across the judiciary.

Nevertheless, we certainly have that as a consideration for implementation if this is made retroactive.

CHAIR SARIS: Thank you.

VICE CHAIR JACKSON: Hi. I'm interested in the aspect of your testimony that says that the judiciary's position in terms of its driving factor behind its views is fundamental fairness. And I wondered if you could elaborate on that a little bit.

HON. KEELEY: All right, thank you. Yes, the general sense of our Committee
was that fairness was the driving factor in our voting. That we were obviously very aware of the number of factors that the Commission considered, but if this is going to be made retroactive we believe that fundamental fairness required or strongly suggested that the amendment apply to all currently incarcerated inmates.

If the reasons that the amendment is being reduced suggest that the former amendment needed to be amended -- the former guideline needed an amendment then there didn't seem to be a logical reason why those who are currently incarcerated shouldn't benefit from that same reasoning.

VICE CHAIR JACKSON: Even post Booker though? I mean, even the defendants who were sentenced post Booker.

HON. KEELEY: Well, of course as the individual judge considers these cases I think we are going to find that post Booker
and post Gall many of these inmates may not be eligible for the two-level reduction.

For example, in districts with fast tracking the variance may have already taken the guidelines below what the new guideline would be. And as I understand the Commission's viewpoint on that they would not be eligible for further reductions.

So I do agree that many of these inmates may not be eligible. But I believe the Commission's own numbers reflect that assumption, correct.

CHAIR SARIS: Thank you. Judge Hinojosa and then Judge Barkow.

VICE CHAIR HINOJOSA: Judge Keeley, a follow-up on the fundamental fairness issue here.

You know, Congress, it's not unusual to lower penalties within the statutes themselves. And I would say they have been very reluctant to apply those
retroactively, including in crack cocaine which I think there's common agreement all over the country from all segments that the ratio there was inappropriate and unfair.

And so in light of the Booker decision as has been pointed out and Congress in facing the fundamental fairness issue has been very reluctant whenever penalties are lowered to apply their statutory authority with regards to retroactivity do you think that that's something the Commission should consider in a situation where we are in the post-Booker world with regards to this particular amendment?

HON. KEELEY: Well, certainly, Judge Hinojosa, that should be considered as our Committee did. And our discussion was very, very thorough on that issue.

But at bottom it was the view of a large majority of our Committee that retroactivity was the fair way to approach
this guideline amendment.

CHAIR SARIS: Commissioner Barkow.

COMMISSIONER BARKOW: Thanks so much for your testimony. It's been very helpful.

My question is about the lag time that you suggest.

HON. KEELEY: Yes.

COMMISSIONER BARKOW: Did the chiefs of probation indicate that that lag time would be sufficient for them to address the public safety concerns that they had previously brought up as suggesting would be possible?

I mean, was it -- were you able to go back and kind of re-poll them or get an assessment from them that that would be a sufficient amount of time?

HON. KEELEY: At our meeting we did have the chief of -- or the head of the
Chiefs Advisory Group. For short-term purposes we call them the CAG so if I call them the CAG you'll know who I'm describing.

We did not have time to leave our meeting and go and poll them again. But it had been anticipated because of the way crack amendments had been implemented that we knew we would need more time and the chiefs had been generally questioned on it.

There is no perfect world here. But six months in the view of the members of our Committee after consulting with the chiefs and talking to also the staff in the Administrative Office of Probation and Pretrial Services it seemed to be a reasonable time frame that would allow us to deal first with the petitions and get over that workload, and then take the new supervisees who would be coming out.

We realize that's not a perfect solution, but it seemed to be the best balance
that we could achieve for the enormous stresses that our system is already experiencing.

And you know, obviously my remarks reflect the great confidence that I and all the judges around the United States have in our Probation and Pretrial Services officers. And we believe that not only are they willing to do this with recognition of the challenges but they're very able to do it.

COMMISSIONER BARKOW: Thank you.

CHAIR SARIS: Judge Pryor and then Judge Breyer.

COMMISSIONER PRYOR: Judge Keeley.

HON. KEELEY: Good morning.

COMMISSIONER PRYOR: Good morning. I wanted to ask you about fundamental fairness too. I want to return to that.
It seems to me that fundamental fairness could be viewed in a couple of ways here. The common law doctrine of abatement provided that if a penalty is reduced for a criminal violation that the offender should benefit regardless of the date of sentencing, work forward and backward.

But that presumption changed in American law about a century ago by virtue of the Savings Statute that Congress and a number of states enacted which reversed the presumption.

And the presumption of fundamental fairness that they adopted was that for those offenders who committed an offense understanding that the higher penalties were in place, they should suffer the higher penalties.

And those who committed an offense at a later date after the law had changed and with lower penalties should be the only ones
to benefit from those lower penalties.

To what extent was that perspective considered as a matter of fundamental fairness by your Committee?

HON. KEELEY: I can't say that we considered it in exactly that context. However, the Committee looked at this from the perspective that Congress has given this Commission the power to make amendments such as this retroactive.

And therefore I believe that we - our discussions in a sense actually assumed that the reasons to consider making this retroactive would be considered in a broader context and would take into consideration a number of factors.

In other words, I think I would say that we didn't necessarily consider that the Savings Clause precluded the application of retroactivity here. And our consideration of fundamental fairness went to probably more
-- issues that were more concerned with viewing the impact on this, the view of the judges that if the system can handle it historically we have supported retroactivity.

And our wrestling was really not around that issue so much as it was around how are we going to make this work effectively so as not to impact public safety in a negative way.

COMMISSIONER PRYOR: So, do you read the --

HON. KEELEY: I will say we had one member of our Committee, if I may, who I think would agree with you entirely. I shouldn't say agree with you, but who did express the view that retroactivity was not something that that member of the Committee could support from a perspective of jurisprudential thought as opposed to other considerations. That it's not necessary.

COMMISSIONER PRYOR: So, do I
understand, you read the authority that
Congress gave the Commission to make
guideline amendments retroactive to work as a
presumption --

HON. KEELEY: No.

COMMISSIONER PRYOR: -- that
amendments should be retroactive? No.

HON. KEELEY: No. No, not at all.

COMMISSIONER PRYOR: There's
really not a presumption either way, as I
find.

HON. KEELEY: No, but I believe
there's an authority to consider reasons why
it ought or ought not to be, correct?

COMMISSIONER PRYOR: Right.

HON. KEELEY: Yes.

COMMISSIONER PRYOR: Right. And
well, what I was wondering, then, is if there
are two competing views of fundamental
fairness that have been at work in American
law since the founding of the Republic, why
choose one over the other? Which one is it?

How should we choose one or the other? This isn't like the crack amendment, right, where we were reducing what everyone recognized was an unfair disparity. What should guide us in choosing one view of fundamental fairness over another?

HON. KEELEY: Well, I will agree that there's a lack of what we described in 2007 as a corrosive effect of the disparity in the crack powder sentences. Our general sense of fairness on this one considered the factors I believe this Committee is looking at, the impact on the inmates, including reducing overcrowding in the Bureau of Prisons.

The fact that, if made retroactive there would be no -- history tells us that this would be consistent with the prior position that our Committee and the judiciary had taken. And as well, we believe that we
could moderate any negative impacts on the system. And if the system could handle it, and it was consistent with the reasons given for the amendment to begin with, there was no compelling reason not to make it retroactive.

Had public safety been an issue that could not be managed we probably would not have recommended this, okay? But, the purpose of the amendment in total and our historical policy of supporting retroactivity, where the administrative resources can handle it, was the -- I think would summarize the viewpoint of the Committee in our deliberations.

CHAIR SARIS: Thank you. Judge Breyer.

VICE CHAIR BREYER: First, Judge Keeley, let me thank you and your Committee for addressing this so efficaciously. It's a difficult subject and I think that your report is very thoughtful, the Committee's.
When we get into discussions about fundamental fairness which has, as you have reported, motivated the Committee in its recommendation, I'm always concerned that because I have a particular view of fundamental fairness, another person may have a different view. And that view may be not only defensible, it may even be superior to my view.

So, I'm asking the question as to whether or not, in your Committee's deliberations, one of the factors was that the individual judge who will be examining the issue as to whether or not to give retroactive application may take all those considerations into effect in adjudicating his or her response to it.

That is, as I understand it, in testimony that your Committee contemplates, that while this Commission may take a position with respect to retroactivity, that is, it
may, as a policy matter, advise judges that
they can apply it retroactively, we're not
mandating it.

HON. KEELEY: Oh no, obviously
that's not --

VICE CHAIR BREYER: And any judge
who looks at it and says, look, you know, I
have this particular view of the law, and I
have this particular view of the facts that
gave rise to this particular sentence. And
in light of all of these considerations I
choose not to adjust the sentence. That's
one of the factors -- is it one of the factors
that your Committee considered in making its
recommendation?

HON. KEELEY: Yes, of course.
And we were informed by the manner in which
the crack cocaine amendments were made
retroactive in 2007. Indeed, we on the
Committee recognized that this is, and as I
said in my remarks, this is an individual,
judge by judge, decision and the burden of
these initial petitions falls on us.

We receive the information from
Probation and Pretrial Services, but at the
end of the day every district judge in the
country is going to be required to consider —
- if it's made retroactive, will be required
to consider whether retroactivity is
reasonable and appropriate in the individual
inmate's case. And that will be a carefully
considered decision that may differ depending
on the judge and the inmate.

One of the comments we heard, from
a number of judges, was about what happened
to finality. And I'm sure that's an issue.
Because, didn't we already sentenced this
person. And certainly I would be less than
candid if I didn't acknowledge that there was
not unanimity within the judiciary on this
question.

Nevertheless, the judges that did
respond were essentially most concerned about the administrative issue. Fundamental fairness was not a significant factor for those, in my opinion, in what I read from the responses, it was not a fundamental concern of those judges who were worried about retroactivity, were outright opposed to retroactivity.

It was far more likely the stress on the system that is already stressed. The lack of resources in a system where we have in the last 10 years, as I said 5 percent fewer staff -- lower staffing I should say, and 19 percent higher caseload on the post-supervision side, or post-conviction, post-release side with supervision where we have an increasing criminogenic risk.

So, were there judges who were concerned about are we throwing finality out? What about the principle of the Sentencing Reform Act? No. There were judges who were
concerned about that. On balance, however, that was not a concern that we heard over and over again. What we heard over and over again was the one we tried to address here, which is the administrative and public safety matters.

CHAIR SARIS: Thank you.

Commissioner Friedrich?

COMMISSIONER FRIEDRICH: Judge Keeley, thank you for your testimony today. The Senate Committee report that discussed this extraordinary power the Commission's been given to make amendments retroactive talked about the unusual cases in which reduction could be justified. And it talked about extraordinary and compelling circumstances.

And as I understand your discussion of fundamental fairness, what you're saying is the Committee thought it was important, critical that offenders be put on
the same footing as defendants who commit the same crimes in the future. So regardless of the date of the sentencing, they should be treated alike.

HON. KEELEY: Right.

COMMISSIONER FRIEDRICH: But of course, that logic would apply to any amendment the Commission ever did that lowered penalties. So I'm curious. You also mentioned in your testimony the Committee's longstanding position that the Commission should de-link the guidelines from the mandatory minimums. I'm curious as to what extent that was one of the driving forces behind the Committee's recommendation. Given that you've always, as far as linking the guidelines, been in that position.

HON. KEELEY: Yes, certainly that was a consideration of the Committee. And because it's such a longstanding principle position of not just our Committee, but of
the judiciary we didn't linger long on it.
It was just so fundamental, candidly. And we
were aware as well of the other matters,

systemic matters that we believed had led the
Commission to its decision to recommend the
amendment to the guidelines.

We looked at that and on balance,
when we considered all of it we -- our
perception was that, were this not made
retroactive, there could be enormous systemic
consequences. And that you all would
obviously carefully consider those as we did.

And that we felt that, again, if
the administrative and public safety aspect
of this were manageable that the overarching
fairness of applying this guideline to all
currently incarcerated inmates, who would
otherwise be eligible in the view of the
individual judge, was the right decision.

COMMISSIONER FRIEDRICH: Thank
you.
CHAIR SARIS: Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you, Judge Saris. And thank you, Judge Keeley, for being here and also for inviting the Justice Department to speak with your Committee. I heard -- I want to talk about the budget constraints very very briefly. I read your testimony and then I listened carefully today. And I hear two pieces to your plan, to the Committee's plan to address the budget constraints. And I just want to make sure I'm hearing this correctly.

The first is a delay. And then the second you've said, I think both in your written testimony and here today, that there would be also an attempt to seek new resources.

HON. KEELEY: Yes.

COMMISSIONER WROBLEWSKI: Of course, what happens if those resources are
not forthcoming? What should the Commission do? The Commission is going to be voting in July. What happens then? And given the two-year budget agreement that Congressman Ryan and Senator Murray negotiated six or eight months ago, and the levels that are likely to be in place which I think will be roughly the same for '14 and for '15. How should the Commission address that, given that uncertainty that you're putting forth?

HON. KEELEY: Well, obviously our Committee wishes that you could write a check.

(Laughter)

CHAIR SARIS: We do too.

HON. KEELEY: Short of that, obviously, what our Committee wishes is that you will consider that we carefully weighed this and that we have an opportunity, as Judge Hinojosa recognizes, to apply to the Budget Committee of the Judicial Conference with regard to this issue should it be -- for the
need for resources should the amendment be
made retroactive.

Whether there is a need to ask
Congress for an anomaly to the '15 budget I
don't know. I'm not a budget expert. I
don't know how it would actually work. But
I know that we have alerted the budget
staffing within the Administrative Office
that we have taken this position and made this
recommendation to the Commission, that we
will begin discussing with them what we can
possibly do to alert Congress to this and to
our needs on the issue of public safety.

Let me go back and say one other
thing. Because of the action the Commission
has already taken inmates are going to come
out with increasing frequency, all right?
There are going to be inmates coming out more
frequently than otherwise would have
happened. We have those stresses to deal
with anyway. The numbers will be greater if
it is made retroactive, and we looked at that. But it was not an either-or situation. We are going to have to deal with the consequences of the decisions amendment -- of the Commission's amendment in any case.

And that it might be a heavier burden if it was in support of fundamental fairness was something that we felt was the judiciary's burden to bear, and that we can do it. And we will do it, with the understanding that it will, as I said, it will take all branches of government to address the question of public safety and make sure that as these inmates reenter the community that they come out with a plan, with adequate supervision and with adequate programming.

You know, we know that the two most important factors benefitting an inmate on reentry are a new social network. They don't go back to the former criminal behavior with the same population that they engaged in
before. And secondly, that they have a job
that will provide them with the ability to
support themselves.

There is pending legislation in
Congress, as I'm aware, that attempts to
address, among others these two issues. The
Probation and Pretrial Services staff will
have to deal with these questions should that
legislation pass. Therefore, it informed our
Committee's judgment that these were all
issues that we have to deal with in pretrial
and probation as a matter of our mission, not
merely as a matter of retroactivity here.

So it's a far broader question
that you're asking, and Congress is aware and
has always been very -- thankfully very
responsive to the concerns of public safety
and to the increasing caseload.

All of this demonstrates that
there is no part of our criminal justice
system that isn't impacted by another part of
it. It's a cohesive whole and it is the --
I think the only rational way to deal with it
is with that viewpoint. Whether it's
Director Samuels, from whom you'll hear
later, or the executive chief probation
officers from the District of South Carolina
you are going to hear that we are a community
of interest and we have to deal with this.

CHAIR SARIS: Thank you.

VICE CHAIR HINOJOSA: Yes, Judge
Keeley. I guess it's a two-pronged question.
I obviously come from one of the districts
that would be very affected by this. And
there's two Texas districts -- all four Texas
districts would be pretty high up on the list
and two of them extremely high on the list,
one and two on the list.

And it appears to me that the
feeling of the judges in those districts in
visiting with them and hearing from them,
sometimes unrequested hearing from them --
VICE CHAIR HINOJOSA: -- is that they do not have a strong feeling on the public fairness issue, as to that this particular reduction is a public fairness issue, like they did with crack. That a serious concern about retroactivity not because of the volume of the work that it would put on them but because of the fact that the reasoning behind this amendment is very different than it has been with regards to crack.

The other issue that those two districts face, many of us have grown up on the border with Mexico. And there is no doubt that a percentage of these, maybe one quarter to one-third of the defendants in these cases, if released, are going to be deported. They eventually will be deported when they finish serving their long prison term or their short prison term, but in due course.
And anybody who lives on the border knows the violence that exists in Mexico and the number of killings that happen on a regular basis as well as kidnappings. And that these defendants would be released — as that country struggles within their own resources to grab a hold of their criminal justice situation they would be receiving individuals much sooner and quicker than would normally be the process.

And giving them less time to grab a hold of a very difficult situation in their countries with Mexico and Central America, for example. And the question is, did that play into your thinking with regards to your vote on this matter?

I mean they don't have the probation system that we have. Eventually these defendants will be going back to their country of origin, but at the same time many of them will be tempted to come back, and
maybe quicker, because of the fact that many of them have families on this side of the border. And we will see them as illegal reentry cases, to some extent, sooner than one would normally see them. And I guess the question is was that discussed within the Committee.

HON. KEELEY: The Committee was well aware of the unique situation in the southwest border states, particularly in Texas with the four districts in Texas leading the list for the number of cases to be managed if this be made retroactive.

To the question of what would happen after inmates are released and deported and then coming back, we did not address that in depth. We recognized it. We knew it was an issue. Again, we saw this as an issue that crosses the branches. And that the executive branch, the legislative branch, our branches that are aware of this and need
to address it as they view it to be appropriate.

The judicial branch has to deal with the realities of the situation as you're pointing out. Did we think we could solve that problem? Whether this was made retroactive or not, no. So, I mean I guess at bottom did we think retroactivity was going to have such a dramatic impact that it should be the reason why we would not support retroactivity? Judge Hinojosa, we did not specifically address that question.

CHAIR SARIS: Thank you. Judge Breyer?

VICE CHAIR BREYER: I'd like to return to fairness again, because I think this discussion highlights the fact that people view fairness very differently based upon their experiences and other considerations. Obviously one kind of fairness, I think one of the Commissioners mentioned, is
that with the crack powder disparity it seemed appropriate to have it retroactive, because of the inappropriateness of the high levels of disparities between the drugs. And that seemed to be fair then to apply it retroactively. That's one kind of fairness.

Another kind of fairness is that having decided that sentences for drug offenses are simply too long, and having looked now at defendants who are sentenced a particular way which is less stringent, or less punitive than they were before, some people could look at that and say therefore it's unfair to have people sitting in prison who would get a lighter sentence if in fact they had committed the same offense the same way today. That's another way of approaching fundamental fairness. My question is did that factor, that approach at all play a role in some judges' decision or in the Committee's role as a whole.
HON. KEELEY: Yes, as I believe I stated in my comments that it absolutely did. When we looked at it, we realized that the statement of the Commission seems to be on the amendment there are compelling reasons why these drug guidelines even in the post-Booker age ought to be lowered by two levels. That if that was the Commission's view and wisdom on this issue, other than workload or the principles articulated by Judge Pryor, why would you not make this retroactive? What would -- we know from the recidivism studies post-crack cocaine that there's no significant difference in the outcomes for those inmates who have been released under crack cocaine reductions.

So we're not expecting -- even though we have stresses in the system, even though we see an increasing criminogenic risk profile it's not because of retroactivity, it's not because amendments were made
retroactive. This is the offender population with whom we are working.

And the solutions to that -- the problems of that population don't rest in the longer criminal sentences that this Commission has now decided are no longer appropriate for drugs, but rather in a proper programming and supervision to address the social networks and the employment issues that we know are critical to improving outcomes on supervision.

So, fairness, I come back to it again. It's a very complicated question. It involves many factors, and a larger view of the impact on our society, that we felt was appropriate to consider, if the resources are available.

CHAIR SARIS: I wanted to ask for a second about public safety. I understand that you didn't have the Department of Justice's statement or testimony at the time
HON. KEELEY: We did not.

CHAIR SARIS: -- that the Criminal Law Committee met and had this discussion. Did anyone talk about the possibility of a limited form of retroactivity, along the lines of what was recommended, for example, not having people with guns, or not extending it to people who had supervisory roles, aggravating roles. Was that part of the decision-making at all?

HON. KEELEY: We did look at that and, Judge Saris, we rejected those, essentially the points on the spectrum for the reason of fairness, that we couldn't find or articulate a reason why you would look at pre-Booker or pre-Gall and say we'll only apply it to these other than the numbers.

But if you look at those pre-Gall numbers, and I believe the Commission provided us with those, there were some very
long sentences that would be -- so those 
people would be the sole beneficiaries of the 
reduction or the reduction from the 
retroactivity. Why would you not apply this 
across the entire population affected by 
this?

So there to me you're looking at 
an issue of -- a moral issue, a fairness 
issue. If you're going to apply it to some 
who arguably, are maybe the more dangerous 
because of the length of the sentences, why 
would you exclude those with shorter 
sentences, a sentence under guidelines that 
we have decided to change. Because you 
believe that they -- you now have considered 
and concluded that they're no longer 
appropriate in length.

COMMISSIONER PRYOR: Of course, 
the Committee, I guess, really did adopt a 
proposal that would be limited retroactivity. 
Because the Committee's recommendation is
there be a timing delay, right? That some offenders would not -- some inmates would not benefit, so for them there would not be, effectively, retroactive application.

HON. KEELEY: Judge Pryor, if I may respond to that. In my remarks I did recognize that likely those inmates who would not walk out on November 1 are already in the BOP's program for community reintegration, right, or a halfway house, or a community confinement center, or some form of pre-release home detention. And I'm sure that Director Samuels will be addressing some of that.

But candidly, while we didn't have the exact numbers in front of us, because we could not in the time we had to deliberate this, from what we know from Probation and Pretrial Services we're aware that most of those inmates would not be in the prison itself during this delay time, or most of them
would not be. So if there is some aspect of
--

COMMISSIONER PRYOR: Does that mean that they are lower-level offenders?

HON. KEELEY: No, not necessarily. It just means as their release date approaches --

COMMISSIONER PRYOR: Right.

HON. KEELEY: -- the Bureau of Prisons has a program for moving them out into the community in stages.

And this is wanted to avoid with this six-month delay, not only the opportunity to get through the petitions and to get staffing geared up to deal with this, but also to make sure that there are not inmates who are released on November 1 with no programming, with no plan for reentry. Because that would be -- that would almost guarantee a failure.

COMMISSIONER PRYOR: Right.
Well, if we're going to make those kinds of tradeoffs why wouldn't we make the tradeoff one of choosing lower-level offenders versus higher-level offenders? If we're going to make a tradeoff one way or another why wouldn't that one make more sense?

HON. KEELEY: I could only tell you that, in the view of our Committee, it did not, and we considered it. It's -- really the Committee viewed this as, if you will, an all-or-nothing in that respect. We didn't see any --

COMMISSIONER PRYOR: But you didn't choose an all-or-nothing proposition. You chose --

HON. KEELEY: Well, I would respectfully disagree with you. I think it's an all-or-nothing proposition as to the concept and in the implementation, because of the realities. There will be some who will not get the benefit on November 1. That will
COMMISSIONER BARKOW: Can I ask you a question? I know that you didn't have a chance to see DOJ's proposal, but there's one thing about it that's related to something you did talk about which is that assuming we did any kind of retroactivity, it sounds like it's not so finely calibrated among those who would ask for it, or folks are going to apply whether they're eligible or not.

And so my question is about the Department has suggested we limit it to certain types of people, certain criminal histories and whatnot. How did the judges, in terms of just a front-level workload analysis for the judges and probation is that something that can be easily screened by them? To go through and say, okay, these folks don't meet the criteria.

Or is it in fact, that is just as much workload as if you had a blanket
retroactivity decision and the judges were looking case by case themselves to decide is this someone who should be let out? I'm just trying to get a handle on how much time that Department proposal would actually save.

HON. KEELEY: Thank you. I don't believe it would save any. I don't think that there's any difference in the way in which we would look at these petitions, the amount of time and effort that would go into a team approach as we had adopted under the crack amendments to reviewing these petitions.

And again, one of the driving factors there will be that inmates who are not eligible will not realize that, or will reject that and therefore will petition. And we will be -- and this was a concern of many chief judges. We're going to have to deal not with 51,000 nationally, but rather many more, because these petitions will come in.
But I said to you no matter how you try to limit it that will happen anyway. All right? And that is one of the -- that's just a reality. We know that from the crack.

CHAIR SARIS: Thank you very much. I know how much work your Committee put into this, with your surveying all the probation offices in the heavily impacted districts. And thank you for your input.

HON. KEELEY: Thank you very much for listening. Thank you.

CHAIR SARIS: Thank you. I'd like to introduce -- I'm hoping I'm saying this correctly, O. Quincy Avinger.

MR. AVINGER: Correct.

CHAIR SARIS: Junior. Deputy Chief U.S. Probation Officer from the U.S. Probation Office for the District of South Carolina. Quincy Avinger is the Deputy Chief United States Probation Officer, a position he's held for over 20 years, including when
the Commission's two prior amendments regarding crack cocaine offenses were made retroactive in 2008 and 2011.

Before joining the Probation Office he was a program coordinator of the Parole and Pardon Services at the South Carolina Probation Department.

Now, I want to make it clear here that Judge Keeley was speaking for the courts, and Probation Officer Avinger is here because he is going to share his experiences with how his district procedurally handled the various instances of retroactivity in order to inform us about what worked well, what might not have worked well. But he's not here to state policy for the courts. So, thank you for coming.

MR. AVINGER: Thank you, Judge Saris and Commissioners of the Sentencing Commission. Again, my name is Quincy Avinger. I have been a U.S. Probation Officer in the
District of South Carolina since 1991, and served as Deputy Chief since 2003.

It's a privilege to be here today at the Commission. South Carolina has had strong ties to the Commission since its inception, and I can assure you that few places are held in such high esteem by United States probation officers, especially pre-sentence investigators as the United States Sentencing Commission. Please know that we support the Commission in its continued efforts to provide a sentencing system that's still striving to achieve the original objectives of honesty, uniformity and proportionality.

I'm here before you today to discuss some of our experiences implementing retroactive application of Amendment 706 addressing the longstanding 100 to 1 ratio of crack cocaine to powder cocaine. The preparation of pre-sentence investigations
and recommendations are a task that's taken very seriously by the United States Probation Office.

In 2007, the initial discussion on possibly having to re-sentence up to one thousand offenders in our district created a high degree of anxiety and many questions as it did in other districts as well. To address these concerns several chiefs coordinated two districts to host events to determine the practice on it. I had never been invited to the summit before.

On January 2, 2008, two weeks prior to our scheduled summit, I was forwarded a report generated by your office that listed 753 offenders that had been sentenced in South Carolina that would actually be impacted by the amendment. Seeing that list for the first time gave me pause for several reasons. First, it became very personal at that point. As a native South Carolinian, these were our
citizens and many of them had been in prison for a long time. Their demographic was well known. It had been observed over and over again and again.

To reflect on our attitude at the time, it's important to know that it did not take this guideline amendment for many of us to recognize this group of offenders had been dealt with very harshly through the years. While not deliberately intended, this may have been especially true in South Carolina and in the Fourth Circuit.

The District of South Carolina, like many districts of the Fourth Circuit had a history of strictly applying and following the sentencing guidelines, especially during the nineteen nineties and the early two thousand era. Absent general departures for substantial assistance, there were very few, if any, reduced sentences for this large group.
Second, I felt we had a lot more offenders out there than the 753 that appeared on that initial list. South Carolina had been sentencing hundreds of crack dealers since the inception of the guidelines. A week later, we received another report listing the names of offenders potentially affected by the amendment. This report was prepared by the Administrative Office. Our district had over 1,500 names on this list.

During 2007, the previous year, our district had conducted almost 1,200 pre-sentence investigations. Understanding and supportive of the amendment the idea of resentencing 1,500 offenders was a daunting thought. We certainly needed some direction in sorting it all out.

A week later, on January 18, our chief judge at the time, David Morton, Public Defender Parks Small, Chief United States Probation Officer David Johnson, myself and
Assistant U.S. Attorney Nancy Wicker attended the first practice summit in Charlotte, North Carolina. It was also attended by others in similar positions from other districts that were going through a similar situation.

The summit was very well organized and helpful, and included presentations from a member of your staff, Bureau of Prisons, U.S. Marshal Service, a panel of judges and a separate panel of probation officers.

Our district did not finalize a plan at the summit. We did agree that we would work together to establish a streamlined process that would ensure cases were addressed in an efficient manner. The concerns of having an automated process in addressing these cases while continuing to address our normal workload were on a lot of our minds.

Beyond addressing the process, on the whole coming out of the summit two
questions came to the forefront for us. The first was were each of these sentencing adjustments going to require a court hearing? The second question was were the offenders going to be able to re-argue previously disposed objections?

By answering the second question first, we knew they were not going to be able to re-argue prior objections, the first question became easier to answer. A hearing is not going to be necessary, at least in South Carolina. Circuit court cases later affirmed this practice to be allowed.

The group as a whole agreed with the intention of the amendment. The common sentiment was the relief that was due to many was appropriate and deserved. Through further discussions things started to fall in place. Several agreements were made to aid the process.

The Public Defender's Office
volunteered to represent and contact every inmate sentenced in South Carolina that may have been impacted by the amendment. This was a tremendous gesture and task on their part. They sent letters to thousands of offenders in the Bureau of Prisons to let them know that they would be represented and that no other action would be required on the part of the offender.

The U.S. Attorney's Office, which for years had its bread and butter being crack cocaine prosecutions, also came forward and agreed not to oppose new sentences that were at the low end of the newly established guideline range. With few exceptions, they did not object to sentences of this group being adjusted downward.

Rather than waiting for the individual offenders to make a motion or write a letter before taking action, our court was insistent that no case be overlooked. We
would not only use the provided reports, we of course ran our own reports in an attempt to identify all affected offenders. We also went through every hard file, every file cabinet and every office to make sure we didn't miss anyone.

The U.S. Probation Office created a single-page sentence reduction report that outlined the adopted drug quantities and original guideline ranges and sentences. Of course it also contained the newly established guideline imprisonment ranges.

In this particular process we did not make specific recommendations to the court of what the new sentences should be. Given the volume of cases we assigned the task of assembling and reviewing the cases with our most experienced officers and supervisors.

The courts then were very well acquainted with the calculated drug
quantities and making conversions of different substances. It was not uncommon for them to seek out quarantined workspace away from their offices to work on this high volume of cases.

The sentence reduction reports were sent to the attorneys similar to the regular pre-sentence process with which we're familiar. Given the agreements in place, luckily, there were few objections. The ones that did occur were professionally addressed and resolved by the court if necessary. If the case was ineligible, and we had many that were, or didn't meet the criteria, of course we communicated that as well.

In those circumstances where the Public Defender's Office agreed with our assessment they would write the offender and explain that they were not eligible for the reduction. These cases were forwarded to the court in some cases, and other times they were
not. It became just a judicial preference.

For hundreds of the reports that were sent to the court the judges were appreciative to be able to handle the sentencings in an administrative manner that didn't require a hearing. Upon granting a reduction new JNCs were filed and channeled through the normal routing back to the U.S. Probation Office, and then of course to the Bureau of Prisons. The Bureau of Prisons would set new release dates.

Initially, we had a number of offenders that through their reductions were eligible for immediate release. With this they would bypass regular de-escalation reentry planning that typically comes with inmate release that Judge Keeley had spoke of.

Some, despite our efforts and the Bureau of Prisons' efforts did literally hit the streets without a release plan. Time
would just not allow some of these tasks to be completed due to their immediate release.

As the Commission has documented, and has been stated several times here today, to many's surprise this group fared very well under supervision, and have revocation rates lower than that of the general population that has been released. Since 2008 our district has conducted over 2,600 sentence reduction reports. Many of those were nowhere close to being eligible for the consideration, but made application just the same.

I appreciate each of your efforts and your leadership in addressing these important issues. Thank you for your invitation to appear before you here today. I'd be happy to try to answer any questions if you have any.

CHAIR SARIS: I think I'm just going to jump start. How many hearings did you actually have before a court, as opposed
to having the re-sentencing handled on paper?

MR. AVINGER: Before our process became solidified, a couple of judges to get started did actually hold hearings. And I think some offenders were actually brought in. We quickly learned that that process was not going to be an efficient way of doing it. Other judges, they decided we didn't need to do that. So almost, I want to say, it became a copycat system. But it was just a handful at first.

And if there were some issues that were objected to by, likely the Public Defender's Office, it wouldn't be a hearing. It might be a meeting with the court. The offenders at that point would not be brought back.

CHAIR SARIS: So, once you got going, you didn't have many hearings?

MR. AVINGER: No, ma'am.

VICE CHAIR JACKSON: I just wanted
to ask about something you said at the end. I want to make sure that I heard you correctly. You talked about a group of offenders who bypassed the de-escalation stage, because they were immediately released.

MR. AVINGER: Correct.

VICE CHAIR JACKSON: And I'm just wondering whether your office studied that population particularly. Because I don't know that the Commission has looked at that particular group. We looked at recidivism in general among people who were released earlier than they otherwise would have, but I'm just trying to isolate those who were immediately released and did not go to a halfway house or anything else.

MR. AVINGER: There was a significant group that did bypass the halfway house. They did not get the traditional services, and perhaps downgraded their risk
level as they were getting closer to release.

We as an individual district have not studied that group, no ma'am.

VICE CHAIR JACKSON: Thank you.

CHAIR SARIS: Judge Breyer?

VICE CHAIR BREYER: I wanted to make sure I got the numbers. You said in your district you had about 1,500 eligibles or 1,500 applications?

MR. AVINGER: I'm sorry.

VICE CHAIR BREYER: No, no, that's the question. It just didn't end with a question mark. I apologize.

(Laughter)

CHAIR SARIS: Would you like to object?

(Laughter)

VICE CHAIR BREYER: I sometimes object to my own questions. And believe me, they're objectionable.

MR. AVINGER: The numbers were
scattered. To go back, we had the initial report with 753. A week later we got a different report, 1,550. So that number doubled very quickly.

We went through thousands of cases on our own. I think the Commission's data suggests that almost one thousand actually were properly re-sentenced. So we still had, what, 1,600 on top of that, that were either denied, maybe they were eligible and just they were denied for other reasons. Maybe high-risk, maybe their conduct in prison. And others just were the, "I'm a bank robber who was high on crack, do I get my two-level reduction?"

(Laughter)

MR. AVINGER: And we had to treat those with the sense of urgency that we treat the others in terms of examining the information available.

VICE CHAIR BREYER: So the number
seems to be large. I mean we're talking about literally thousands. Of that number, as I understand your process was that there would be some, as it evolved, some initial meeting with the U.S. Attorney, a defense lawyer and certain guidelines were set as to what would be done without objection. And as to those cases you would simply prepare a proposed order and send it to the judge? Would you do it? Would a counsel do it?

MR. AVINGER: No, sir. The probation officer would prepare it just like the traditional process. It would go to the lawyers to let them look at it. Of course, if the folks qualified there was very little discussion and it would then be forwarded to the court, who would make the determination of whether reduction would be granted and if so where, or whether it was going to be denied.

VICE CHAIR BREYER: But would it
go with a recommendation? That is to say would it state in the document this recommendation has been -- is the joint recommendation of the government and defense counsel?

I'm trying to figure out -- in other words I'm trying to figure out how a judge who looks at something can look at it and say, well, the parties don't object, therefore I'm not going to either have a hearing or I'm not going to listen to any further argument if the parties are in favor of it. I don't have any fundamental reason not to be in favor of it. I'll sign it.

On the other hand it may be contested. That is, one side may think it ought to result in a modification. Another side may think no, it doesn't. And as to that maybe you have to either have a hearing or a further discussion.

My question is in your experience
how do the numbers break down in terms of whether it was contested or whether it was not contested?

MR. AVINGER: The large, large majority in South Carolina were uncontested. The parties agreed that the reductions were proper and there was -- or why it was ever contested.

And there were a handful out of 2,600. There may have been some informal discussion back and forth with the court.

I would say that the other districts tried other processes and tried to have hearings. And the workload really, it really creamed them for a lack of a better way to put it.

And I think there were other districts that tried to spread their cases out to the CJA panel and found that that became a rather cumbersome process as well. And they in turn dropped back and decided to
let the Public Defender's Office take a leadership role in the process.

CHAIR SARIS: Thank you.

Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you very much, Mr. Avinger, for being here.

I've got two questions. First, on this question of identifying those who are not eligible, how long would it take you to identify, for example, back in 2007 there were a lot of people who applied who were not eligible.

Like, for example, a bank robber who was high on crack, that's one. Might be career offenders who might apply and not be eligible. How long would that normally take?

Because it was suggested here a little bit ago that that case would take just as long as a case where somebody actually was eligible in determining how long -- or whether that person should get the reduction.
MR. AVINGER: For us the process worked the same. We had to pull the same documents. We had to examine the same documents. Of course, if there were no recalculations we were spared some time there. But a report would still be created, indicating reasons that the person weren't eligible. Those reports are still sent to both parties just to keep everybody in the loop so to speak.

And in many cases our judges wanted those reports to come to them as well so they could formally, I guess, deny them rather than having the letter-writing and petitioning continue.

COMMISSIONER WROBLEWSKI: And so Judge Keeley, for example, mentioned before that for each case, that if we're going to properly consider public safety that we have to be, for example, she mentioned a release plan thought through for each offender.
There would have to be a consideration of all the different kinds of conditions that would apply for each offender. There would have to be an examination of the prison record. You would do all that even if the person was convicted on a robbery?

MR. AVINGER: Not necessarily, no sir. That would not be accurate. If we knew for sure or felt for sure they were not going to be coming out that there would be no further coordination of a release plan because they would not have a release date so to speak.

The government took the responsibility for checking prison conduct records. I do not think that they themselves check records for folks that were that far out of bounds of being qualified.

COMMISSIONER WROBLEWSKI: Okay.

And then one last question I have. What I
was looking at just here was the Commission's
data on retroactivity of that 2007 amendment.
And it indicated that in the District of South
Carolina between 75 and 80 percent of those
who applied were granted the reduction.

What's really interesting if you
look at that data is that some districts
granted 90-plus percent of applications.
Some granted in the 30 percent.

Do you have any insight as to why
there were such big differences among
districts? Because I'm curious whether the
process that you undertook in South Carolina
was the kind of process that was applied
pretty consistently across the country, or
whether there were very, very different
processes, some with greater examination of
prison records and all the rest and public
safety issues and some with less.

MR. AVINGER: That's a good
question. I don't have a certain answer. I
do know that South Carolina had a lot of career offenders, armed career criminals that were disqualified that were also involved with drug cases.

I do know that the government, while they were very agreeable about not opposing the low end, they certainly did run the Bureau of Prisons' conduct records. And they were opposed to some that they felt were bad characters so to speak.

I cannot account for why ours would be that much lower.

CHAIR SARIS: Just following up on that a bit. The process you describe in South Carolina seems fairly similar to what happened in Massachusetts.

Do you have a sense of how many districts across America use that triage approach which essentially had probation, federal defenders and prosecutors triage it first so that basically for most cases the
judge was just working off of a report? Was that the predominant approach?

MR. AVINGER: It would have to be, especially for the districts that had a large volume. Certainly some of the districts that evidently don't have a crack cocaine problem were able to perhaps take a different approach because the workload was not such an issue for them.

CHAIR SARIS: One difference for us, it seemed to me the probation actually handled the relationship with the Bureau of Prisons. Maybe I've got that wrong.

So did you find at least in your district that getting the records was handled by the U.S. Attorney's Office? Is that to make sure the person wasn't dangerous from prison?

MR. AVINGER: I think the government in our district was really more interested in that. We know these folks are
coming out with whatever kind of record
they've got and we're used to taking them as
they come to us.

So they were more interested in
making sure, at least in their mind, to oppose
the folks that either the first time they were
sentenced had some very aggravating things
about them, or that had done some things in
prison.

We did work closely with the
Bureau of Prisons as time allowed and
especially as time went on to make sure we
had proper reentry programming available.
And knowing what the offenders' conditions
were and perhaps needs were upon release.

CHAIR SARIS: My sense, I don't
know if it was true, that if somebody was a
bad actor in prison and you got that report
from SENTRY that the judge took -- at least I
did and I think many judges would take that
as one of the signals that there may be a
public safety problem. Did you see that in your district?

MR. AVINGER: That's correct.

And that is how it worked. If the U.S. Attorney's Office found such and felt that way they would communicate that to the court. And that would perhaps be one of the reasons some of these cases were denied.

CHAIR SARIS: Anything else from anyone? Thank you very much for coming.

MR. AVINGER: Thank you. It was a pleasure to be here.

CHAIR SARIS: And thank you for all the work that you do.

MR. AVINGER: Well, you're quite welcome.

CHAIR SARIS: So, welcome. I want to thank you all for coming. Our next panel is -- the other panels went a little bit over what we'd been planning so I'm getting very strong hints from my fellow
Commissioners that maybe a break is in order.

So I thought what we would do is start with you, Ms. Yates, and then we may take a break depending on how jumpy everybody is.

So let me just start with introducing you. Sally Quillian Yates was confirmed as a United States Attorney for the Northern District of Georgia in 2010.

Prior to her appointment Ms. Yates served within the Northern District as an Assistant United States Attorney, Chief of the Fraud and Public Corruption Section, and First Assistant United States Attorney.

Following law school she joined King & Spalding's Atlanta office as an associate. Ms. Yates earned both her undergraduate and law degrees at the University of Georgia.

I think we talked beforehand and you've been before us twice before I guess?
MS. YATES: That's right.

CHAIR SARIS: So despite it all you've returned.

(Laughter)

MS. YATES: It's been awhile so I've forgotten the experience.

CHAIR SARIS: So it's just like riding a bike. Just instead of a bicycle we've got an amendment cycle. I'm sorry.

(Laughter)

CHAIR SARIS: So Charles Samuels is also a repeat testifier. Thank you for returning. Director of the Federal Bureau of Prisons. He was appointed director of the - - he received his BS in Social and Behavioral Sciences in 1987 from the University of Alabama at Birmingham.

In addition he graduated from the Harvard University Executive Education Program for Senior Managers in Government in August 2007. Thank you and welcome back.
MS. YATES: Well, thank you, Judge Saris and members of the Commission. Thank you for the opportunity to appear before you today and share the Department's views on whether and to what extent the Sentencing Commission should apply retroactively the recently promulgated sentencing guidelines amendment for drug offenses.

I am particularly pleased to be here today with my colleague, Bureau of Prisons Director Charles Samuels.

Let me say at the outset that there has been extensive discussion of this issue within the Department of Justice. After considering the various policy interests at stake including public safety, individual justice for offenders and public trust and confidence in the federal justice system, the Department supports limited retroactivity of the pending drug guideline amendments.
As I'll discuss further in a few minutes, we think that the approach that we are recommending here today strikes the right balance of policy interests that can be effectively implemented across the federal criminal justice system within our existing resource constraints.

The Commission identified several objectives of the amendment when you unanimously voted to reduce the base offense level for drug crimes, including recalibrating the guideline range to include terms below the applicable mandatory minimum sentences, decreasing the emphasis on drug quantity relative to the other more specific sentencing factors, and reducing the prison overcrowdedness resulting from long prison sentences.

The Department believes that this amendment is also consistent with the assessment that previous drug offense levels
produced sentences in some cases that were longer than necessary to accomplish public safety goals.

When the Attorney General testified before the Commission supporting the amendment, he testified that this modest reduction would yield more proportional sentences for some drug offenders, while also helping to rein in federal prison spending and focusing limited resources on the more serious threats to public safety.

Assessing whether the amendment should be applied retroactively requires a balancing of factors.

In that analysis the primary factor driving our position to support retroactive application of the amendment, albeit limited retroactive application of the amendment, is that the federal drug sentencing structure in place before the amendment resulted in unnecessarily long
sentences for some offenders.

While we believe that finality in sentencing should remain the general rule, we also recognize that when sentences are longer than necessary, this creates a negative impact on both the public's confidence in the criminal justice system and in our prison resources.

Twenty-eight years ago, Congress passed the Anti-Drug Abuse Act of 1986 to address illegal drug trafficking and to put in place a stringent sentencing policy that's helped us to disrupt and dismantle drug trafficking organizations.

As you know, the Commission in turn set guideline penalties for drug offenses linked to but slightly above the mandatory penalties.

The sentencing policy created by the act and the guidelines certainly played a significant role in the two-decade long
decline in violent crime.

But our growing experience in prosecuting these cases and carrying out these stringent drug sentences in our prisons has taught us that the same act and guidelines also create sentences that were unnecessarily long in some cases.

About half of the federal prison population is incarcerated for drug offenses, and 55 percent of those offenders are serving sentences in excess of 10 years.

As the Attorney General noted when he testified before the Commission, 1 in 28 children has a parent behind bars. He observed that this level of incarceration is not just unsustainable financially, but comes with, in his words, "human and moral costs that are impossible to calculate."

In supporting the underlying drug amendment the Attorney General testified that the amendment is consistent with other
Department initiatives aimed at, again in his words, "controlling the federal prison population and ensuring just and proportional sentences."

More specifically, the Attorney General noted that he has modified the Department's charging policies to ensure that people convicted of certain low-level non-violent federal drug crimes will face sentences appropriate to their individual conduct, rather than the stringent mandatory minimums which will now be applied only to the most serious criminals.

Limited retroactive application of the drug amendment in the manner we are recommending, today, would further these objectives.

Foremost among the other policy considerations to be weighed in the retroactivity analysis is public safety. Because of public safety concerns that arise
from the release of dangerous drug offenders,
and from the diversion of resources necessary
to process over 50,000 inmates, we believe
that retroactivity in the drug amendment
should be limited to lower-level non-violent
drug offenders without significant criminal
histories.

Limited retroactivity will ensure
that release decisions for eligible offenders
are fully considered on a case-by-case basis
as is required, and that sufficient
supervision and monitoring of released
offenders will be accomplished by probation
officers, and that the public safety risks to
the community are minimized.

Release dates should not be pushed
up for those offenders who pose a significant
danger to the community. Indeed, we believe
that certain dangerous offenders should be
categorically prohibited from receiving the
benefits of retroactivity.
In making the retroactivity determination, the Commission should also consider the resources necessary to effectuate retroactivity and the corresponding negative impact on public safety for the resultant diversion of these criminal justice resources.

The Commission, as we've discussed this morning, estimates that full retroactivity would apply to approximately 51,000 inmates.

Based on past experience, we can anticipate that a substantial number of ineligible offenders will also apply.

In 2007, for example, the Commission estimated about 20,000 offenders would be eligible for the crack reduction. According to the Commission's last report over 25,000 motions were filed seeking reduced sentences. Therefore, we think that we can fairly anticipate that 60,000 or more
offenders will file motions for sentencing modification, should the 2014 amendment be made retroactive.

This is a striking number in light of the fact that in all of Fiscal Year 2013 only 80,000 offenders were sentenced across the entire country.

Resolution of these 60,000 motions will require the input and participation of federal prosecutors, probation officers, BOP counselors and even federal defenders or appointed counsel, as well as review and ruling by the courts.

There are real and serious resource limitations for all of these entities in implementing any retroactivity decision.

This diversion of resources within the criminal justice system would have a substantially negative impact on public safety.
Not only would 60,000-plus petitions divert prosecutors, judges and probation officers from their normal caseloads, but the thorough, individualized assessment required in each petition will also add to this burden in a significant way.

When considering the petition for re-sentencing our foremost consideration is ensuring public safety. It's a simple fact that many federal drug offenders are dangerous. Many were involved in violent conduct. Many used a weapon in their offense and many are repeat offenders. This is part of the reality surrounding this policy decision.

Section 1B1.10 of the guidelines provides that even if a guideline amendment is made retroactive, its application must be limited if it poses a significant risk to public safety.

Indeed, Section 1B1.10 requires
judges to perform a case-by-case basis assessment of the public safety considerations before awarding any requested reduction.

These case-by-case basis assessments, if done properly, would not only be costly in the short term but will divert prosecutors, judges, probation officers and others away from working on cases that are necessary to keep our community safe.

Further, especially in light of the Supreme Court's Booker decision we continue to believe that retroactive application of the guidelines amendment should be rare.

Indeed, both Congress and the Supreme Court in Sections 3582 and the Savings Statute and in Teague they repeatedly recognized the importance of finality of criminal judgments as essential to the operation of our criminal justice system.
So, in balancing all of these factors the Department supports limited retroactive application of the 2014 drug guidelines amendment but only for those offenders who do not pose a significant public safety risk.

We believe the Commission should limit retroactive application to offenders in criminal history categories 1 and 2 who did not receive a mandatory minimum sentence for a firearms offense pursuant to Section 924C, an enhancement for possession of a dangerous weapon pursuant to Section 2D1.1, an enhancement for using, threatening, or directing the use of violence pursuant to Sections 2D1.1(b)(2), an enhancement for playing an aggravating role in the offense pursuant to Section 3D1.1, or an enhancement for obstruction of justice.

With these limitations, all of which should have been determined in the prior
court action and should be documented in a
court file in most cases, courts will be able
to determine eligibility for retroactivity
based solely on the existing record and
without the need for transporting the
defendant or holding any intensive fact-
finding.

Retroactivity would be limited to
a class of non-violent offenders who have
limited criminal history, that did not
possess or use a weapon and this will only
apply to the category of drug offender who
warrants a less severe sentence. And who
also poses the least risk of re-offending.

While the factors we suggest are
not a perfect proxy for dangerousness they
are a reasonable proxy based on the
Commission's own research and identifying
them will not require new hearings.

Judge Saris, members of the
Commission, our goal in the Department of
Justice is to ensure that our sentencing system is tough and predictable, but at the same time promotes trust and confidence in the fairness of our criminal justice system.

Ultimately we all share the goals of ensuring that the public is kept safe, in reducing crime and in minimizing the wide-reaching negative effects of illegal drugs.

We believe that the policy we are suggesting on retroactivity strikes the proper balance of policy interests at stake here. It addresses an issue of proportionality but does so in a way that will promote public safety.

Thank you for the opportunity to share the views of the Department of Justice on this important topic. We look forward to working with the Commission on this issue and to working with all in the criminal justice system to achieve equity and fairness under the law. Thank you.
CHAIR SARIS: Director Samuels, welcome back.

MR. SAMUELS: Thank you. Good morning, Chair Saris and other members of the Commission. Thank you for inviting my colleague Sally Yates and me to testify today.

I will provide information from the Bureau of Prisons in the context of their decision on whether to apply retroactively the recently passed sentencing guideline amendment for drug offenses.

The Commission's recent decision to reduce the base offense level for drug offenses has the potential to significantly impact the size of the federal prison population in the years ahead.

Retroactive application of the amendment even if limited also has the potential to immediately impact the size of the federal prison population as well as our day-to-day operations. For these reasons I
greatly appreciate the opportunity to discuss
two aspects of retroactivity that are
specific to the Bureau of Prisons.

First, I will discuss the public safety and reentry implications of releasing potential thousands of inmates shortly after the November 1 effective date.

Secondly, I will note our plan to provide courts and prosecutors with inmates' prison disciplinary records for consideration during re-sentencing.

We have experience regarding the retroactive application of a guideline provision. In both 2007 and 2011, we assisted in the processing and release of inmates whose sentences were reduced by decreases in the drug quantity tables for crack cocaine.

However, none of those instances was of the scale contemplated for retroactivity of the most recent amendment.
As you know, about half of the sentenced prison population are incarcerated for drug-related offenses. A great many of them would be eligible to receive sentence reduction if you were to make the base offense level reduction apply retroactively.

As described in the report prepared by the Commission's research staff, over 4,500 inmates could be eligible for immediate release from custody after November 1, 2014 if the Commission decided to make the reduction applicable to all drug offenders and judges awarded the full reduction to each defendant.

Generally, we start formulating release plans for inmates 180 days prior to release, and the residential reentry center referrals and other specific plans 90 days prior to release.

At any given time we have approximately 9,384 individuals in
residential reentry centers and another 3,216 on home confinement.

While we know that the Commission estimates one quarter of those eligible for a reduction are non-U.S. citizens who are likely to be deported, we will still be adding as many as 3,500 inmates to our community programs in the first year alone if the amendment were made retroactive to all eligible drug offenders.

We will certainly face challenges in making residential reentry center places for these offenders. In some regions we do not have empty beds and we would need to reduce lengths of stay for all offenders in residential reentry center custody, or try to expand our contracts on an emergency basis.

We're going to continue to make the greatest possible use of home confinement but we are limited by statute in terms of the duration of such to 10 percent of the sentence.
not to exceed six months.

We are also limited by the number of inmates who have a residence and other resources suitable for home confinement.

If a decision is made to make the reduction retroactive either in full or for a limited subset of the population, we hope to work with Commission staff to identify the specific inmates likely to qualify for immediate release.

We work to compile rosters by institutions to allow case managers and other staff to begin making the necessary plans for the inmates in the event their sentence was reduced.

These efforts will include coordinating with the United States Probation Offices around the country to establish appropriate release preparation plans.

There will be some cases that will require careful planning such as those
inmates who are completing the residential substance abuse treatment program.

We also note that in 2007, to minimize the impact of a large-scale release, some courts delayed release dates for days or weeks in order to provide sufficient time for appropriate release planning.

Judicial orders that impose a new term require staff to recompute the sentence and establish a new projected release date. This is likely to be a substantial task considering the Commission's estimate that there are as many as 51,000 inmates potentially eligible for a sentence reduction, although if there is limited retroactivity the number will be more manageable.

We are prepared to use overtime and make other arrangements to detail additional staff as needed. The more time we have, the better.
Finally, we stand ready to provide information to the courts regarding inmates adjustment in prison, including disciplinary records like we did in 2007. We do not anticipate having issues with providing these records.

Chair Saris, Vice Chair Hinojosa, Jackson and Breyer and Commissioners, I look forward to hearing of the Commission's opinion decision that I know will be based on a thorough and thoughtful consideration of the main relevant factors.

I'm pleased to answer questions you may have or provide further information in the weeks ahead as the Commission makes a decision.

CHAIR SARIS: So, any questions? I'm getting a strong hint. Why don't we take a 15-minute break and we'll come back for questions afterwards, all right? Thank you.

(Whereupon, the above-entitled
matter went off the record at 10:43 a.m. and
resumed at 11:00 a.m.)

CHAIR SARIS: So let me start off. We heard the statements before. Thank you
from the Department of Justice and the Bureau
of Prisons.

And let me just start off with a
question on resources. As I understand it
what is the current cost of a prisoner, say,
in the Bureau of Prisons? Per prisoner.

MR. SAMUELS: The average cost is
$29,000 per year.

CHAIR SARIS: And I forget the
exact number, but as I understand it the
probation office to supervise someone is in
the vicinity of, say, $3,500. Is that what
your understanding is? Neither of you know.

Let's say there's a huge
differential along that order of magnitude.
There's always some concern as you've heard
from the courts about the resources that would
be necessary to implement it.

   So let me just understand, what
would you do with the savings that the Bureau
of Prisons would have from the number of
prisoner beds. And could any of it be shared?

   (Laughter)

   MR. SAMUELS: Well, Your Honor,
for the Bureau of Prisons which is well known,
we have significant concerns relate to
staffing with the inmate to staff ratio.
Therefore, any savings that could be gained
for the Bureau of Prisons we would definitely
see it as a request at least from our part
for us to utilize those savings for additional
staffing.

CHAIR SARIS: So that's like more
-- what kinds of staffing? Prison guards as
well as --

   MR. SAMUELS: Correctional
officers.

CHAIR SARIS: And what about
treatment programs?

MR. SAMUELS:  Well, for treatment programs, again, depending on the complex issues with the number of inmates we have in our system and to ensure that we're providing the programs consistently throughout the agency there's always the need for program staff or for treatment.

But our primary concern would be the safe and security facility. So any increases we can have with improving the number of staff who have direct contact with inmates within our institutions would be our primary focus.

CHAIR SARIS:  And just in terms of we just put online we, the federal government, what, two new prisons?

MR. SAMUELS:  Yes. I had the honored distinction last week to bring on the 121st institution for the Bureau of Prisons in Yazoo City, Mississippi, which is a United
States penitentiary. And the week prior we activated another facility in West Virginia. And so now we've brought on two so that has helped us as far as alleviating some of the crowding concerns.

CHAIR SARIS: And to the extent that there's any retroactivity or reduction in the prison population does that mean no more prisons are necessary?

MR. SAMUELS: At this point I mean we would be able to manage the inmate population. But considering the fact that over the years as we all know that our population has literally exploded.

And we're doing our best to try to manage the individuals within Bureau institutions but we still have contract prisons as well. And we have a total of 14.

CHAIR SARIS: Thank you very much.

VICE CHAIR JACKSON: Good morning, Ms. Yates. I wanted to hear a little
bit more about the DOJ's suggested carve-outs which I'm concerned about to this extent.

It seems to me that it would impose higher administrative costs, the more conditions you impose. Maybe I'm wrong about that so you might respond.

In other words, you know, with everybody in or everybody out you're going to have less to do I suppose as a judicial officer or a probation officer we heard the amount of work that goes into screening.

And it seems to me that the more conditions and caveats and carve-outs you have within your screening process, the harder it's going to be administratively. So, what would be your reaction to that thought?

MS. YATES: Well, my reaction would be I think it's sort of a two-step process in terms of what the administrative burden would be.
And with our proposal, the factors that would screen out some defendants are readily apparent from both the J&C, or the PSR or the sentencing transcript. Usually it would be I think the J&C and the PSR.

And so we would be able to see, for example, on the face of that if someone has a criminal history category in excess of 2. And they would be automatically disqualified. We don't have to go any farther than that. So there would be some screening on the front end.

But what this saves is the individualized public safety assessment that is absolutely required under Section 1B1.10 and that is really the critical screening process that makes sure that we're not releasing defendants back into the community before they should be released.

That is a much more detailed analysis that we would submit should take a
lot more time than just going through and looking at the face of the PSR or the J&C.

VICE CHAIR JACKSON: And so one of your carve-outs has to do with the weapon SOC which in my note is through relevant conduct can be applied to people who didn't even carry a weapon. But the government's position is that they would still be carved out.

MS. YATES: Yes, and that really addresses I think the first concern that you raised would be the administrative burden.

Certainly there's a possibility that you could say, for example, if someone who had constructively possessed a weapon, that they are less dangerous than someone who had actually possessed that weapon. That would go precisely to your first point though and would require a tremendous amount of administrative assessment.

And in the cost and benefit analysis, and in weighing these factors we
COMMISSIONER BARKOW: So I had a couple of questions along that same lines for you.

The first is -- just in terms of the factors you listed are these going to be comparably applied at the Department for purposes of the clemency project that's also taking place? Because there's some similarities here and I'm just curious if these are being defined in the same way in both contexts.

Because if we're thinking about folks that might also get relief on that side of things, there's also been some discussion about violence, use of a weapon. Is it consistent across the board at the Department in terms of how you're defining these?

MS. YATES: It's certainly consistent in terms of our approach, to give
relief to low-level non-violent drug offenders.

There are additional criteria that we are proposing here that would further define who is or is not a low-level non-violent drug offender.

For example, the clemency initiative does not necessarily eliminate someone who had a weapon. But if they were dangerous, if they had actually used that weapon then that would eliminate that person. So there's a bit of a more detailed analysis in that.

COMMISSIONER BARKOW: I guess I'm kind of curious why the variance then in the two approaches. And I know that's also raising similar concerns with public safety and also administration. So why are they not the same?

MS. YATES: Well, certainly the goal is the same. But when you are -- the
number of petitions that we will be examining for the clemency initiative will be far fewer than the number of defendants that we are looking at here. And are in a position to do a more detailed analysis of the specific facts and circumstances underlying the case than we would be here.

COMMISSIONER BARKOW: And that brings up my related question which is that to the extent that the judiciary is telling us it's about a wash whether they have to do this case by case on their own versus taking into account -- from the first panel -- taking into account these criteria.

We know from the way that the crack retroactivity analysis was handled the judges did a very good job in terms of assessing who was dangerous and who wasn't in terms of what we see in terms of recidivism rates for the folks who got it.

I'm just curious why the
Department -- so the Department's position on this -- is it to save Department resources? To save judicial resources? Probation resources? Or some subset? All of them?

I'm just kind of -- where is the resource savings actually being -- where will we actually see the resources being saved?

MS. YATES: Well, from the Department perspective it's not a wash for us. There is a significant difference in our assessment as to whether someone meets the individual criteria to be considered for retroactive application and whether they are someone who should receive the benefit of retroactive application.

We strongly believe that courts should be engaged in a detailed and thorough analysis of each individual defendant and make a public safety assessment.

And that would include not only what their conduct had been while they were
in the custody of the Bureau of Prisons, but
they should look at their underlying conduct
as well and make assessments there about
violence and the likelihood of recidivism.

So, from our perspective for both
us and for the courts, it shouldn't be a wash.
There should be a much more detailed analysis
going on about whether the court would
actually grant retroactivity than rather
whether they qualify for retroactivity.

Also, from our perspective with
respect to -- and I had to say, you know, the
Department has not considered -- had the
opportunity to consider the submission from
the Criminal Law Committee.

And while we certainly appreciate
the efforts to reduce the number of defendants
who would be eligible and consequently make
this a more manageable process, from our
perspective I'm not sure that that really
meets our public safety goal here.
And again, I'm kind of giving you my gut reaction to this rather than the Department's considered judgment of this. For a couple of reasons.

One, while there will be some defendants who will be excluded because of a timing factor here, it's open to everyone. And for the Department of Justice the timing issue here really doesn't help us at all, because we have to immediately begin considering motions for the reduction on the front end. So that takes prosecutors away from handling cases they would otherwise be handling.

We'll have victims of new crimes and cases that will be unaddressed because prosecutors will be addressing those. So the sort of two-step process really doesn't help the Department of Justice in that sense.

One other aspect to this is that it doesn't reduce the number of petitions
other than those who might sort of -- would
be released before they would ever be
considered.

It instead just sort of extends
the period of time that courts would have to
consider these.

We're still talking around 60,000
petitions. That is a huge number when you
consider 80,000 people a year are sentenced.

So, we have concerns from that perspective.

And we would have concerns that
this, again, would apply to that class of
defenders that we think by definition are more
dangerous. People with significant criminal
histories, who were violent, who had weapons,
who were leaders or organizers, those people
are by definition more dangerous.

And consequently the courts should
particularly be engaging in a more detailed
analysis of the public safety aspects in
making those decisions.
And then finally I'd say one concern I have about that proposal, not being of this city, but relying on Congress to do anything to make it work makes me very nervous.

And if it requires that Congress has to allocate more money for a budget for that process to work, that makes me a bit uneasy, which is why I would have some concerns about that. I may have gone farther than what you were envisioning.

COMMISSIONER BARKOW: No, that was helpful. Can I ask one last quick one?

Which is just the obstruction of justice. How is that inherently related to dangerous?

You know, the category of folks who typically get that and the range of kinds of behaviors that might be included that lead the Department to conclude that to be one of the factors.

MS. YATES: And, you know, that -
- I wouldn't say that that's the most important factor in this analysis, but I think the feeling is that if you have someone who not only has not accepted responsibility but who has gone to trial and lied or tried to get other witnesses to lie, that that is someone that is somewhat more likely to recidivate. They haven't learned their lesson.

VICE CHAIR BREYER: Thank you very much for testifying. I had the same questions of you and also the Director. But I don't want to get into a discussion on the resources only because I think your observation tells it all.

Which is that the question isn't can we depend on Congress to allocate enough funds to carry out whatever the policy is. That's something we can't answer.

The question of allocation of resources is really up to the Congress to
decide as a matter of policy, how do they want
to do X, Y and Z.

What is clear I think from this is
that every year you don't have somebody
serving in a penal institution from the point
of view of resources is a savings there of
approximately $29,000.

Now, I think the Bureau of Prisons
may have very good needs with respect to how
that money should be allocated, but it's not
up to the Bureau of Prisons, it's not up to
the Department of Justice. It's up to
Congress to allocate appropriately. So I
don't want to get into that discussion because
I don't think any of us have the answers to
that particular discussion.

I'm interested in your public
safety argument. Because you say your carve-
outs are designed for public safety concerns.
And I would say, right across the board,
that's really right at the top, or close to
the top of all the considerations of the Commission.

But I'm puzzled a bit, not just by the obstruction, as to how these carve-outs really address that from the point of view of whether they ought to be considered for a retroactive application.

And let me say it this way. As a result of the reduction in the drug quantity table which was endorsed by the Department of Justice you can have an individual who is sentenced in November with all of these characteristics, every one, the gun characteristic, the instruction characteristic, category number 6 characteristic, all those characteristics. And will get a sentence of X. Okay?

There will be a person in prison who has all these characteristics and his sentence will be X plus 2.

So the question is if it's safe to
give a person -- say, in some sense to give a
to allow a person who is already serving the
same kind of sentence to get the same type of
sentence? Instead of X plus two he gets the
sentence X.

In other words, I hope it's clear
I'm asking you the public safety. And what
I don't understand is if the Attorney General
has said that sentence of X is appropriate
for today's criminal, why would he say that
the sentence of X plus two is the appropriate
sentence in terms of public safety. Not in
terms of finality, not in terms of all those
other things. Just in terms of public
safety. And I'd like you to explain the logic
to that.

COMMISSIONER PRYOR: That was my
question also.

MS. YATES: Well, that's an
excellent question that actually we spent a
great deal of time debating within the Department of Justice.

Our assessment that this category of defendant should be excluded from retroactive application is not based solely on their inherent dangerousness because of those specific offense characteristics. That's the first step.

But we are comfortable, as you just noted, Judge Pryor, going forward that applying this prospectively that courts can do the kind of individualized determination in making the sentencing decision there that will assure that those dangerous defendants, by their nature, receive appropriate sentences.

The public safety calculus to us is that in applying it retroactively, particularly when you have 60,000 defendants to be considering that it puts the courts, the probation officers and the prosecutors in
a very difficult position to be able to do the kind of thorough analysis there retroactively going back.

   Particularly when it can be years after the event, after the offense. You don't have the same prosecutor. You may not even have the same judge. To try to recreate all of that for that category of by definition more dangerous offenders is difficult.

   And then there's a second reason. Although you're nodding. Maybe I should stop now while I'm ahead.

   VICE CHAIR BREYER: I'm nodding because I understand your reasoning.

   MS. YATES: Not that you agree.

   VICE CHAIR BREYER: I appreciate it. It was very articulate. But go ahead, please.

   MS. YATES: But the second reason also is a resource issue but I would submit it's not just resources but resources for us
at the Department of Justice, that is policy. When I as a U.S. Attorney have to take AUSAs to be able to process a huge volume of re-sentencings that we would have here, that's an AUSA who's not doing a new case. That means there is a defendant out there who's not being prosecuted because my AUSA is processing this re-sentencing. That's a public safety issue for us.

So when you combine these factors that's what led us to make the recommendation that we did.

VICE CHAIR BREYER: Could I ask Director Samuels? I promised not to say anything about resources but of course I'm violating my promise.

Those defendants -- and first of all, do you have a sense of the number of defendants who are presently incarcerated who at the conclusion of their sentence will be deported? What number is that approximately?
MR. SAMUELS: Well, our criminal alien population, Your Honor, is right around 55,000.

VICE CHAIR BREYER: Okay. And some subset of that, though a very large subset of that would be affected by the retroactivity, right? If it were made fully retroactive, if it were, a substantial number of that, of the 55,000.

MR. SAMUELS: Yes.

VICE CHAIR BREYER: And my question is as to those individuals you don't need, do you, a reentry plan, a halfway house, any of those things? Isn't that person simply sent to, at the conclusion of his or her sentence, sent to a -- I don't know what they're called. What are they called? Thank you, a detention center for the purpose of deportation.

They're not released in the community. There is no plan for them. Many
of them don't have supervised release pursuant to Commission policy. So as to those people that doesn't pass, does it, the Bureau of Prisons with respect to a resource matter?

MR. SAMUELS: You're correct, Your Honor. However, I would add that for any inmate within the Bureau of Prisons we do expect for those individuals to participate in reentry programs.

But for any individual released into the communities within the United States as you've described we would not be utilizing resources, working with probation such as what we would be for American citizens.

VICE CHAIR BREYER: Thank you.
CHAIR SARIS: Judge Hinojosa?
VICE CHAIR HINOJOSA: Well, Judge Breyer has already asked a good question I had.

But I guess having sat through...
almost 11 years on this Commission, or 11 years on the Commission and had different Departments of Justice and Attorney Generals present their views here I've been from no reduction to crack, no retroactivity to crack, and as recently as this Attorney General a year or so ago no drugs minus two yet.

And then all of a sudden it's these are unfair sentences. We're sending people to prison for longer periods than they deserve. And hadn't heard that before from the Justice Department here. And not a willingness to say it's okay to proceed with drugs minus two.

So what has happened in the last year that has made the Justice Department start with this thinking? Because I've heard from judges who say, you know, we've been sentencing people and we've had recommendations from the Justice Department
for these kind of sentences.

So then all of a sudden the Justice Department is out there through the Attorney General saying these are unfair long sentences. And so did something happen in the last year that maybe has been missed by the AUSAs across the country that now has changed this whole situation?

And also this follow-up of the Justice Department through the Attorney General immediately sent before the Commission even voted and before Congress has had the opportunity to even express their dislike for drugs minus two the idea that this should apply right now to everybody without carving out anyone.

And so -- or is this just a question of we want to save money in the prison system because we're -- it's like we're somewhat overcrowded? I mean, is this a save money type thing as opposed to all the other
issues that are brought up here all of a sudden?

MS. YATES: Well, let me try to answer the last question first. And that is no, it's not just a save money kind of thing. I too have seen the evolution of --

VICE CHAIR HINOJOSA: I think you've had to represent different views here.

MS. YATES: And I was an AUSA for 20 years before becoming U.S. Attorney. So it'll be almost 25 years that I've been in the Department of Justice.

And I certainly have seen an evolution in velocities. And each Attorney General under whom I've worked I believe sincerely believed that his or her policies were the right and just approach to addressing drug prosecutions. And we've seen a change in those policies over the years.

And so this is not to suggest that the prior policies of other Attorneys General
were unfair or unjust.

VICE CHAIR HINOJOSA: -- or of the state Attorney General for that matter.

VICE CHAIR BREYER: I don't think you have to answer that.

MS. YATES: Okay, thank you. I appreciate. Thank you for saving me.

In this instance with respect to the fairness issue I understand. And certainly AUSAs across the country I think have bristled at the notion that the changes recommended now are a statement that what they have done in the past was unjust. That is not the position of the Department of Justice.

But I do think that the new policies are a reflection of an evolved view of how much time somebody needs to serve for a drug offense. Not counting all of the other aggravating factors, but how much time is enough.

And I would submit that that's an
entirely appropriate thing for the Department
of Justice to be considering.

And when this Commission
unanimously voted to reduce sentences for
drug offenses it seems to me that implicit in
that decision was an acknowledgment that the
sentences for some drug offenders under the
prior guideline were longer than necessary.

Now, under Section 3553 courts are
required to fashion a sentence that meets the
purposes of punishment but is not more than
is necessary to achieve the purposes of
punishment. And that is behind, I believe,
the Attorney General's recalibration of our
approach in drug cases.

Now, to your point about the
Department directing AUSAs before the
Sentencing Commission had voted on the two-
level amendment. And I understand that some
of you may have been uncomfortable with that.
And I understand why. But let me try and
tell you a little bit --

VICE CHAIR HINOJOSA: I don't know

that I would just describe it as

uncomfortable.

MS. YATES: Okay. You might have

been angry about that. And I can understand

why. But let me try to give you a little bit

of the thinking behind that.

And this is that our AUSAs have an

obligation to correctly calculate the

sentencing guidelines. And they were

directed in the memo that went out to continue

to correctly calculate the sentencing

guidelines under the guidelines in effect at

the time.

But our AUSAs also have an

obligation to make a sentencing

recommendation utilizing the 3553 factors.

And once our Attorney General has

testified and has said that he believes that

the drug guidelines are too high and that they
should be reduced by two levels it puts our AUSAs in an untenable position to then go into court and to have to be telling a judge that, yes, our Attorney General has said that they're too high and they should be lowered by two levels but we object to a variance down two levels.

And so while I can understand you may not agree with that there was an analysis that went behind that of what was the appropriate approach for our AUSAs to be taking in courts after this public position.

VICE CHAIR HINOJOSA: Well, would you direct the AUSAs whenever the Justice Department did this time ask for increases in some of the penalties to therefore ask for variances higher up in those cases?

MS. YATES: Well, I hope that AUSAs are asking for upward variances in cases where the facts would support it. And that may very well be in cases where we're asking
for increases in the guidelines.

CHAIR SARIS: Thank you.

Commissioner Friedrich.

COMMISSIONER FRIEDRICH: So, Ms. Yates, I just want to make sure I understand both the written testimony and the oral testimony you've given us.

One, you've said finality is an appropriate general rule.

Two, you've said --

CHAIR SARIS: Go into the mike because I think people are losing you.

COMMISSIONER FRIEDRICH: -- retroactivity should be rare.

Three, you've said the prior drug penalties weren't unfair or unjust. I think you just testified. Is that correct?

MS. YATES: I hate to put a label on it as whether something is unfair or unjust. I think Judge Breyer may have captured it more eloquently than I could.
It's not the same kind of situation like we had in crack retroactivity where we were going back and we were correcting a sentencing disparity there that I think everybody agreed was unfair and unjust.

But I do think there is a fairness factor. If we have determined that a sentence is longer than necessary there's a fairness element to that.

COMMISSIONER FRIEDRICH:

Understood. So the language from your written testimony is, "The Department supports this because sentences are longer than necessary."

Well, that's the case in any instance in which the Commission lowers guideline penalties. The Commission, based on all the input it's received has determined that the sentence could be lower. It's longer than necessary.
So under that logic we should apply every guideline amendment retroactively. And that simply can't be the case because the Commission has never acted that way nor has the Department. In fact, the Department has only supported retroactivity on one occasion.

So how do we reconcile on the one hand the fact that this is an extraordinary power that should be applied rarely with your view that the sentences are longer than necessary? There's not -- that can't be the standard by which the Commission makes decisions on retroactivity.

MS. YATES: Well, I think that it's in a balancing of factors. Finality is certainly an important factor to consider. But from my perspective it's not a trump card. It is a factor to consider.

The Commission has in other instances made retroactive determinations
that would lower offense levels, and
specifically with respect to drug offenses,
and not just necessarily crack cocaine.

Going back to mid-nineties when
the LSD quantities were raised that would
trigger certain offense levels. That was
applied retroactively.

In '95 when the weight for
marijuana plants was changed, that was
applied retroactively.

More recently in 2003 when there
was a change in the guidelines for oxycodone,
and specifically Percocet, that was applied
retroactively.

I think one of the things you have
to look at is the magnitude of the change. I
think there have been a lot of amendments that
made very small differences in sentences.

Here, the average difference is
approximately 23 months, about 18 percent of
the average sentence. That's a significant
enough change from our perspective to be something that then is where fairness kicks in. And that we should balance those factors.

COMMISSIONER FRIEDRICH: But in addition to the drug amendments you mentioned there are others, over half a dozen that the Commission did change drug penalties, whether it's safety valve or Lee Gabel and others where the Commission did not make it retroactive.

MS. YATES: That's right.

COMMISSIONER FRIEDRICH: And the magnitude arguably from your testimony cuts both ways. On the one hand, a two-level reduction is substantial. On the other hand, you've suggested 50,000-plus is too much. Right? For you as a resource matter.

MS. YATES: It's too much because of the public safety implications a resource matter. That's right.
COMMISSIONER FRIEDRICH: So we have to weigh the magnitude is both -- a certain level is necessary for it to justify retroactivity, and too much is something we need to consider as well, right? So it's --

MS. YATES: Now you see why we talked about it so long in the Department.

CHAIR SARIS: Well, I think that's it. Thank you very much to both of you. And I thank you for struggling, wrestling with the issue. And I'm sure we'll be seeing both of you again at another hearing sometime so thank you for coming back.

MS. YATES: Thank you for having me.

CHAIR SARIS: And I know we're going to move right onto -- we're a little behind but we will finish what we're supposed to before lunch for those who have planes to catch. So the other panels I'm going to hold pretty tightly to five minutes a person and
come on up. Thank you.

Welcome. Thank you for coming.

This panel, not that you couldn't have guessed, the law enforcement views.

So we have Sergeant Richard Fulginiti, the chairman of the National Legislative Committee of the Fraternal Order of Police.

Mr. Fulginiti is a retired sergeant in the homicide unit of the Prince George's County, Maryland, Police Department. He is also past president of the Fraternal Order of Police Lodge No. 89 and is currently the national trustee for the Maryland State Lodge. Welcome.

Mr. Bushman is president of the National Narcotic Officers' Associations' Coalition. He's currently a leadership consultant at law enforcement leadership strategies. He's a former special agent of the Minnesota Bureau of Criminal Apprehension
and the former statewide gaming and drug coordinator of the Minnesota Department of Public Safety.

And J. Thomas Manger, Chief Manger, is the chief of police, Montgomery County. And he serves on the board of directors of the Major Cities Chiefs Association. He also serves as the chief of the Fairfax County Police Department.

Welcome to all of you. Thank you.

Mr. Fulginiti?

MR. FULGINITI: Good morning.

CHAIR SARIS: Sergeant. I'm sorry.

MR. FULGINITI: Mister. Retired.

Thank you. Good morning, Madam Chair, Vice Chair and distinguished members of the Commission.

My name is Rick Fulginiti, the National Legislative Committee chair for the Fraternal Order of Police.
The FOP is the largest law enforcement labor organization in the United States representing more than 330,000 rank and file police officers in every region of the country. I want to thank the Commission for allowing me today to express their views.

You all have a copy of my text and what I'd like to do is just hit a couple of pieces within the text and then share with you a story.

Today we are considering whether or not the revised lower levels should be retroactively applied to offenders currently serving the just sentences they received from the courts.

It should come as no surprise that the rank and file officers who put themselves in harm's way to arrest and convict these drug offenders oppose Amendment 72.

While the FOP believes that the new guidelines will certainly weaken the
overall fight against drug traffickers,
retroactive application of the guidelines
would have an immediate and deleterious
effect on public safety and the crime rates
in our communities.

Let me put it into perspective as
a former law enforcement officer in Prince
George's County, Maryland.

In 2009 we arrested 1,102
individuals for manufacturing and selling
drugs. Using the Commission's own data if
the retroactive sentencing guidelines are
applied 629 convicted traffickers will be
coming home to Maryland, and another 225 will
be released to the District of Columbia.

At a time when law enforcement in
my county is making real strides in its fight
to reduce violent crimes it seems at variance
with common sense and good public policy to
release en masse more than 800 drug offenders
in our area.
I know one of the driving forces behind the reduction of sentences for drug offenders is driven by costs associated with incarceration.

The FOP acknowledges that the federal person system is operating above capacity. However, if sentences are not real and not meaningful, if criminals begin to accept that short stays as guests of the government are just part of the cost of conducting illegal drug sales then the recidivism rates will go up, not down.

Any savings realized by early releases is likely to be lost with re-offenders.

As I stated earlier I put in 31 years with Prince George's County. Twenty-two of those years was in the homicide unit. All too often a lot of our cases were drug-related.

And having such cases you often
found a lack of witnesses and you ended up — what you did was used a participant, hopefully small-time participant within the case. And maybe they went ahead and plead to a lesser offense, a drug charge, because they were mostly drug-related.

These are the people that I'm concerned will be released and may get to where they should have spent the rest of their lives in jail for committing a murder.

I want to tell you about a particular instance that happened relatively recently in 2010, Prince George's. It was on August 6 of 2010. Police were called to an assault call. And they responded to the 6800 block of 3rd Street in Lanham, Maryland.

When they arrived they were taken to a detached garage and above this garage was a makeshift apartment. And in that apartment when they went to the door they found a Dawn Brooks, a 41-year-old Black
female who was laying at the door and she had been shot to death.

When they searched the apartment they found in a rear room a Wasita Silica. And Wasita is a 38-year-old Black female. They found her 3-year-old daughter Shayla and her 4-year-old son Shakur, all shot to death. So now we had a quadruple murder we were working.

We had one witness, thank goodness, who was able to go ahead and point out several other people that may be involved. And through investigation we found that they, in fact, were the ones that committed this crime.

The story goes they had just delivered 40 to 50 pounds of marijuana to this residence from Texas. They placed it in the garage portion of this dwelling and left. When they returned the marijuana was gone.

They reached out to their source
in Texas and told the source what had happened
and he said either someone in Maryland would
be dead or when they returned they would die.

The one suspect, the individual
who decided this is what he was going to do,
he blamed the folks upstairs and he killed
four people.

He didn't just kill them. He then
took his cell phone and spent quite a bit of
time taking very nice photographs of the dead
bodies and then sent them back to Texas so he
could show his distributor what he had done
so that he could save his own soul.

Because of that link we were able
to effect an arrest in Texas also, but
unfortunately the only thing that that
individual got was a short sentence for a
distribution charge.

And that's the type of case that's
not atypical. That happens all the time.
And that's the individual that I'm concerned
that the retroactivity of this would go ahead
and help and release onto the streets.

I appreciate the time that you
gave me today and that's the view of the
Fraternal Order of Police rank and file.
Thank you.

CHAIR SARIS: Thank you.

MR. BUSHMAN: Madam Chair,
members of the Commission, thank you for the
opportunity to appear before you today.

My name's Bob Bushman. I am
president of the National Narcotic Officers'
Associations' Coalition. We represent 40
state narcotic officers associations.

Like me, the men and women of our
associations have experienced the devastating
consequences that result from illegal drugs
that pour into our neighborhoods.

Some claim that our efforts to
keep drugs off our streets have been fruitless
and that our time, money and effort should be
spent elsewhere. I strongly disagree and the numbers support me.

Violent crime and drug use rates have declined substantially over the past couple of decades. I believe that much of that success can be attributed to the tough on crime approach which has included aggressive enforcement, strong prosecution and serious sentencing policies.

Drug dealers prey on their own family members and neighbors and especially our young people. Drug traffickers use violence as a tactic of intimidation to ensure success of their business.

They don't pay taxes on their earnings, yet their illicit activities cost taxpayers dearly as we pay for the law enforcement, medical and social services that are required to clean up the carnage and destruction left in their wake.

It's true that aggressive
enforcement of our nation's drug laws has led to an increase in incarceration numbers. Many of the people we arrest are not strangers to the criminal justice system. They've been arrested before.

And while many argue that recidivism rates have decreased we know that those rates only reflect criminals who are re-arrested. They do not account for those who continue to commit crimes upon release but now evade arrest because during their previous trips through the criminal justice system they became educated about law enforcement tactics and how to insulate themselves to avoid being caught again.

We also know that a small number of people commit a majority of the crimes in many neighborhoods. When we arrest, convict and sentence those offenders to prison the crime rates drop.

There are some who believe that we
lack fairness in the sentencing process but
the facts show a different story. Most
offenders plead guilty and plead to lesser
charges than the actual offenses that were
committed. And most defendants have already
taken advantage of the provisions in the law
that reduce their sentences.

The question that is before us
here today is whether your recent
recommendations to reduce the sentencing
guidelines for drug traffickers should be
applied retroactively.

According to your own analysis,
and we've heard this several times already
today, if these recommendations were made
retroactive more than 51,000 inmates will be
eligible for sentence reductions.

United States Attorney's Offices
are already inundated with cases and our
courts' calendars are already full. If
they're required to process the myriad of
cases that are sure to be filed for review

how can you expect them to keep up with
current workloads or take on new
prosecutions? Because crime is not going to stop.

The cost in time and money that
will be expended on criminals that have
already been given leniency based upon the
sentence reduction options that currently exist is offensive to law-abiding citizens.

Many of the proponents of sentencing reductions and a retroactive application portray those who have received prison sentences as victims. They're not.

The real victims are the law-abiding citizens who live in the neighborhoods that have been ravaged by drug crime and its collateral consequences. Drive-by shootings, assaults, property crimes. They have also experienced the loss of value of their homes and properties located
in undesirable high-crime neighborhoods.

Many of us have loved ones and acquaintances that have battled with substance abuse or addiction. But how do you justify to the families of addicts and abusers, or to those who have lost family members and children to drug addiction and drug-related violence that the so-called low-level non-violent drug trafficker, the one who is profiting off their pain, deserves more leniency?

It should be our law-abiding citizens that are the focal point of these discussions, not the convicted criminals who by their own selfish actions have proven that they have little regard for the law or for their neighbors.

In the end, these criminals are rarely held accountable for all their crimes or the damage they've inflicted. Plea bargains and pretrial negotiations already
save most defendants from ever being exposed to the maximum penalties allowed by the law. Those who receive the severe sentences have lengthy criminal histories, have committed violent crimes, or been involved in large-scale drug trafficking organizations. They've already had several opportunities to reform but have decided not to and it's their hard work at a life of crime that's led them to their prison sentence.

In my experience most are sorry that they were caught, not that they committed crimes against their neighbors.

Let me leave you with one final thought. During my 30-year career I spent several years working undercover where I was embedded in drug rings. And I listened to drug dealers and their minions plan their illegal deals, working their illegal business.

I've also interviewed thousands of
suspects and defendants and witnesses, and
I've quickly learned one thing. It's that
they all fear getting arrested and being sent
to prison.

So from a very informed point of
view I can tell you that the more you reduce
prison sentences the more incentive you'll
give drug dealers to continue committing the
crimes that help their businesses grow while
they poison our young people and destroy our
communities.

So on behalf of our nation's
narcotic officers who face great risk on the
front lines as they respond daily to calls
for help from these communities I want to once
again our association's strong objection to
expanding or implementing the Commission's
proposed drug sentencing reductions
retroactively.

I appreciate the opportunity to
address you and I'll be more than happy to
answer any questions that you may have.

CHAIR SARIS: Thank you.

MR. MANGER: Madam Chair, Commissioners. My name's Tom Manger. I'm the Chief of Police in Montgomery County, Maryland, former chief of the Fairfax County Police Department in Virginia.

I'm here today on behalf of the Major Cities Chiefs Association representing the 66 largest police departments in the United States. So I'm privileged to serve as the chairman of the Legislative Committee and a member of the board of directors for the Major Cities Chiefs.

Thank you for allowing law enforcement and the Major Cities police chiefs to testify today. We commend you for this opportunity because it demonstrates your concern for public safety.

I'm pleased to be here today to set forth the position of the agencies that
police the country's largest metropolitan areas on these measures on the question of retroactivity.

The urban areas our membership encompasses will most be affected by the sentencing reform and it's absolutely essential to our public safety mission to ensure these reforms are implemented with caution and not just with cost in mind.

Without certain steps in place to put it bluntly these released offenders will have a great deal of trouble reintegrating into the community and there is a likely chance that they will become our problem again.

Whether it's a violent crime, a theft to support a drug habit, or an overdose, we are the ones that will answer the 911 calls and we are the ones investigating the crimes, making the arrests and providing services to crime victims.
Whether retroactive or going forward with further reforms, let me articulate the principles that comprise our position.

First, we support the individual review of each person's sentence. Sentencing reform must not be a one size fits all approach. Actions to simply cut sentences across the board because prison costs have soared is irresponsible policy that threatens the safety of the communities we are sworn to protect.

Secondly, we support reentry services for those that are released. Major Cities Chiefs calls upon the federal government to ensure that prisoners transition into communities with the support of reentry services that include drug treatment, supervision and other support.

We have an opportunity to slow the revolving door of our criminal justice system.
with this critical support.

Third, we believe that repeat
offenders present the highest danger to our
communities. Many years of solid research
show that repeat offenders commit the vast
majority of crimes. We urge the Commission
to further study how to address this highest-
risk category of inmates.

Fourth, we believe that dangerous
offenders should serve their full sentences.
Major Cities Chiefs strongly opposes any
measure that reduces the punishments for
offenders who are violent, target minors for
drug sales, use a firearm or other weapon,
are members of cartels, or are in any way
considered to be serious drug traffickers.

In my written testimony I've
quoted the language from the Smarter
Sentencing Act which directs the Sentencing
Commission to retain current mandatory
minimum sentences for these dangerous
If these considerations are put into place I believe that it's possible to begin the reintegration process for inmates who through reduced sentences find themselves back in our communities.

I hope that the Commission will agree that it is through this comprehensive approach that we will give these inmates the best chance to succeed once they are released.

Police experience firsthand the horrors drugs inflict. Our officers in our communities have to deal with youth dependence and abuse issues, violence, drug-related crimes and overdose deaths.

And we have watched as offenders go in and out of the prison system because they do not receive the help that they need for reentry.

Until we treat the abuse and addiction recidivism rates will remain high,
no matter what the length of sentence. That's why sentencing reform by itself is not enough.

In order to ensure that offenders who receive shorter sentences are able to successfully integrate back into our cities and communities across the nation sentencing reform must be completed in a comprehensive manner to include education, prevention and treatment.

I want to thank the Commission for once again having the opportunity to testify and I encourage you to keep the law enforcement community and Major Cities Chiefs actively involved in this important discussion. Thank you.

CHAIR SARIS: Thank you.

VICE CHAIR JACKSON: Good morning. Thank you for being here. You know, we have some experience with retroactivity at least with respect to a
certain subgroup of drug offenders and that being crack offenders from a few years ago.

And I'm wondering whether any of you work in areas in which there is a significant crack offender population. And whether you saw any of the problems that you have articulated or worried about with respect to the return to the community of some of the crack offenders.

MR. BUSHMAN: I'd be happy to address that, ma'am.

At one time I lived in the highest crime area of our Twin Cities. The busiest crack house in the city was located across the alley outside my window and we did surveillance there and watched in a short period of time 100 different people come and buy crack. Sometimes the same people back two or three or four times during the hour.

Drive-by shootings, assaults.

That whole area of town was unsafe for
everybody and anybody.

As we talk about sentencing, as we talk about the effects of policies, retroactivity, I've been a cop my entire life. I'm not as smart as you folks. I am not a student of the mechanics of the law like you are.

But during my entire career, and I think both these gentlemen would back me up, we've seen the effects of what the policies do or don't do on the street.

Drug addiction is a terrible, terrible thing. It's a terrible thing for the people that experience it, it's a terrible thing for the families and it's a terrible thing for the community because it takes away opportunities for economic success. It takes away opportunities for personal success. It affects the schools. It affects everything.

And help it as they may, these people are coming and going from the system,
they just can't stay out of trouble. That doesn't mean to say that they're all bad or wicked people, but they've made choices that have pretty much doomed them to any opportunity for success.

As law enforcement officers our federal courts and our prosecutions were saved for the worst of the worst because very frankly they had better justice, they had quicker justice and in many cases it was longer justice.

That crack house that I told you about, one group would move out, another group would move in. It was a revolving door. When they went to the state courts or the local courts it was the same people.

In my career I've arrested people with five pending cases in state courts. They finally went to federal court where there was a long sentence waiting for them. Took them out of the community and gave us
opportunities to use resources other places.

I and the people I work with, we think about the other ramifications. I can remember many times responding to a shooting on a street corner that happened because of drug dealing, battles over turf, getting involved with the gangs. Using that intimidation and fear to protect the business.

Watching the life drain out of young people on a street corner while we're frantically trying to stop a sucking chest wound, hoping the ambulance will get there. Even knowing though that if they were in the emergency room right now they're not going to make it.

And then have to turn around and deal with the grieving families. Trying to put together an investigation where everybody was watching but nobody saw anything. Trying to deliver justice to those folks.
As we talk about sentence reductions and we talk about retroactivity I think about some of these young people or some of these people that have been victims of that type of crime. Where is the justice for their families?

The offender may go to prison maybe for murder, maybe for some other crime, has a chance to live and get out. This person is gone forever and that's something their family deals with.

When I talked about the law-abiding citizens being the real victims I mean it. There are people trapped in these communities that nobody wants to buy their house. They've raised their kids. But they're not free to go out and enjoy the front porch and visit with their neighbors because of drive-by shootings.

Week in and week out we see these cases from around the country where kids are
sleeping in their own beds and a stray bullet comes through and kills them or injures them. That's the type of crime we're dealing with. We talk about the serious criminals. Everybody that participates in the drug business has a hand in this. So I realize I've probably gotten far off from your question but this is all -- this is what we see. This is what we live.

VICE CHAIR JACKSON: And I appreciate that. Can I follow up by asking on the issue of public safety? And I know both you and Sergeant Fulginiti focused on this.

Does it give you any comfort at all to know that if there was some retroactivity available a judge would be screening. You know, it's not a situation in which people would be released immediately to the street, but there would be a careful review of whether or not this particular
individual was dangerous or posed additional
danger to the community beyond the original
drug crime.

MR. MANGER: Does that include
some reentry services for that person if the
decision is made to put them back? Because
that's the key.

And I think, you know, I'm here
representing cities like New York, Chicago,
Los Angeles, Atlanta. There's going to be a
lot of folks going back into those
communities.

And to -- even if a judge is very
discerning and makes a decision that this
individual is right for being released to just
release them and then keep your fingers
crossed, gee, I hope this works out for them
I think is shortsighted.

I think that what Mr. Bushman
describes is very accurate in terms of the
kinds of offenders, the kinds of living
situations many of these folks go back into.

And unless we ensure that they have the appropriate supervision, that they have the appropriate wraparound services to help them succeed with their reentry I think it's just going to come back to that revolving door.

COMMISSIONER BARKOW: What would be your assessment of current federal reentry processes? Because assume they had enough time where they could go through whatever the normal BOP adjustment to society programs would be. Do you have a sense of how well those work?

MR. MANGER: My assessment of that is based on very limited information. And that is the percentage of people that recidivate. And it's pretty high. So clearly we've got work to do.

CHAIR SARIS: As I understand some of the debate is not just about over-
incarceration but under-policing. You know, exactly the kinds of neighborhoods you're talking about, Officer Bushman, about these neighborhoods that just don't have enough to protect the safety of the people.

And I understand one of the theories or at least the goals would be is to shift some of the money from the prisons to the local and state police officers to protect the communities better, and also to deal with what you're saying absolutely spot on which is proceed with caution. You need to have the reentry programs to manage this process.

So if there were some slight shift and you sort of carved out the really violent people you were all describing would that kind of a system work? More boots on the ground, slightly fewer people in jail and better reentry? Is that the right -- the way to be going here?

MR. MANGER: Well, I'll say that
I think it's -- I'm a big believer that additional boots on the ground if they're deployed appropriately and they're targeting the right things can be a very effective measure to increase public safety.

My concern is that I'm not sure that -- it's not just more policing that we need to do. I mean, it's got to be a more comprehensive approach in terms of increasing the public safety in our neighborhoods.

And the kind of folks we're talking about here, drug offenders, it's easy -- it's actually very easy to lock them up again because most of them will recidivate and we can lock them up again. But that's not solving the problem.

If we're trying to keep them out of prison and keep them from committing more crimes that's more than just more cops.

MR. BUSHMAN: Just two quick things. In some areas more cops on the street
is going to result in more people being arrested because in a lot of places they can't handle all the calls and get to things now quick enough, so that's going to happen.

The other thing, when we talked about retroactivity, when we talked about the judicial part of this, I think one of the things that's important is consistency. That's one thing we've always battled.

And I remember having defendants out on supervised release. Some judges would follow the rules to the letter. If you have a dirty UA you're going to get revoked. Other judges would give them four or five bites at the apple.

CHAIR SARIS: UA is urinary?

MR. BUSHMAN: The test. Urinalysis. Yes. Drug test. And consistency is very important.

And one thing that I have always liked about the federal system with the
mandatory sentencing, the sentences in place, you know, they didn't have to hear it from us.

These defendants could talk to their defense attorneys and say you know what, you are in the big leagues now. You're looking at a serious sentence. And many times that compelled information that helped us move that investigation up the chain to get to the people that were really the impetus behind all the crime and things we've discussed during this segment.

CHAIR SARIS: Thank you. Anyone else? Thank you very much, all of you, not only for coming here but really all that you do to keep our communities safe. Thank you.

MR. BUSHMAN: Thank you for the opportunity.

CHAIR SARIS: So our fourth panel involves practitioners. Thank you to all of you for coming. Again, anybody here need to
go in a specific order? Don't be shy. All
right. I think we're actually going to be
roughly on time. So let me introduce
everybody.

Let me start with Sarah Gannett. Ms. Gannett is an assistant federal defender in the Appellate Unit of the Federal Community Defender Office for the Eastern District of Pennsylvania.

Before joining the Federal Community Defender Office Ms. Gannett was employed by the Federal Public Defender for the district of Maryland and the Public Defender Service for the District of Columbia. Thank you.

Someone who's no stranger. David Debold who's the chair of the Practitioners Advisory Group. He is a partner at the law firm of Gibson Dunn and practices in the firm's appellate and constitutional law, securities litigation and white collar
defense and investigations practice groups.

James Felman, also well known to
us who's the chair-elect -- congratulations,
I guess -- of the Criminal Justice Section of
the American Bar Association is a partner in
the firm of Kynes, Markman & Felman in Tampa,
Florida and chair-elect of the Criminal
Justice Section of the American Bar
Association.

He previously co-chaired the
Sentencing Commission's Practitioners
Advisory Group.

And last but by no means least --
I'm going to not say this right -- Kenneth
Sukhia? Sukhia. Mr. Sukhia has been an
attorney in private practice in Tallahassee,
Florida since 1993.

Before entering private practice
Mr. Sukhia worked for 10 years as a prosecutor
in the U.S. Attorney's Office in the Northern
District of Florida and then served as United
So, welcome to all of you and why don't we start with you. Thank you.

MS. GANNETT: Thank you. We appreciate the opportunity to speak -- thank you also for the opportunity to speak with you today about the possible retroactivity of the 2014 amendment to the drug quantity tables. The defenders are for retroactivity of the amendment without limitation.

The Commission has already concluded in adopting the amendment in the first place that the drug quantity table produces sentences that are greater than necessary to fulfill the purposes of punishment.

The amendment does not undo the length of sentences completely. It's a modest step. It leaves in place enhancements for things like violence, or weapons
possession, or criminal history.

But it would serve justice, be fiscally responsible and promote the Commission's mission under Sections 994A and G of the Sentencing Reform Act to apply the amendment retroactively.

There are two things that should not be controversial here, that it is the right thing to do and that it has the potential to produce substantial savings.

It is the right thing to do because of the fairness issues at stake. Congress has authorized this body in the Sentencing Reform Act and in Section 3582C(2) to right wrongs in sentencing policy.

The amendment as discussed in our statement meets all of the Commission's traditional reasons for retroactivity.

Doing the right thing itself has power and we should not underestimate the power that taking even a modest step to reduce
unfair sentences can have for an inmate, for
his family and also for our communities.

In my work on the retroactive
crack amendments I've had a chance to see
firsthand what it means when a client can
return home to a graduating child, to a sick
parent, even to live out his own last days
outside of prison.

More than that I've seen what kind
of an impact a change in policy can have on a
person's beliefs, on his sense of fairness,
of justice, on his understanding of second
chances.

When we have the courage to do
what's right no matter how hard it is, no
matter how much work it's going to take then
it empowers our clients to believe that they
can do the right things too.

Adopting this amendment
retroactively also has the potential to
create great savings in the millions or even
billions of dollars by placing on supervision
offenders who would otherwise be incarcerated
for terms that they no longer need to serve
according to the data at a fraction of the
cost which would free up those resources to
attack other problems that we're facing in
the criminal justice system.

What makes this decision difficult
or apparently more difficult is the volume of
cases at issue. But that is what should spur
us to act. There's been so much injustice
over so many years to so many people.

Making this amendment retroactive
will no doubt require processing and
supervising many cases. But as Commissioner
Hinojosa remarked in 2011 about the 2007 crack
amendment that process was simpler and worked
better than we expected. And that was true
of the 2011 process as well.

And it's because of the experience
that we've gained over the bold decisions that
this Commission made about crack retroactivity. And that experience will help
us make this process work as well. And we'll have a head start if the Commission votes as
planned in July to make this amendment retroactive as well.

The testimony about South Carolina's process I thought was very informative and it's indicative also of what happened in other small districts like the Eastern District of Virginia where thousands of cases were processed.

If small districts like that can make a process like this work then large districts like the districts in Texas that are going to be facing the greatest caseloads can surely make the process work this time around.

Fifty-one thousand cases will not drop on day one in November. What will happen is what we did in 2011. We'll prioritize
them by the dates of release of the offenders
so that all the motions will not land on the
court, so that all the analyses will not land
on the desks of probation officers on the date
that the Commission decides to make this
retroactive, or even between now and November
1.

Instead, we'll organize the files
in the defender offices and in the U.S.
Attorney's Offices based on the years of
anticipated release.

The parties can also help the
court identify which cases are going to be
ineligible for relief. In the District of
Maryland, for example, when courts received
motions they referred them to the defender
office to provide input on whether those
defendants would be eligible for relief or
not eligible for relief.

So that probation didn't have to
do an analysis that would turn out to be
unnecessary when, for instance, the bank robber who had been using crack at the time was applying, petitioning the court for relief that was going to obviously be unnecessary.

And even in the closer cases the defender office could assist in providing that kind of input.

Those kinds of collaborative approaches can save resources both of the courts and of probation and make this process efficient and effective to the benefit of the defendants who are serving time now, the same way that the fairness will be applied for those defendants that the Commission has already acted on behalf of. Thank you.

MR. DEBOLD: Thank you, Chief Judge Saris and members of the Commission. The PAG also fully supports retroactive application of this amendment without exceptions.
You have my written testimony.

I'd like today in my oral testimony to focus on the line-drawing issue that the Department of Justice has proposed in their testimony. And for that I have really three points I want to cover.

The first is what I will call the double-counting and indeed the double standard point.

As you know the Department has proposed certain categorical limits based on criminal history category, role in the offense, the presence of a firearm, the involvement of violence and the like.

Every single one of those factors that the Department would use to disqualify a defendant who is currently serving a sentence from eligibility is a factor that the sentencing court was required to consider at the time of the original sentencing, and by virtue of the sentencing guidelines
calculation and the guidelines manual that this Commission has promulgated, resulted in a meaningful increase of the sentencing guideline range.

To disqualify these defendants from eligibility for consideration, not automatic sentence reduction, but eligibility for consideration for a sentence reduction based on this amendment would in effect be to say that the criminal history category, that categories that apply to these defendants, or the role enhancement, or the gun enhancement, or the obstruction enhancement, were in hindsight at least two levels too low to adequately punish those individuals.

The Commission has already made a determination that the drug quantity table should be reduced by two levels across the board and that will adequately take into account the seriousness of the offense in combination with other factors such as the
ones I just mentioned.

This is not a concern that I've ever heard the Department of Justice or other law enforcement agencies voice, that somehow the enhancements that already exist for these types of factors were and are inadequate.

In fact, our experience tells us otherwise. I'd like to draw the Commission's attention to the eight sentences that the President commuted in December for significant drug trafficking offenses.

If you were to look at those eight cases these are cases that went through the DOJ Pardon Attorney and that the President commuted.

You will find for at least one of those eight defendants at least one of the following factors: an obstruction increase, a criminal history category greater than 2. In fact, there are at least four of those defendants who I believe had a higher criminal
You will find multiple 851 enhancements, in fact. You will find gun enhancements including one defendant who had a conviction at the time he received the drug offense for a felony possession of a firearm. And in at least three of the cases you will find leadership enhancements were applied.

Yet, and we have heard as practitioners when we apply for clemency petitions how overburdened the Pardon Attorney Office is and how difficult it is for them to process all these applications coming from around the country.

Yet the Pardon Attorney does not categorically exclude people based on these kinds of factors. And in fact, in these cases where the President actually commuted sentences we have specific examples of where the Pardon Attorney apparently did not view
those factors as disqualifying the person from actually receiving the relief.

If the Pardon Attorney's Office as overburdened as it is can do this kind of individualized assessment, hundreds of U.S. federal judges can do the same.

The second point I'd like to raise is the benefit of categorical exclusions. In our view the benefits are highly overstated or questionable, and in fact the analysis that's being done in this situation is incomplete.

And you've heard quite a bit about the process for weeding out the ineligible and whether making it more complicated on the front end by having these various exclusionary factors is necessarily going to save resources for the lawyers, the judges and the probation officers.

What I want to focus on is how the benefit analysis that the Department is
advocating is incomplete.

You heard, for example, the testimony today about how Assistant U.S. Attorneys will be diverted from spending time on new cases by having to devote their attention to older cases.

I think that's an incomplete analysis because for every defendant who's going to get the relief, for every additional eligible person who actually qualifies for relief there is going to be a net resource savings not just for the government as a whole but the Department of Justice individually by savings that will occur in less prison time for those individuals.

The Department can certainly allocate those resources to take care of its need for additional prosecutors to prosecute new offenses.

My final point is that I want the Commission to remember that for every
argument you hear against retroactivity you should ask yourself is this an argument against the wisdom of the amendment in the first place. Or putting it another way, would the same point be made to undermine prospective application.

In our written testimony I pointed out how the Booker exception would not make sense because that -- we are not going to assume that when people are sentenced in the future after November 1 that judges are going to say, ah, I'm going to give you the same sentence I would have given you before. They're going to give the lower sentence because this guideline provision clearly calls for a different analysis of the effect of the drug quantity.

The same is true for other exceptions. The same is true for a number of the things you heard from the law enforcement officers.
So we strongly urge the Commission to apply this amendment retroactively without introducing any additional exclusions or exceptions. Thank you.

MR. FELMAN: Good afternoon, Chief Judge Saris, distinguished members of the Sentencing Commission.

Since 1998 I've been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Florida. I am a former co-chair of your Practitioners Advisory Group and I'm appearing today on behalf of the American Bar Association for which I serve as the liaison to the Sentencing Commission and as chair-elect of the Criminal Justice Section.

The American Bar Association is the world's largest voluntary organization with a membership of nearly 400,000 lawyers including a broad cross-section of prosecuting attorneys, criminal defense
counsel, judges and law students.

The ABA continuously works to improve the American system of justice and to advance the rule of law in the world.

I appear today at the request of ABA President James Silkenat to present to the Sentencing Commission the ABA's position of the retroactivity of the 2014 drug guideline amendments.

We've got too many people in prison in this country. A large part of the reason for that is that there are too many people in federal prison in this country. And a significant reason there are too many people in federal prison in this country is because they are there for federal drug offenses where the sentences are too long.

I was reflecting this morning, this year is the 20th anniversary of my joining the Practitioners Advisory Group and beginning to appear before this Commission
and the 20th anniversary of my beginning to
organize the national training program on the
guidelines.

And in all those 20 years the one
ting thing that I think virtually everyone that I
ran into recognized is that the severity
levels of the mandatory minimum penalties in
federal drug crimes may represent the single
worst and least advised policy decision of
federal sentencing law in our history. They
were aimed at kingpins but they missed the
mark.

The Commission didn't make that
judgment, but it hampered the Commission's
efforts to peg the severity levels of the
guidelines to existing sentencing practices.
They understandably felt a need to peg the
guidelines to the mandatory minimums to avoid
cliffs.

It has catapulted us into an age
of over-incarceration the likes of which have
not been seen in the history of human society.

This is the opportunity for the Commission to do something about that. It is so exciting to appear before you at such a time.

The Commission has been able to unanimously chip away at that going forward. It's able to support bipartisan efforts in the Congress to do so much more.

But you and this time is the only opportunity that there will ever be to help those who have already been sentenced under these sentences which even the Department of Justice comes before you and says in some cases are too long.

It is a moral imperative. It's easily satisfied by your considerations of purpose, impact and ease.

And I also want to look at history. There was a suggestion earlier today that it's not unusual for Congress to
lower the penalties in a statute.

I respectfully disagree. I believe they have done it once in 2007. I don't believe they've ever done it before in the history of our Republic.

Now, true enough, they didn't make that one retroactive. But this Commission has the authority to make amendments retroactive and it has done so at least with respect to the drug guideline in 1993, in 1994, in 1995, in 2003, in 2007 and in 2011. In no instance has the Congress ever rejected such a step by the Commission. And those are just the amendments to the drug guideline which I believe are every amendment to the drug guideline. So there has never been an amendment to the drug guideline that was not made retroactive.

And I understand that the mitigating role adjustment wasn't made retroactive and the safety valve wasn't made
retroactive, but they're not a part of the
drug guideline. So I would suggest that
history would suggest that this would also be
consistent if made retroactive.

The other thing that I see is that
this Commission acts on data. We don't have
to guess. Unlike other actors you have the
data and the data here is really quite
remarkable.

In every -- I understand we're
saying it's not significantly significant,
but in every criminal history category the
recidivism rate of those released was lower.

This cohort would fare even better
if the same trends continue. This cohort is
older and unlike the last cohort that was
measured where only 27 percent were in
criminal history category 1, 40 percent, just
about 40 percent of this cohort are in
criminal history category 1. Now, that
suggests that we're going to do even better
this time around.

   And I only note that I see the

Department of Justice today says, well, don't
count categories 3, 4 and 5. The gap between
how those released early and those who serve
their full sentence is actually greatest in
criminal history category 4. There's like an
8 percent lower rate of recidivism among the
crack releasees who have category 4 as
compared to the control group.

   So I don't think that that's a
good way to do it for the reasons that Dave
said. These people have already been hit for
all that.

   So this is the right thing to do.

   Please do it.

MR. SUKHIA: Madam Chairman, my
name's Ken Sukhia. I was the U.S. Attorney
in the Northern District of Florida. During
my tenure as an Assistant U.S. Attorney from
1980 to 1990.
And during my term as United States Attorney I think it could be fairly presented, represented that that was a time when we were dealing with I think the drug scourge in our nation.

Both the increase in cocaine distribution and also the issue we dealt with with the crack cocaine, the epidemic that we were dealing with.

At the time when I started federal prisoners typically served about one-third of their term. By the time I left in 1993 as you know the incidence of those serving most of their time in federal prison was fairly significant. It was something like 93 percent I think of the time that they served.

I know that reasonable people take different positions on this. Obviously people from both sides of the political spectrum support it.

And I don't know that I can
contribute a great deal when it comes to the
data before the Commission. But I do have a
hard time separating my own experience in
prosecuting during that period from what I
think is the wisdom or lack thereof in
reverting, in going back, in stepping in a
direction which takes us back to at least in
the direction of where we were.

I know it's been said here this
morning that this is arguably the most
draconian sentencing structure in the history
of humankind I believe it was just said.

I would say that the reduction in
our nation's crime rate over the last 20 years
has been certainly the most significant
reduction in violent crime and crime across
the board in our nation's history.

And yet, at a time when -- and let
me share at least some of the statistics with
you. In 1991 the murder rate in the country
was 9.7 per 100,000. We had 252 million
people living in the country at that time.

We had something like 25,000 murders, homicides, intentional homicides.

By 2012, the last UCR report, we had a 4.7 murder rate per 100,000. We had 14,000 murders that year.

We had 3.2 million burglaries in 1991. That was reduced to 2.1 million in 2012. That was a reduction of over half of -- when it comes to the burglary rate per 100,000.

We had 675,000 robberies in 1991 and today we have three hundred and sixty or something like that. It's in my statement. More than half, or reduced by more than half.

Our population now is 317 million. So you can't do it based purely on those numbers, you have to look at the rate per 100,000, the crime rate.

Now, that is an astounding reduction in major crime in the country. The
same situation with violent crime throughout the nation.

Now, when the sentencing guidelines were first enacted in the Sentencing Act in 1986 was first enacted it was passed on a bipartisan basis by people who predicted that this -- or who knew that we were in this type of epidemic. There was a problem.

Now, you might say, well, okay, how is this -- I know there are some tricky issues here because I think it was a very prescient point that Mr. Felman just made that many of these arguments could have been made and relate to both issues, both the initial issue of the reduction across the board and also to retroactivity. I think there's something to say for that.

But it's difficult for me to separate the philosophic issue here and from the pure, quote, "fairness" issue.
I was surprised, or not really
surprised but I did note that during the
Department of Justice spokesman's statement
some six times it was said that, well, these
reduced sentences that were longer than
necessary was the phrasing. Unnecessarily
long. Longer than necessary. Greater than
necessary. Unnecessarily long. Stringent
mandatory minimums resulting in greater than
necessary penalties.

   And I think that's an extremely
subjective assessment here to say that they
were greater than necessary when you're
looking at a reduction in crime of such a
dramatic nature.

   Now, why is it related necessarily
to drug offenses? I was totally shocked when
I was preparing for this message at the recent
statistics from the ADAM Report which I'm sure
the Commission is aware of which was reported
by the ONDCP Chairman. And even she had to
acknowledge that drugs are fueling most of
the crime in our nation.

Eighty percent of those arrested,
roughly 80 percent of those arrested for
violent crime in Sacramento, for instance,
tested positive for a controlled substance in
their system.

The average of the 10 cities that
were surveyed by the ADAM Report -- this is
in 2012 -- the average was over 60 percent of
those arrested for violent crimes had drugs
in their system, controlled substances.
We're not talking alcohol, we're talking
controlled substances.

The surveys that are conducted,
national and state, of prisoners throughout
the country show that some 30 percent of those
arrested for burglary, 30 percent, admitted
that they committed their crimes for the
purpose of procuring money to obtain drugs.
The same statistics, virtually the same hold
up for burglary.

Now, we heard a lot of discussion about the cost here, an astounding cost to the system. But the cost in pure dollars, not to mention the untold cost in human misery and pain and trauma associated with the drug culture, it far, far outstrips the some $2 billion that the prison -- and that's the top number that the prison chief just discussed.

Now, I don't know about these numbers, and I don't know, the Commission may already have a sense of whether they have validity or not. But the New York Times reported that -- it was the most comprehensive study of its kind by Iowa State University in determining what the cost of each crime was.

Now, I mentioned earlier that there were 674,000 robberies in the country in 2012. If you look at the statistics they show that 30 percent of those were committed by those seeking money to obtain drugs, you've
got about two hundred and some plus thousand
of those robbery offenses.

This study, the most comprehensive
study, said that the cost in human, the
societal cost from each robbery is some
$331,000. Now if you add that up that comes
out to about $32 billion and that's in 2012
alone.

If you add to that the burglaries
you're looking at 2.1 million burglaries 30
percent of which were committed by those
seeking money to purchase drugs. If you add
that up based on the statistics showing
$41,000 -- and I'll end right here -- $41,000
--

CHAIR SARIS: See the red light?

MR. SUKHIA: Yes, I'm sorry. If
you multiply that you come up with a total of
$59 billion in 2012 alone in the cost to
society for these crimes.

Now, if I might I'd just like to
conclude because I want to say that I've represented folks who are in federal prison. And I have a great empathy for what they've
gone through.

If you hone it down to the individual case it's difficult not to. In fact, I did when I was prosecuting. I'm fully aware of my own frailties so I would always look at it as Benjamin Disraeli did when he said that there but for the grace of God go I.

I completely and totally empathize and I feel a sense of conflict about this issue.

But I would want to say that someone had once said that mercy to the guilty can be cruelty to the innocent. And I have to say in balance, and when I was called by the staff I had to take a double take and say well, what would my position be on this.

Because when I look at the
dramatic decrease in crime over the course of the last 28 years I don't think it's the right thing to do as has been said here.

Those who -- and I just conclude with my remarks -- but those who argue that the war on drugs has failed would do well to stop and consider what our nation would look like if there had been no law enforcement efforts to combat the onslaught.

As I noted at the outset which I didn't hear but because drug offenses are so wide-ranging and indiscriminate, the many victims of the illicit drug trade are not easily identified.

Ironically, many of the beneficiaries of the war on drugs will also never be known. They're the untold millions who were able to avoid being victimized by drugs and their inherent violence because of the many drug lords and traffickers who served the better part of their time in the war
behind bars.

Proponents have argued that the amendment and its retroactive application will save money, but this argument seems to overlook the enormous human cost inherent in stepping back from a sentencing formula that has contributed to the largest sustained decrease in crime in our nation's history.

Thank you.

CHAIR SARIS: Thank you.

Questions?

VICE CHAIR JACKSON: So, Ms. Gannett, I heard you say at the outset that the Commission has already determined that the drug guideline produces sentences that are greater than necessary. And I am a little concerned about the framing of the issue in that way.

MS. GANNETT: The drug quantity table.

VICE CHAIR JACKSON: The drug
quantity table. So, thank you, I misheard you.

MS. GANNETT: If I said the wrong thing I apologize. What I meant to say is the drug quantity table reduces sentences.

VICE CHAIR JACKSON: And let me just follow up by saying, and this sort of segue-ways into a question I think for Mr. Debold, that at least my understanding speaking for one Commissioner is that there was a significant concern about the fact that quantity was sort of driving the guideline. And that by lowering the quantity other factors related to the crime could be taken into account. And there would be better differentiation.

And so it's possible I think that under those circumstances there will be sentences that judges have already imposed in cases that the court might upon retroactivity determine were perfectly appropriate given
the other factors in the case that perhaps
may not have been able to come to full flower
in a situation in which we had so much
emphasis on drug quantity.

So my question I guess, Mr. Debold, is that you said you believe that
judges would change their sentences upon
retroactivity in I guess the vast majority of
cases if not all the cases.

And I'm not so sure that's so. So
I'm just wondering what your reaction is.

MR. DEBOLD: Yes, and I didn't
mean to suggest that that will happen across
the board.

What I was doing, and I was
probably rushing through it, was I was
addressing I think at that point the idea of
there being an exception or an exclusion for
defendants who were sentenced after Booker,
for example, that they would not get the
benefit of this.
Under the assumption that judges since Booker have been under an advisory regime and they've been able to take into account the ways in which the drug quantity table may overstate the seriousness of the offense in relation to the other factors.

My point is I don't think judges have been uniform in how they have reacted to Booker in general or in the drug guidelines in particular.

And I think to have an exclusion on the assumption that, well, after Booker judges could already take into account the ways in which they might disagree with the drug quantity table.

I think some judges may have done that and they may honestly say to a defendant after retroactivity is put through I actually already took that into account in your sentence so I'm not going to lower it.

But I think a large number of
judges who will be sentencing people after November 1 will be giving them a lower sentence than they would have given them before November 1.

I think if you look at it that way you can see the ways in which retroactivity is going to result in judges imposing sentences that are more tailored to the particular facts and the particular nature of the offense in those cases.

I think putting an artificial limit on when judges can do that is not the way to go in light of that.

MS. GANNETT: Judge Jackson, if I could address that question as well.

The specific statistics are in our written statement, but I think that the numbers that we looked at suggest that the majority of the eligible defendants if the amendment is made retroactive are going to be post-Booker defendants.
And that post Booker the Commission's statistics demonstrate that something like four-fifths of these defendants were sentenced to within-guidelines sentences. And that even among those the majority who received any reduction sentence received a government sponsored reduction in sentence. So that the number who received a variance sentence is very small. And if my memory serves correctly which it may not it's something like only 10 percent received a non-government sponsored reduction in sentence at their original sentence. And so I think the numbers will actually turn out to be greater than you might suspect post Booker. I think that the guidelines still provide a real anchor to most judges in sentencing. And so that the retroactive amendment will still provide a
real possibility for relief for a lot of defendants.

Of course, judges will still take a very close look at those cases where there may be a defendant who presents a public safety risk, or a danger to the community and will make appropriate decisions about who should be entitled to those reductions.

But I don't think it's a safe assumption to make that the sentences have been appropriately calibrated based on drug quantity.

CHAIR SARIS: I think it was Officer Manger from the Major Chiefs Association, who said -- I took it down because I liked the way he said it which is don't just think about costs. Move cautiously to think about public safety. And he came up with a series of measures that he thought were essential so that the violence wouldn't return.
And one of the concerns of course we're all grappling with which I think only merited a footnote in some of the testimony were resources, to make sure that there were significant enough resources to handle the huge numbers of people we're talking about.

And I wondered whether in light of that, whether it's a carve-out, or whether it's a delayed implementation, whether any of you could comment on whether or not you thought that that would be a fair balance between public safety and fairness.

MR. FELMAN: Well, I'll say that I thought that the judiciary suggestion of a slightly delayed implementation seemed pretty well considered.

And I guess it's also consistent with what the Commission did in 2007 where it took a little while for the Commission to do the vote on retroactivity, and then it took a little while to implement it.
And I think that it's -- I mean, this I have to say I guess is my personal reaction. The ABA doesn't have a policy on that point. But my sense was that that was a pretty fair balancing of the resource issue.

VICE CHAIR HINOJOSA: I guess I'm always puzzled by the discussion of drug penalties are driven by type of drug and the quantity of drug. Because I don't care what the system is, guidelines or no guidelines, of course that would be the major concern and discussion I think of any sentencing judge, certainly the type of drug and certainly the amount of the drug.

Having done five years of sentencing without guidelines it certainly was a huge factor in how I approached a case.

But so far nobody today has addressed the issue of should it make a difference as to what the type of drug is.

Are there some drugs that this should be
eligible for and others not eligible for.
Nobody's commented on that and I guess there's no distinction made by anyone on that particular point.

MR. FELMAN: I looked at it because I was ready to make the argument, well, surely the propaganda at least is that crack dealers are the worst. And I was ready to be able to come in and say well, these people are all better.

And then I looked and I saw that there are a lot of meth, the meth was pretty high. And I don't know whether there's any data on whether meth dealers are more or less dangerous than crack dealers so I didn't go there.

But certainly there's a whole lot of marijuana which may be less. But I looked at it.

It just struck me that if we did it with crack and the retroactivity data for
those people showed that letting them out earlier resulted in lower rates of recidivism that there isn't any real reason to think there would be a difference. I know it says statistically significant, but in every criminal history category it's a lower rate.

It just struck me if it wasn't a difference in recidivism and public safety impact for crack there isn't any reason to limit it to the other drugs.

MR. DEBOLD: I come back to my third point in my oral testimony which is this is really an argument for not making the change for certain categories of drugs prospectively.

I mean, if we are satisfied with a minus two across the table for all drug types and there isn't concern that meth or whatever drug it is, you know, that we're going to have problems going forward I don't see why we would apply that kind of an issue
for the purpose -- if we're going to do it retroactively I don't see why we would draw a line that way. That's been my sort of view of it on a lot of these issues.

CHAIR SARIS: Judge Breyer and then Commissioner Barkow.

VICE CHAIR BREYER: I wondered along with Commissioner Saris in light of our concerns about public safety going forward, in light of the chiefs' concern about not just individualized evaluations, but also a network out there, some type of safety network that would include such things as monitoring during release and so forth whether there is some potential marriage to the effective date of the release in terms of the decision being made whether or not this person should be released.

For example, if you say that the effective date of the retroactivity is March or May or some date next year does that mean
that you cannot, a judge cannot make that
determination as to whether or not the person
to be released in March or May in November or
December or January.

I'm trying to see, because I am
very concerned about, one, resources over
which we don't control. I mean, that was the
-- there couldn't have been a truer statement
made today that we don't control resources.
It's a question of appropriations. It's a
question of the Congress of the United States.

Maybe to some extent it's a
question of how DOJ or some other Department
allocates their given resources. That's
another issue.

But for us to have some comfort at
all in the system I think at least one
Commissioner would like to see whether or not
there can be some intelligent -- when I say
intelligent I'm arguing the result -- some
type of allocation of a decision, or a making
of a decision, and an effective date for implementation of that decision.

Does that create problems? Does it answer some problems? So it really is sort of what you people are the experts in. You're the Practitioners Group or the public defender and so forth. Is that doable? Is it not doable?

MS. GANNETT: I would like to address that. I think from the defender's perspective obviously some retroactivity is better than no retroactivity.

But I think we need to be careful about speculating as to what solution would solve an indisputable question about resources. We are guessing about the resource problem to some degree.

I mean, there is a resource problem but we're guessing about the degree. And I don't know how we know whether implementing this as of November, as of March,
as of May would be the right result.

And our concern is that we're deciding that somewhere between 4,500 and 12,000 depending on how the data work out, I don't know after November 1 how the next 8,000 people get released over year one -- may not get the benefit of this amendment based on questions that we have about resources and how those resources will be allocated.

And that seems like a very slippery slope to be walking on. Particularly because those four to twelve thousand people are probably the people for whom we have the best pre-release planning in place since as the judge pointed out those people are the closest to the end of their sentences. And as BOP pointed out we begin pre-release planning somewhere between 180 and 90 days before the sentence is coming to a close.

I was encouraged that BOP just
based on the potential that this might become retroactive is already planning for the prospect that it would be and had some ideas and some offerings about, you know, this is what we're doing already in case it does.

And it sounds like Probation is also being thoughtful about that, and the Criminal Law Committee is also being thoughtful about that.

It seems to me that the right thing to do is for all of us to start being thoughtful about what things we can do to streamline the process, to shift resources where they need to be shifted, to use the plans that we have in place in 2011 to teach folks from districts that didn't have to grapple with this before how to do that.

And to use every day of the next three and a half, four months between the Commission's decision-making and November 1 to provide the benefit of the retroactive
amendment to every person to whom it can be provided.

Probation certainly has demonstrated in the past as has every agency seated around this room an ability to juggle tight resources. And certainly the last two years all of us have had to do that in our respective agencies.

This will be undoubtedly a burden, but the most positive kind of burden, the kind of burden that we should all embrace because it does justice.

CHAIR SARIS: Thank you.

Commissioner Barkow?

COMMISSIONER BARKOW: Thanks, and I'll keep this quick. I'm just curious from your experience with the crack decisions from the hearings that judges had made how often was it the case that someone who had some of these factors that the Department of Justice has identified was nevertheless given the
I'm just trying to get a sense of when -- let's say you had before when there wasn't a categorical prohibition a judge had before him or her someone who had a violent SOC, or someone who had an aggravating role, or a weapon.

In many cases they did get reductions. In some cases they didn't.

But what happened was a very cooperative process where prosecutors and defense lawyers came together and figured out who are the people who are safe to release into the community and who are the people who
are not. And then made a recommendation to judges.

And attached to our testimony you have examples of the kind of motions and agreed-upon orders that were submitted to judges to make that process effective and efficient for judges.

There were very few actual litigated public safety motions where there was a dispute about who was okay to release early and who wasn't.

And when there was a community safety issue that was litigated before the judge. But those cases were few and far between.

And I think that's reflected in what you heard from Probation about the number of hearings that occurred. There were very few.

But when they needed to happen they did. And when courts needed to deny
those motions they did and those people served out the remainder of their sentences.

It's important to note though that the recidivism study demonstrates that even in those higher categories, 3, 4, 5, 6, there are not higher rates of re-offending. Even for people who had weapons there are not higher rates of re-offending.

Even for people that have mandatory minimums because of gun possession. A lot of those cases are gun possession, not brandishing or use of a weapon.

So they're really broad categories that the Department is proposing be applied here that aren't necessarily going to well measure who's safe to release into the community or not.

COMMISSIONER WROBLEWSKI: But, Ms. Gannett, if you were correct that this in fact was a robust process the last time we went through this in 2007 and 2011, wouldn't
the recidivism rate be significantly lower for the people who went through that process than for the people who didn't go through that process?

Yes, it was lower, but by a smidge. It was basically the same. So how can you conclude -- I'm just curious how you come to the conclusion that that process was a robust process identifying public safety.

MS. GANNETT: Because community safety is not -- the danger to the community is not the only thing that affects recidivism. When people return to the community they face all kinds of challenges that can't be estimated based only on their record. I think that's just the reality that we have to confront. These people are often returning to communities where they face significant challenges that are unrelated to the kind of factors the Department has identified.
The Department didn't identify their socioeconomic condition. The Department -- and we can't identify that. But returning to a community like that creates issues for people. And that's not something that we can control for.

There's going to be some recidivism. Just like when these people are released at the end of a full-term sentence there's going to be some recidivism. That's just a fact.

But all of these individuals that we're talking about today are going to be released someday. It's just when. Are they going to be released at a time that we think is sufficient but not greater than necessary to fulfill the purposes of punishment? Or are they going to be released at a later date?

CHAIR SARIS: One more question and then everybody can have lunch. So a quick response.
MR. SUKHIA: One thought. On the crack cocaine level of recidivism at least in our community and I think in our state and probably across the country we had a crack cocaine wave. And it came and it's still an issue but it's far less of an issue now.

I don't know to what extent that should factor in in determining how recidivism rates among those who got caught up in the crack cocaine epidemic, their recidivism rates versus those who are involved in across the border offenses that you've identified here.

CHAIR SARIS: Thank you. One last question and then lunch.

VICE CHAIR JACKSON: We've heard a lot about fairness, the moral imperative, et cetera, et cetera. And I have to say that I saw that very clearly in the crack cocaine retroactivity.

Here it's not as clear. And I'm
wondering is crack retroactivity a different animal or not? From your perspective.

MR. DEBOLD: To me they're different but I'm not sure they're really different in kind. They may be different in degree. And I think there are factors for each that are important.

I think the common theme is with the current amendment the Commission is considering is the extent to which a statutory provision, mandatory minimums, has skewed in some fashion the penalties that apply up and down the drug quantity table because of the effort to try to avoid the cliffs that Jim referred to.

And although I think there is a difference when you're talking about the racial disparities that a number of people were concerned about between crack and powder, the common theme is that you've got a statutory provision that was not written in a
very circumscribed and careful manner in our view.

And I think that view is now pretty widely held, that that was resulting in sentences that were greater than necessary to achieve the purposes of sentencing as a general matter. And that if you apply those in individual cases that you're going to come out with different outcomes after you've made that fix.

And so I think that is a common theme. I understand the arguments, there were some more compelling arguments in crack, but it doesn't meant that just because there were stronger arguments in the crack context that there isn't a strong argument in this case albeit based on some different factors.

But all coming back to the question of whether the guidelines were properly calibrated in light of what was influencing them and how they were
promulgated in the first place.

MR. FELMAN: I think they're slightly different arguments but equally strong given the number of human beings that we're talking about that are sitting in federal prisons right now that maybe don't need to be there. And that would be my last effort to stand between everyone and lunch.

CHAIR SARIS: Thank you very much. Thank you for -- you represent the people in the courts who -- fighting every day to do the just thing. So thank you very much for your testimony. Fighting us every day.

(Laughter)

CHAIR SARIS: Thank you very much. Enjoy lunch. One hour. Thank you.

(Whereupon, the above-entitled matter went off the record at 12:54 p.m. and resumed at 2:00 p.m.)

CHAIR SARIS: Okay, here we go.

All right. So we're here. Thank you very
much for coming to this meeting. This is the
group from all of you who work so hard on
policy issues in this area.

I begin with Pat Nolan who is the
director of the Criminal Justice Reform
Project of the American Conservative Union
Foundation.

He is the former president of the
Justice Fellowship, the public policy arm of
Chuck Colson's Prison Fellowship Ministries.
Mr. Nolan served for 15 years in the
California State Assembly, 4 of those years
as the Assembly's Republican leader.

So, the next person is Jesselyn
McCurdy. Welcome. Senior legislative
counsel for the American Civil Liberties
Union.

Ms. McCurdy previously served as
counsel for the House Subcommittee on Crime,
Terrorism and Homeland Security. She co-
directed the Children's Defense Fund's
Mary Price -- I think, Ms. McCurdy, you've been here before, right? And Mr. Nolan, have you? Yes? All right. So repeat testifiers.

Mary Price certainly has as general counsel for the Families Against Mandatory Minimums. She's been general counsel since 2000. She directs the FAMM Litigation Project and works on federal sentencing reform.

And prior to joining FAMM she was associated with the firm of Feldesman, Tucker, Leifer, Fidell & Bank handling appeals of court martials and has conducted administrative advocacy on behalf of United States servicemembers.

Brandon Sample, the Executive Director of Prisology, has worked as a client
affairs coordinator at the Federal Legal Center, a Florida law firm, and is currently involved at the Vermont Law School.

And last but by no means least is Russell Butler who's the chair of the Commission's Victims Advisory Group as well as the executive director of the Maryland Crime Victims Resource Center.

He serves as an adjunct professor at the University of Baltimore Law School.

Welcome.

For those of you who were not here before lunch we have this -- I think most of you know this, you've testified here before. This light symbol. And then when the light goes off I start jumping up and down and so please don't ignore me because I think I need to be more aggressive about enforcing the lights.

(Laughter)

CHAIR SARIS: So thank you very
much, Mr. Nolan.

MR. NOLAN: Judge Saris and distinguished Commissioners, thank you for the chance to comment on this. As Judge Saris said I served in the legislature and I was a leader on criminal issues, especially crime victims, on behalf of crime victims.

I was an original co-sponsor of the Victims Bill of Rights and I received the Parents of Murdered Children Victims Advocate Award.

During the course of my service there, however, I was prosecuted for a campaign contribution I received that turned out to be part of a federal sting. And so I was convicted and pleaded to one count of racketeering and served 29 months in federal custody. So I've had a chance to see the criminal justice system from both sides of the bars.

I'm a conservative Republican and
I would note to you that there's a growing movement among conservatives to rethink the long sentences and the excessive costs not only in human terms but in fiscal terms for the states.

I'm part of a group called Right on Crime which includes among its signatories former Attorney General Ed Meese, former Speaker of the House Newt Gingrich, former drug czar Asa Hutchinson among dozens of other prominent conservatives.

None of them would anyone accuse of being soft on crime but they do think we need to rethink the way we handle crime.

Texas led the way in efforts to do this, and substantially reducing the prison population based on dangerousness. There's a rubric we use which is prisons are for people we're afraid of, but we've often filled them with folks we're just mad at.

And by diverting those folks we're
just mad at to other punishments but that
don't include incarceration it takes less of
a toll on their lives and far less toll on
the public pocketbook.

Because of those reforms Texas is
able to scrap plans for three new prisons and
in fact close an existing prison and diverted
that money, a substantial part of the money
into drug treatment and mental health
treatment.

The results have been phenomenal.
The crime rate is now the lowest it's been
since 1968. And they've saved literally
billions of dollars for the taxpayers.

Texas was followed by South
Carolina, Georgia, Pennsylvania, Missouri,
Kentucky, there's a longer list than that of
states that have had adopted these reforms.

And it's shown that we can keep
the public safe, saving taxpayers money and
frankly put people back on the road to
reforming and restoring their lives more quickly than by the lock them up and throw away the key methods.

There are two points I would make about this. One is where the sentence reduction which this Commission adopted not made retroactive it would cause great resentment within the prison.

While I was in prison there was the disparity, the tremendous disparity between crack and powder cocaine. And the friction among cellmates and among other prisoners between those who had relatively significantly lighter sentence for powder than for crack even though pharmacologically there's no difference was -- it was palpable.

To not make this retroactive would mean people would go into prison under the new sentence, serve their sentence and leave, while someone convicted before would remain in prison. And that is a basic unfairness
that I don't think the system should tolerate.

Now, there are Cassandras that have predicted that the streets will run riot with violent prisoners if you make this retroactive.

Frankly, those same voices repeatedly have told this Commission and Congress that any reduction in sentences will result in a crime wave. I can quote chapter and verse of their testimony.

The fact of the matter is they've misled this Commission for years. Those things never happened. There was not a crime wave after you made the crack/powder disparity retroactive. The recidivism rate of those who were reduced was no greater than the average population.

The second point I'd make is the average person under this proposal would serve eight years. That's a long sentence by any stretch. And if they still pose a danger
after that point the prosecutor can make that point to the judge.

Lastly, I'd say the Bible tells us that sentences should be measure for measure and pound for pound. That's the balance in our system. And I just strongly urge you to adopt this reform retroactively so that we have that equality of sentencing. Thank you.

CHAIR SARIS: Thank you. Ms. McCurdy.

MS. MCCURDY: Thank you. I want to thank Judge Saris and the other Commissioners for inviting the American Civil Liberties Union to testify today on the retroactivity of the amendment that would revise guidelines applicable to drug trafficking offenses.

The ACLU is a nationwide non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in our
Constitution.

We believe the Commission should apply this amendment to the drug quantity table retroactively because it would be an important step toward improving the fairness, proportionality of the guidelines, racial disparities in sentencing and an unsustainable and costly explosion in the number of people in the custody of the Bureau of Prisons.

In testimony before the Commission on March 13 the Attorney General endorsed the Commission's amendment and in his testimony he stated that it would help to rein in federal prison spending while focusing limited resources on the most serious threats to public safety.

The Commission's own data further proves Attorney General Holder's point because it indicates that BOP would save over 83,000 bed years if the amendment were applied
Currently, 50 percent of the federal prison population is comprised of drug offenders. In the more than 25 years since the enactment of the guidelines one of the most important indications that the guidelines for drug trafficking offenses are excessive is the dramatic impact it has had on the federal prison population.

In 1984 when the Sentencing Reform Act was passed the federal prison population was over 34,000. By 1994 it was more than 95,000. By 2004 it was approximately 180,000. And as of June 5 there are almost 217,000 inmates in the custody of BOP.

The guidelines' severity has been one of the driving causes of the federal prison population that has grown at an astonishing rate of almost 800 percent since 1980 resulting in BOP operating at about 35 percent over capacity.
While the amendment lowering the base offense levels in the drug quantity table is a critical step forward, it would be an unfortunate step backwards and a drastic dilution of its potential impact if the Commission were to decide not to apply the amendment retroactively.

This is particularly true in light of the fact that the underlying concerns with ensuring fairness, proportionality and rationality in federal sentencing that motivated the Commission to promulgate the amendment in the first place apply as equally to old sentences as they do to new sentences.

The Commission's Office of Research and Data estimates that over the course of 30 years over 51,000 people sentenced between 1991 and 2014 would be eligible to see a reduction in their current sentence if the Commission were to make the amendment retroactive.
Of these people about 4,500 would gain immediate release while 25 percent of the people who appear to be eligible for sentencing reductions are projected to be released over the first five years.

Another 25 percent would remain incarcerated for the first five years after implementation. And the average sentence for offenders who would be eligible for retroactivity is 10 years and 5 months.

Over one-third of eligible people would receive a sentence reduction of less than one year. Sixty-nine percent of those eligible would receive a sentence reduction of less than two years, and only 3 percent would be eligible for a sentence reduction of more than five years.

Almost 40 percent of the eligible offenders fall into the lowest criminal history category.

Third, the impact on racial
disparities in drug sentencing will be profound. The data analysis of racial impact on retroactive reduction indicates that over 74 percent of the people whose sentences would be reduced or could be reduced under the law are Black or Hispanic.

This effort, like retroactivity of the crack cocaine amendments, is important to restore much needed confidence in the criminal justice system, especially in communities of color.

The Commission has amended the drug guidelines with the effect of lowering sentences several times before. In each instance has made the amendments retroactive.

For example, with LSD, marijuana, oxycodone, all have been made retroactive without incident.

More recently, the Commission elected to apply the 2007 and 2011 crack amendments again without difficulty.
After the Commission voted to authorize courts to apply the 2007 crack cocaine amendment by 2011, courts had decided over 25,000 motions for retroactive application.

Of those motions, over 16,000 or 64 percent were granted and more than 9,000 were denied. But among those 9,000 more than 7,000 were filed on behalf of people who were not eligible for the sentencing reduction.

The courts denied 14 percent of the motions on the merits, but no more than 6 percent of all motions were denied for reasons that may be related to public safety.

Between 2008 and 2011, courts across the country reviewed and were able to decide half as many re-sentencing motions as the Commission estimates are eligible under the recent drug quantity table amendment.

This proves that courts are more
than able to review the potential number of motions that may be filed as a result of the current amendment.

Considering the more than 51,000 people the Commission estimates could be eligible under the current amendment have release dates that span over 30 years retroactive implementation of the amendment could be staggered such that courts could prioritize the motions of people who are eligible for release within the first few years.

The relatively smooth application of courts of the two other reductions over 2007-2008 demonstrates that retroactivity of sentencing reducing amendments in addition to being just can be implemented practically.

The ACLU appreciates the opportunity to testify on retroactive application of the amendment. We urge the Commission to seize this historic opportunity
to correct the injustices of the past.

CHAIR SARIS: Perfect. Thank you.

MS. PRICE: Judge Saris and Commissioners, thank you for the invitation to testify before you today.

I'm grateful for this. I'm here on behalf of the staff, the board and the 75,000 members and supporters of FAMM. These are members who are directly affected in the most profound and personal ways by many of the decisions that you make. For them, on their behalf we urge you to make the 2014 drug guidelines amendment retroactive.

In our written testimony we explain why retroactivity meets the core considerations the Commission applies, purpose, magnitude and ease of application.

It's certainly warranted in light of these factors, but it's required in the interests of justice.
I was going to treat you today to
a treat that I had received was to talk with
a number of ex-prisoners who had been released
years early because of the two past decisions
on retroactivity.
I wanted to bring you their
stories and their messages about how they've
spent the years that they got back.
But after hearing this morning
from the Department of Justice about the
exclusions that the Department is urging you
to adopt, should you adopt retroactivity, I
thought I ought to maybe treat you to those
stories in my written submission and take a
moment to talk about those exclusions.
I'm pleased, first of all, in fact
delighted that the Department is supporting
retroactivity. But, of course we're
concerned about the exclusions. And we feel
that the Department's position is both
curious but also insupportable.
The DOJ witness told us that in the interest of efficiency and public safety that the Commission should limit retroactivity to the Department of Justice's definition of lower-level non-violent offenders without significant criminal history. But this is wrong for many, many reasons.

First and foremost is the Department's own commitment to this amendment brought to you by none other than the Attorney General himself who cited fairness and the need to get a grip on the overburdened federal prison population as reasons to lower all drug sentences by two levels.

He said to you this sent a strong message on the fairness of our criminal justice system to the public.

The Department came under fire at the meeting where you voted on drugs minus two because the Attorney General had just the
night before directed Assistant U.S. Attorneys to not object to defense recommendations for a drug sentence reduction of two levels.

Commissioner Wroblewski launched a spirited defense citing the requirement in law that sentence be sufficient and no greater than necessary to serve the interest of sentencing and the Department's obligation to uphold the law.

If the Department agrees that drugs minus two is -- and its retroactivity is required in the interest of justice there's no principled way it can argue for justice to be sliced and diced in the manner that the Department now argues for when it comes to retroactivity.

In fact, the Department supports crack retroactivity unreservedly in the Smarter Sentencing Act. So, this is a curious decision.
A number of you were here, not all of you but a number of you were here four years ago when you considered retroactivity of the Fair Sentencing Act compliant amendments.

And at that time the Department of Justice also argued the carve-outs. In fact, I think they've asked for more carve-outs this time than they did that time. I haven't done a count but you will, I'm sure.

The Commission roundly rejected the guidance from the Department then and I ask that it do so today.

The reasons that the Commissioners gave at that meeting are as fresh today as they were then and relevant and I want to share some of them with you.

One Commissioner pointed out that as to the public safety considerations that the Department has cited, quote, "Judges have proven that they are now up to the task. We
know from experience that not all will receive reduced penalties when the circumstances of their cases are reviewed and the retroactivity analysis is applied.

"This in my view," she said, "is precisely why the Justice Department's position on retroactivity need not be sustained.

"In this context there's simply no need to employ imperfect proxies, imperfect proxies for dangerousness when an actual judge with an actual case can make that whole."

Another Commissioner pointed out the time-consuming and administratively difficult work of applying factors for courts to look at on a retroactive basis.

A third told us that the data from the earlier crack amendment process showed how admirably the parties had worked together to help judges exercise appropriate
discretion. And we heard today from the
Criminal Law Committee and Probation on that
point as well.

Two of the same Commissioners
pointed out the double-counting aspect of the
Department's position. "Offenders," they
said, one of them said, "who fall within
higher criminal history categories and those
who receive enhancements are subject to
higher penalties. Any reduction of sentence
that these offenders may receive will in no
way negate the extra prison time they're
required to serve as a result of the
aggravating factors.

"To be sure, reductions in
sentences pursuant to 3582(c)(2) are not
automatic. Judges must consider the risk to
the public in each and every case."

As to efficiency, I think that the
Judicial Conference probation witnesses
addressed those concerns and made thoughtful
suggestions none of which involved categorical carve-outs.

I was most concerned though to hear the Department witness assert that as a matter of convenience any prisoner who had received a gun bump should be excluded even if she had nothing to do with gun.

Specifically, she said, it would not be, quote, "appropriate use of resources" to figure out if a co-defendant had the gun rather than the prisoner.

And that's precisely why we want judges to assess these cases rather than to subject them to categorical carve-outs ahead of time. It's precisely because judges ought to be able to make those determinations, is the gun integral to the person's dangerousness, or was it incidental to the offense.

I'll stop there. My time's up.

Please don't adopt these enhancements. The
carve-outs. Thank you.

CHAIR SARIS: Mr. Sample?

MR. SAMPLE: On behalf of Prisology, Judge Saris, I would like to thank you for the opportunity to appear and provide testimony.

Prisology is a relatively new organization. I come to the Commission with some unique experience. Like Mr. Nolan I was in federal prison myself for over 12 years for a series of non-violent offenses. I was a high school dropout before I went to federal prison. I earned my bachelor's degree while I was there and I'm now presently in law school having completed my first year at Vermont Law School.

So, people can change if they're given the opportunity to do so. And there are a lot of people in federal prison that I believe and our organization believes would seize this opportunity if the Commission were
to make the amendment retroactive.

In terms of public safety the Commission has heard a lot of testimony today. But one of the things that I have not heard is the effect of public safety on children and the family unit.

As we indicated in our written testimony according to a 2008 report from the Bureau of Justice Statistics nearly 60 percent of federal prisoners are parents of children.

The adverse effects of incarceration on children is well documented and includes but is not limited to increased risk of drug or alcohol abuse, depression, antisocial behavior, withdrawing from school and aggression.

And we believe that through retroactive application of this amendment the Commission is uniquely situated to restore broken family units with their parents that
so desperately need that father figure or mother figure in their life.

Apart from that there have been other concerns that have been expressed about the lack of resources to be able to properly implement retroactive application.

And one of the potential areas to help mitigate the effects of implementing this amendment on U.S. Probation that we identified in our written testimony is for the Commission to perhaps give instruction to U.S. probation officers with regard to early termination of supervised release.

When we looked at the relevant data according to Fiscal Year 2013 there were 131,869 offenders that were on some type of federal supervision, whether probation or supervised release.

The vast majority of the offenders each year terminate their supervised release through full-term expiration. And according
to the data a mere 13 percent were terminated by early termination.

Yet, while we have these very large supervision caseloads approximately 40 percent of the people according to 2012 data were on what's called low-intensity supervision.

And according to the probation monograph low-intensity supervision is something that is given to a defendant when they are, quote, "is likely to remain crime free, to appear in court and to comply with all other conditions without further interventions by the officer."

So we respectfully submit that there is an opportunity to help mitigate some of the effect of retroactive application of the amendment on supervision caseloads through early termination of supervised release for appropriate offenders that individual U.S. probation officers are
already familiar with and most likely the
district judges have been receiving
appropriate reports on their progress
throughout their period of supervision.

Apart from that we would also
suggest that in implementing the amendment
the Commission consider making a requirement
that for persons who do not have a family unit
to return to, they don't have a place to live
or something along those lines, to require
the district court to either amend the
conditions of supervised release or lower the
period of reduction that would be granted in
order to give the Bureau of Prisons the
opportunity to allow the person to transition
through normal pre-release procedures.

If that was to occur that would
give the Commission the opportunity to be able
to allow persons to receive the effect of the
amendment come November 1.

In addition, we would also suggest
that perhaps with cooperation from the Department of Justice that the Bureau of Prisons could create a survey as they have done in implementing the Clemency Project that would allow offenders to go online there in the Bureau of Prisons and submit their request if they believe that they might be eligible for this retroactive amendment.

And from there with coordination with DOJ, perhaps FPDs, appropriate USPO officials, then take the information and process the request for retroactive application. As opposed to dealing with this perhaps influx of some 50,000 motions or things like that. It would create an additional screening mechanism.

And with that and based on the other written testimony that we submitted we strongly urge retroactive application of the amendment.

CHAIR SARIS: Thank you. Mr.
Butler, welcome back.

MR. BUTLER: Thank you, Judge.

Thank you, members of the Commission for allowing me on behalf of the Victims Advisory Group to address you today.

A couple of points I want to emphasize from our written statement. First, the Victims Advisory Group is not taking a position whether the guidelines should be applied retroactively or not.

We are, however, concerned that if the Commission does decide to make these retroactive that these are not all cases where there are no victims.

And we believe that in some of these cases, we don't know how many, that there are identifiable victims. There may be various -- different guidelines are applied and the drug guidelines may have been applied over assault guidelines, for example, or some other victim enhancements.
So, first, we believe that there are and we would encourage the Commission to have the staff run some queries to find out exactly how many of these cases there are.

We think that they are ascertainable. You know, perhaps it's 1 percent but 1 percent of 50,000 cases is 500 cases. So there may be some cases.

We are concerned primarily with the process, perhaps how this has been handled in the past. And we are concerned that victims' rights will be denied unless the Commission issues some directives.

Unless there's a public hearing we don't believe that victims will be notified. We don't believe that they will be notified until the offender is released and then will be told why the sentence was reduced.

We think that is contrary to the spirit of the federal law both in terms of statutes and rules.
We've heard a lot about, and I've read the comments that these are -- public safety is required to be considered. These are individual determinations. And at a sentencing a victim would have the opportunity to present a victim impact statement.

And it should be no different in these circumstances that public safety could be affected in a particular person who might know what happened to that victim because the defendants act as the victim.

So we believe that if there is retroactivity that there needs to be a process for the victim to be informed so that they can be heard. That may be not necessarily -- if there's no hearing not necessarily heard in person, but to submit a written statement. And we've cited a case from a federal habeas where the similar analysis was applied.

And without the victims being
heard they're basically, they're not reasonably heard at all because they're not heard, because they don't even know this is happening.

So we believe that especially for those cases where there may be violent contact on victims fairness dictates that the process -- that victims be included in the process.

Last but not least, many members of the VAG were particularly concerned about when cases are retroactively changed because the retroactivity is always in the offender's favor.

And they are concerned particularly because they believe that having such actions taken, especially without the victim knowledge, will re-victimize the victim.

Crimes cause serious emotional, financial, economic, mental issues on victims. And one of the things that the
members of the VAG are particularly concerned about is that the process do not re-victimize those victims. So in accord with their rights to be heard I would just conclude with the fact that we encourage strongly the Commission if it moves forward with any retroactivity to provide that victims be informed and allowed to be heard. Thank you very much.

CHAIR SARIS: Thank you.

VICE CHAIR BREYER: I want to thank all the panel members but particularly Mr. Butler because I hadn't thought about it in the way that you've suggested. And I think it's crucial that we have some sort of process to advise victims as to what is being contemplated. I mean, that was behind the Sentencing Reform Act. It was to encourage transparency, to encourage honesty, to make sure that the sentence was imposed was the sentence that
was served. And this is a change in those circumstances. So, and that is if retroactivity is applied.

So, I'd be interested in whether you thought it was satisfactory since judges don't want to have a lot of hearings if they can avoid it. If it was satisfactory simply to notify the victim and then give the victim the opportunity to write a statement. Maybe you give the victim a form. I think that's now on probation reports if I'm correct. Where -- a victim witness impact statement. And that victim then has the opportunity to write whatever the victim feels about the situation and submit it to the court.

Is that adequate from your point of view? Does something more have to be done? Or do you think that that would be satisfactory?

MR. BUTLER: I think that is satisfactory unless the court does hold a
hearing. I think if the court holds a hearing and the court allows defendant's counsel, the government to be heard, I think it's only fair and reasonable that to be reasonably heard would also be -- to be heard orally. Or have the option of either in writing or orally or both.

But yes, I think that the case law would support that reasonably heard in those cases since there wouldn't be any hearing to be heard in writing. Yes, we would agree.

CHAIR SARIS: Thank you. Judge Jackson?

VICE CHAIR JACKSON: Yes. Good afternoon to all of you. Ms. Price, I do understand FAMM's resistance to the Department's carve-outs. But I heard in a previous panel the defender representatives say at one point some retroactivity is better than no retroactivity. And I wanted to know what FAMM's position was and whether you would
agree.

  MS. PRICE: You know, certainly whatever you can do is welcome. I cannot think, however, of a principled way to make the cuts that are being contemplated, or are being suggested rather.

   For all the reasons that you considered those proposals four years ago, you, some of you, because the Commission considered and rejected such concepts four years ago. They are as true today. It's not necessary, I think, to make those determinations.

   And I mean, really the partnerships that were developed among the U.S. Attorney's Offices, Probation, Office of the Defenders and ultimately the courts in examining each of these cases closely to determine whether or not somebody would present a public safety risk or otherwise not be eligible worked well for that.
And when you begin to have categorical exclusions you're going to miss people who otherwise would be deserving by even the Department's own bias in deserving of retroactive application. So I think it would be a shame to let somebody sit any longer in prison than necessary because they didn't quite make the cut. And I don't think you have to.

CHAIR SARIS: Mr. Nolan?

MR. NOLAN: It's a Hobson's choice. I figure it would be so unfair to categorically and arbitrarily impose those restrictions the Department of Justice asked for.

Justice should be individual. And Chuck Colson with whom I've worked for 15 years was appalled at the mandatory minimums and the one size fits all sentencing that removes the individual defendant and the individual acts of the crime from
consideration. The automaton process of just
a chart.

And these arbitrary exclusions by
the Department of Justice, and they are
arbitrary, would be essentially an extension
of that type of mandatory minimum thesis that
deproves judges of their right to consider
all the factors in the crime.

I would -- if I could also say I
strongly agree with Mr. Butler. To surprise
a victim by finding out that the offender has
been released before they even knew about it
really does re-victimize them. So I think
some process like has been discussed here I
think is really essential.

The victim is the real party in
interest after all, not the government. And
we should remember that in this process.

VICE CHAIR HINOJOSA: I guess some
of these points were made by some of you all
here today. And those of us who live in
communities hear them on a pretty regular basis.

One is with regards to the impact of family members of individuals who are in prison. But after reading thousands of presentence investigation reports sometimes, and it's not unusual, the family structure of the person committing the offense has already been hurt and is a serious factor in contributing to the commission of the offense to some extent.

And it's a socioeconomic issue with regards to something that probably should be addressed before somebody gets to the prison system rather than after the prison system. And the effect, it will always be there, before or after unless the country as a whole decides to do something about that which is beyond the criminal justice system.

The other point that we also see, and Ms. McCurdy pointed out the racial makeup
of the defendants in the drug trafficking offenses.

And the knowledge in the sentencing system as judges that we see that drugs are different in the sense that the victims normally don't appear in the courtroom. It's society as a whole. It is somebody's family member, somebody's son or daughter, father or mother, brother or sister, or somebody in the community that's affecting society because -- and then the drug treatment costs that come in. And the fact that it's not unusual for somebody who becomes a drug addict then to violate the law in a certain way.

And that the victimization of society as a whole rather than individual victims. What factor, if any, should that play on the Commission with regards to having a lot of people come out at the same time without the usual process of trying to have
done the rehabilitation aspects right before they're let out of prison.

And the effect on communities. It tends to be -- I live in an Hispanic community in South Texas. It's a high percentage Hispanic. But the drug trafficking has victimized the community as a whole. And it tends to be an Hispanic community.

And so the question is those factors affect I guess our decision. We've done it for the future. The question is, as has been explained before, that a lot of people would be coming out right now without having gone through the usual process.

So what, if any, effect should these factors have in us considering the retroactivity aspect? We obviously have considered them for the future by going through the reduction here, but should they have an effect on retroactivity?

MS. PRICE: I know it's obnoxious
to answer a question with a question, but --

VICE CHAIR HINOJOSA: Well, I'll be glad to answer the question.

MS. PRICE: I'd be curious how you resolved that the last two times. Because those questions were paramount before, yet -

VICE CHAIR HINOJOSA: The last two times was not as difficult because there was a common understanding I think nationally from all segments that the crack powder of 100 to 1 was very unfair.

I have to say the reaction after drugs minus two in some of our communities has been there isn't a problem with drug trafficking to the point that -- drug trafficking sentences to the point that the Commission should have acted like this like there was with crack.

And so my question is do we consider these different for that particular
reason. I'm just basing it on reactions that one gets.

MS. PRICE: But the Commission wasn't --

VICE CHAIR HINOJOSA: The panel never just hears really the general public. That doesn't mean that we don't hear from them.

MS. PRICE: Of course. Since 1991 the Commission has recognized the inherent unfairness and poor reasoning behind the establishment of mandatory minimums.

What the Commission did when it established the corresponding base offense levels was unfortunately to anchor them so that they're higher than the mandatory minimums.

So right now what you're doing, you're making a correction going forward in the interest of justice and to serve the interest of sentencing that you should have
every comfort in doing. And you've been supported in doing.

I can't see why you wouldn't apply that --

VICE CHAIR HINOJOSA: Mary, I have to make a correction here. And I'm doing this because I've looked into it in the past.

The Commission has never come out against mandatory minimums. What the Commission used to say under the, quote, "mandatory" system that was never totally mandatory is that the sentencing guidelines took out the necessity of mandatory minimums because we had the guidelines.

Post Booker our statements have been that we as a Commission cannot come to a -- we have a spectrum of views as to whether we should have mandatory minimums or not.

But that we all agree that we have some mandatory minimums that are a bit too high in certain crimes and that the safety
valve possibly might be extended.

And so I don't think it's a fair statement to say the Commission is opposed to mandatory minimums.

MS. PRICE: But you are unanimous in your belief that the sentencing guidelines are too high. It serves the interest of justice to lower them by two levels. That you are unanimous in.

VICE CHAIR BREYER: Well, I would put it differently because I just sort of feel that that's not necessarily what everybody is saying.

I think that what people are saying is they believe that the drug quantity which drives the sentence is disproportionate to the appropriate length of the sentence that results from the high drug quantity.

And I think that -- in other words, it's a recognition that the drug quantity was playing a paramount and perhaps
too large a role in terms of the sentencing length.

I think there's agreement as to that because I heard that -- there's almost agreement as to that.

(Laughter)

CHAIR SARIS: I don't know how you get that in the record.

VICE CHAIR HINOJOSA: He's taking care of it by saying almost in agreement. We have never -- we've never --

VICE CHAIR BREYER: Maybe it's simpler to say that the Commission was unanimous in recommending the change, an amendment which would effectively have reduced by two levels the role that the quantity of drugs plays in the overall sentence.

I think that's -- I can get away with that I think because I think that's exactly what we did. We did that and we did
that unanimously.

Where the parallel between the crack cocaine and the disparity, the crack and powder disparity fails in this case is that we're -- in that case we talked about proportionality.

That is, we talked about the disparate impact it had on two individuals as a result of a very high disproportionate measure which was then translated into a sentence.

In this case we're saying something different. We're talking about the length of sentence as distinct from the proportional effect or impact upon a sentence. So that's a different type of measure. That's what I think we're saying now.

VICE CHAIR HINOJOSA: I just want to say something. At least from my standpoint the statement I would make about
the weight is I voted for it because it still gives Congress their due respect with regards to the weight factor because what we voted for is still within the mandatory minimums of Congress and their decision as to what the weight factor should be with regards to sentencing.

I'm sure we all had possible different reasons as to why we voted for it. But I certainly felt strongly that the congressional statutes were due the respect that they deserve from the standpoint of weight. And that they considered weight important and this was still giving them the weight factor that the statutes require.

CHAIR SARIS: Thank you.

MS. MCCURDY: Can I respond?

CHAIR SARIS: Sure.

MS. MCCURDY: Judge Hinojosa, your question raised to mind a call I got in my office yesterday from Dorothy Gaines who
is a person who received a commutee from
President Clinton. She was here in
Washington, D.C. recently for an event the
ACLU and FAMM had put together for commutees.

But she called me yesterday and
she had called me last week because she is
struggling with her son who is now sitting in
jail accused of robbery and credit card fraud,
but who has struggled because she was away
from him in his formative years in prison.

She was a low-level girlfriend
type of drug offender. She was lucky enough
to receive a commutation from President
Clinton. But the six or so years that she
was in prison destroyed her children's lives,
or just -- she was just not there for their
formative years.

And one of the things that she
called me about yesterday was that she wanted
to send the message to people here in
Washington that these drug sentences and the
time that people are being taken away from
their family is really affecting the children
in the generations to come.

And that while we all are
concerned about our communities that we live
in. I live in Prince George's County,
Maryland. We're all concerned about the
crime and drug-related crime in our
communities.

We're also concerned about the
families that are being destroyed by these
long harsh sentences that just in some cases
don't make any sense. And the collateral
consequences are the children such as Dorothy
Gaines' children who Dorothy has struggled in
her years out of prison and her children have
struggled also in that same time and while
she was in prison.

And so that is -- it's a balance,
I get it. But I want to make sure that we
remember those people as well.
CHAIR SARIS: Thank you. I'd just like to go on and let me jump to Commissioner Wroblewski here.

COMMISSIONER WROBLEWSKI: Thank you very much, Judge Saris. I have two questions.

First, to Mr. Nolan, I want to take advantage of the opportunity that we have to have a Republican legislator here.

Tell me why you think that despite the Right on Crime movement that's been around for a little while, despite the tremendous success of justice reinvestment across the country including in many red states, we're having significant problems with the Smarter Sentencing Act moving in Congress.

And do you have any recommendations as to how to get that moving? In particular in the House where there has been less interest in this and frankly no movement on the Smarter Sentencing Act. So
that's question number one.

And then for Ms. Price, you discussed the idea of individualized determinations. Mr. Nolan also talked about that. Of course every offender who's been sentenced within the last 10 years has had an individualized assessment without regard to the sentencing guidelines.

You also suggest that the 3582 process can effectively weed out dangerous offenders. If that were the case wouldn't we expect that the recidivism rate of offenders who went through the 3582 process would be significantly lower than offenders who didn't go through the 3582 process?

And interestingly enough the Commission has done this analysis and has found no, they're virtually identical.

And I ask for a hypothetical. If we excluded everyone who had -- every offender who is in criminal history category 3 through
6, and every offender who had a gun or was involved in violence, and we used that rather than the 3582 process do you really think that the recidivism rate would be the same as for the general population we'll release?

So in other words, what I'm saying is right now we have this comparison, 3582 process without carve-outs and people who went through the entire sentence. They have roughly the same recidivism rate. Do you really think that would be true if we had the carve-outs, the people who are just criminal history 1 and 2, that their recidivism rate would be the same as the general population coming out? Those are my two questions.

CHAIR SARIS: So, you got it?

MR. NOLAN: Yes, I do. I support the Smarter Sentencing Act. Politically it was a torpedo amid ships when President Obama announced his clemency policy. It was part of the telephone and pen -- part and parcel
of the telephone and pen initiatives by the President.

And as I think very ably stated by Steve Hayes and Charles Krauthammer on the Fox Report that evening the substance is probably good and he certainly has the authority to. But Congress was in the process of dealing with this in a bipartisan way and the President preempted it. And politically that literally took the wind out of our sails on the Hill.

And I'm not sure we can recover this year. I think we probably have to have the midterm elections and get this beyond us. But literally the effect was palpable among my friends.

Again, the President has that authority. And it's been used far too little by him. President Nixon, President Reagan had far more commutations than he has. But it's the way it did.
And part of the language of basically I now do my will. Forget about Congress and the public.

And I think that has damaged us to the point where if I could just sneak in an answer to Judge Hinojosa, politically this has been damaging to us.

There's reaction to the minus two not because of the substance of minus two but it looks like this oh my goodness, soft on crime, fuzzy heads are at it again.

And lastly, as far as the impact on families, the devastation on families of imprisonment is palpable. But no person can replace a mother or father. They're the people God gave us to raise children.

And if you talk to anybody in corrections they'll tell you that a prisoner whose family comes and visits and retains ties to their family is probably the best behaved prisoner there because they don't want to lose
that right to see their family.

And all the studies show that when they leave the family is the greatest factor in their ability to get back on their feet.

CHAIR SARIS: Thank you. Ms. Price?

MS. PRICE: I had thought we'd all taken comfort in those recidivism numbers. I think we had that discussion actually.

I have a couple of thoughts. I mean, you can run that to its logical conclusion and say that everybody who has criminal history category 3 or higher, or a gun bump, or, I don't know all of your exclusions, shouldn't get out at all because ultimately they may add to the recidivism rate.

I don't know what happens to the recidivism rate if you do -- for people who are released early. I assume that it goes down if you exclude certain people.
But really and truly what you're also doing is in such categorical exclusions you're leaving a lot of people behind that absolutely don't deserve to be treated in a sort of one size fits all exclusion.

And I -- for example, criminal history. We know that one of the factors that judges just deplore is how criminal history is counted. And judges depart and vary based on the fact that criminal history overstates the actual danger that the person posed to the community in the prior offenses. It's the number one reason.

And yet you -- the Department would say we're going to exclude everybody from doing basically the right thing because they happen to fall into criminal history category 3 or higher.

Similarly with obstruction of justice. You know people who get the obstruction enhancement sometimes didn't do
anything really wrong or bad necessarily or dangerous, they simply didn't necessarily tell the truth.

Are they truly a danger? Well, by the exclusion they would all be of course kept behind.

I don't think that it's worth taking that decision and that judgment away from judges. Remember, a number of these were also the result of consent motions, right? I mean, I assume that there were prosecutors consenting to motions for some of the folks who eventually reappeared in court as they might have been expected to.

I still think it's the right thing to do and I think you ought to do it unreservedly.

CHAIR SARIS: Let me ask you all. You know, Judge Keeley talked about the balance, she said it correctly, the balance between fairness, between public safety, and
between what you can fiscally afford. That's not always coming up with the perfect answer.

You're all focusing on fairness. Fair enough. You know, we also have to consider resources.

So, the question that I have is if you did anything like a six-month extension or a carve-out or something to sort of bring into balance all these very important values how would that -- what would be the reaction in the prisons?

I'm looking at you, Ms. Price and Mr. Sample, and really all of you who deal with people in the prisons. What would the reaction be? What are people expecting? What's happening there?

MR. SAMPLE: Well, I'll give you two perspectives, one being from the family members who follow us like on Facebook. And I think that there is great anticipation and angst amongst the family members with regard
to this hearing and to the upcoming vote because they badly want to see their family members come home.

You know, they have children. They have people. They need that other person in their life for a support structure.

In terms of individuals that are incarcerated, I mean we receive hundreds of emails a week from federal prisoners discussing the amendment. You have so many people who are already not subject to the amendment because they either have a mandatory minimum, or they're a career offender.

And I mean, I will give you -- if this was not made retroactive my personal sense having been someone that's been there in federal prison, you know, lived it 24 hours a day, 365 days a year, there's of course probably the potential that there's some prisoners that may do some things that they
shouldn't do because they are expecting there to be retroactivity.

There were problems back in the mid-nineteen nineties when the Commission had supported retroactivity and Congress ultimately decided to disapprove that. And I think that there's the possibility that that would happen.

I mean, of course, I don't suggest that that should be the reason why the Commission should or shouldn't take action. But the question was asked and I think that there is that possibility.

And I'm sure that that's probably a concern that the Bureau of Prisons is thinking about in how do they mitigate or address those kinds of things.

COMMISSIONER PRYOR: But that doesn't answer the question about carve-outs. That doesn't answer the question about what the reaction would be if, for example,
retroactivity were limited to those in criminal histories categories 1 or 2.

MR. SAMPLE: There would be disappointment. There would be severe disappointment.

COMMISSIONER PRYOR: There would be disappointment for those who are denied the sentencing reductions as there would be if it were fully retroactive?

MR. SAMPLE: That's true, that's correct.

CHAIR SARIS: Ms. Price?

MS. PRICE: Yes. I mean, we hear from prisoners all the time.

CHAIR SARIS: Have you managed expectations in terms of that --

MS. PRICE: We certainly try. We don't have control over hope. Hope is, you know, it's a huge, huge thing.

And you can't, you know, as often as you say repeatedly this decision hasn't
been made yet, and they're grappling with this
decision, they're struggling with hard
issues, and they're worrying about resources.

And they are aware -- we talk
about you to the prisoners. We say they're
aware that prisons are overcrowded. They're
aware. So aware that the guidelines have
contributed phenomenally to overcrowding.

I mean, what you did at the
beginning of the cycle to -- was commendable
to talk about -- to make us all talk about
the impact on public safety that prison
overcrowding has done. And to explain to you
why we think -- what we think you can do to
make our communities a better place and to
make the prisons a better place. How do we
look at these amendments in light of the
mandated 994G I think with respect to prison
overcrowding?

I mean, we tell them all of these
things. And we explain to them your efforts.
But you know, I do a Facebook forum. People write in and ask questions. I answer the questions. And people ask the same questions over and over again. You can tell them this and you can tell them this. But hope is a powerful force.

MR. NOLAN: And as far as the impact on the prisoners of the carve-outs for those that benefitted from it they would obviously be joyed. For those that don't they I think would puzzle over the difference.

But I think it's also important to say we can always guarantee public safety if we just lock up everybody and never let them out. I mean that's the certainty.

The question is, and you posed it well. How do we balance public safety which is a primary function of government with justice and with the societal impact of the solutions we made.

And I think those carve-outs are
so arbitrary. Yes, it puts it so low probably nobody or few would recidivate. So yes, there's a way to do that.

But the cost is there are that many more that would probably be able to make it successfully on the outside, be back with their family, become taxpayers and earners, and we're denying them that chance on the basis that, well, we aren't sure.

Because those risk factors are arbitrary. That's why the states have moved much more to risk assessments, looking at the factors.

Virginia has done a terrific job. So, assessing the individual risk of the prisoner as opposed to categories like DOJ does.

VICE CHAIR BREYER: So if there is a carve-out, and I know you're against them, but if there is a carve-out it might be a carve-out looking at the criminal history
category like a 6 or a 5.

Because if -- and of course it's where you draw the line. But I'm trying to figure out from a public safety point of view that if you were going to apply it unevenly maybe that would be the category that you might exclude, the 6's and the 5's.

I think in answer to Commissioner Wroblewski's point about, well, when we ran it with the -- in the crack powder disparity isn't it odd that you had the same rate of recidivism for the group that was kept in and the group that was eliminated earlier. Isn't that -- you know, how do you account for that.

Of course, one might simply say well, you account for it because the length of the sentence doesn't necessarily dictate the rate of recidivism. That there can't be argument about because that's exactly what that shows.

It doesn't necessarily show the
public safety factors, but it does show that length doesn't necessarily correlate on a one-to-one basis with recidivism.

My question is different which is if you carved out anything could you give -- and not look at the argument about fairness. But if you carved out anything could you carve out category history 6 or 5? Do you have any views on that? Maybe you don't. Anyone.

MR. SAMPLE: I will say that if there was a carve-out for category 6 that those individuals probably would of course be disappointed, but that's a carve-out that would be more understanding because of the criminal history that they have.

They already actually expect that they're probably not going to get anything because they have such a great criminal history.

I think there is that talk, there are those emails that come in from the
prisoners where they pretty much figure already that they're going to get excluded.

And so I think in terms of managing expectations that it's much more easy to do that when you have someone that is in a category 6 in comparison to somebody who's in a category 3 that maybe is there because, you know, for a variety of reasons minor offenses.

CHAIR SARIS: Thank you.

Commissioner Barkow?

COMMISSIONER BARKOW: Yes, I wanted to ask you about -- Mr. Nolan and Ms. Price in particular had mentioned was this idea of the Department's prior positions and they kind of raised the public safety issue.

But I wasn't here for the prior decisions and what has struck me today was the Department's point argument that if they allocate folks to work on these petitions those are people who can't be prosecuting
current cases. And it's just the sheer numbers of it.

And so I'm just curious if there were any parallel arguments previously, or any other experiences that you can draw upon to help me at least figure out whether or not that could raise a safety concern going forward.

MS. PRICE: I'm looking at Jonathan. I don't know and I don't remember, and I'm happy to go back and look.

I will say that the Department has been in the forefront of expressing extreme concern about the public safety problem that is posed by the fact that one out of every four dollars that the Department of Justice spends, I think it's one out of every three when you take in the Marshal Service, is spent on keeping people locked up.

And that's a dollar that cannot be spent in the prevention and protection of
crime, in grants to state and local
governments to do the kinds of reentry
services and prevention services that they
do.

The Inspector General of the
Department of Justice has been particularly
one on this point. I'll send you or attach
his testimony when I send in our final
comments.

But I think that we need to look
at public safety much more broadly as you
helped us to do at the beginning of this year
when you asked us to comment on the
overcrowding issues in our comments. And I
encourage you to do that.

VICE CHAIR HINOJOSA: So the
written testimony will point out the
arguments that were made on those issues?
Because I went back and reviewed some of it
and you'll find the units for expense some of
which ended up not applying.
Bureau of Prisons talked about it's going to be terribly expensive to bring the prisoners to all these hearings. And it'll cost so much marshal time, so much hotel time. Of course that ended up not happening nearly to the level envisioned.

And the Justice Department had other expenses. And you'll find that -- you'll see the arguments if you look at that.

MR. NOLAN: They predicted this would absolutely gum up the whole system. It would grind to a halt if the crack powder disparity was made retroactive. And it didn't happen.

The DOJ and public defenders, everybody got together and the judges worked out a system that worked flawlessly. There wasn't a bump in it.

So, again, the Cassandras have always warned this parade of horribles and they haven't eventuated.
CHAIR SARIS: All right, thank you. Anything else? I want to thank you all. You kept us awake, lively and full of beans after lunch which is an amazing testament to you all.

Our link to understanding people who are -- some of the people anyway who are directly affected by what we're doing. And I very much appreciate the work that you all do. Thank you very much.

(Whereupon, the above-entitled matter went off the record at 3:05 p.m.)