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UNITED STATES SENTENCING COMMISSION  
PUBLIC HEARING ON RETROACTIVITY

WASHINGTON, D.C.

TUESDAY, NOVEMBER 13, 2007

The Commission convened at the Georgetown University  
Law Center, Gewirz Student Center, 12th Floor  
Conference Room, Washington, D.C., JUDGE RICARDO H.  
HINOJOSA, presiding.

COMMISSION MEMBERS PRESENT:

- JUDGE RUBEN CASTILLO
- CHIEF JUDGE WILLIAM K. SESSIONS, III
- JOHN R. STEER
- DABNEY C. FRIEDRICH
- BERYL HOWELL
- MICHAEL HOROWITZ
- KELLI FERRY
- EDWARD F. REILLY, JR.

1 | PANELISTS PRESENT:  
2 | HONORABLE REGGIE WALTON  
Criminal Law Committee  
3 |  
4 | STEPHEN SADY  
LISA FREELAND  
Federal Public Defenders  
5 |  
6 | DAVID DEBOLD  
Practitioners Advisory Group  
7 |  
8 | BARRY BOSS  
American Bar Association  
9 |  
10 | CARMEN HERNANDEZ  
NACDL  
11 |  
12 | GRETCHEN C.F. SHAPPERT, United States Attorney  
Western District of North Carolina  
13 |  
14 | SYLVESTER E. JONES, Assistant Director  
Witness Security and Prisoner Operations  
United States Marshals Service  
15 |  
16 | JOE I. CASSILY  
National District Attorneys Association  
17 |  
18 | STEVE CHANENSON  
Villanova University School of Law  
19 |  
20 | ANNE PIEHL  
Rutgers University  
21 |  
22 | CHUCK CANTERBURY  
Fraternal Order of Police  
23 |  
24 | WADE IKARD, Weed and Seed Coordinator  
South Statesville, North Carolina  
25 |  
26 | HILARY SHELTON  
NAACP  
27 |  
28 | PAT NOLAN  
Prison Fellowship Ministries  
29 |  
30 | MARC MAUER  
Sentencing Project  
31 |

1 | PANELISTS PRESENT (Continued):

2 | OCIE L. ACOFF, Pastor and Director  
3 | Varner Education and Training Facility  
4 | Selma, Alabama

4 | JULIE STEWART  
5 | DE-ANN COFFMAN  
6 | FAMM

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PROCEEDINGS

(9:30 a.m.)

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3 CHAIR HINOJOSA: I would like to welcome  
4 everyone to the United States Sentencing Commission  
5 Public Hearing on Retroactivity being held here at the  
6 Georgetown Law Center and on behalf of the Commission,  
7 I want to thank Dena Alexander (phonetic sp.),  
8 Elena Koff (phonetic sp.) and Larry Center, who are the  
9 -- Larry Center, who is the Director of Continuing  
10 Legal Education here at Georgetown Law, for their  
11 helpfulness in allowing us to meet here. We certainly  
12 appreciate their hospitality.

13 For those of you who may not be too familiar  
14 with the U.S. Sentencing Commission, it was created by  
15 the Sentencing Reform Act of 1984 as a bipartisan,  
16 independent agency within the Judicial Branch, whose  
17 principal purposes are to establish sentencing policies  
18 for the federal courts, including guidelines, to advise  
19 and assist in the development of effective crime policy  
20 and to collect, analyze, research and distribute a  
21 broad array of information on federal crime and  
22 sentencing issues, serving as an information resource  
23 on federal crime policy. There are seven members of  
24 the Commission. We're all appointed by the President  
25 and confirmed by the Senate and two ex officio members.

1 I would like to briefly introduce each one of the  
2 members. I have enjoyed working with them and I have  
3 to say it is a very hard-working group of individuals  
4 and I enjoy being able to chair this commission with  
5 them. We have Vice Chair Ruben Castillo, who has  
6 served as a U.S. District Judge for the Northern  
7 District of Illinois since 1994 and just to strengthen  
8 himself today, he did bring his father with him, who is  
9 present and we welcome him.

10 We also have Vice Chair William K. Sessions  
11 III, who is the Chief Judge of the District of Vermont,  
12 where he has been a U.S. District Judge since 1995. We  
13 have Vice Chair John R. Steer, who has served from 1987  
14 to 1999 as a General Counsel of the Commission and  
15 before that, as Deputy General Counsel to the  
16 Commission, and has served as Vice Chair of the  
17 Commission since 1999.

18 We have Commissioner Michael Horowitz, who is  
19 currently a partner with the law firm of Cadwalader,  
20 Wickersham and Taft here in Washington. He previously  
21 served in the Justice Department's criminal division as  
22 Deputy Assistant Attorney General and is Chief of  
23 Staff. We have Commissioner Beryl Howell, who serves  
24 as Executive Managing Director and General Counsel at  
25 Stroz Friedberg here in Washington, D.C. and she is the

1 | former General Counsel to Senator Patrick Leahy. We  
2 | also have Commissioner Dabney Friedrich, who has served  
3 | as Associate Counsel at the White House  
4 | from 2003 until her appointment to the Commission in  
5 | December of 2006 and is a former Assistant United  
6 | States Attorney. The ex officio members are  
7 | Commissioner Kelli Ferry, who represents the office of  
8 | the Attorney General for the U.S. Department of  
9 | Justice. Ms. Ferry serves as counselor to the  
10 | Assistant Attorney General for the Criminal Division.  
11 | And we have Commissioner Ed Reilly, also serves as an  
12 | ex officio member and he has been the chair of the U.S.  
13 | Parole Commission since May 31st of the year 2001.

14 |           The purpose of today's hearing, some of you  
15 | may know, is to have interested individuals and  
16 | organizations and interest groups address the  
17 | Commission on whether two guideline amendments recently  
18 | promulgated by the Commission on crack cocaine and  
19 | criminal history, which went into effect on  
20 | November 1st, should be made retroactive. With regards  
21 | to crack cocaine, that is an issue -- federal cocaine  
22 | sentencing policy has been an issue that the Commission  
23 | has worked on for a long time, promulgated amendments  
24 | before that have not gone into effect, as well as sent  
25 | either statements in or reports to Congress at least



1 | four times on the issue, the latest being in the  
2 | year 2007, after we promulgated the amendment, which  
3 | the Commission felt was a very small step with regards  
4 | to correction of a problem which the Commission  
5 | identifies with regards to the 100 to one ratio between  
6 | crack and powder cocaine sentencing. Along with the  
7 | promulgation of the amendment, the Commission sent a  
8 | report to Congress urging Congressional action because  
9 | in the end, Congress is the one that can have the  
10 | solution with regards to the problem concerning the  
11 | mandatory minimum ratios.

12 |           With regards to criminal history, we also  
13 | promulgated an amendment which may have the effect,  
14 | also, of reducing sentences with regards to changing  
15 | two minor offenses from the -- that count for criminal  
16 | history points to do not count for criminal history  
17 | points and trying to correct some confusion that might  
18 | be out there with regards to cases that might be  
19 | considered just as one case rather than as separate  
20 | cases for criminal history points. The Sentencing  
21 | Reform Act specifically authorized the Commission to  
22 | make retroactive amendments that resulted in lower  
23 | penalties. To facilitate this directive, the  
24 | Commission has promulgated a policy statement in  
25 | Section 1(b)(1.10) of the guidelines. Among the

1 factors which the Commission has traditionally  
2 considered as to whether a guideline amendment should  
3 be made retroactive have been the purpose of the  
4 amendment, the magnitude of the change in the guideline  
5 range made by the amendment and the difficulty of  
6 applying the amendment retroactively. Of course, the  
7 Commission, whenever it acts, whether it's the  
8 promulgation of an amendment, as well as a new  
9 guideline, as well as decisions on retroactivity,  
10 always takes into account all of the -- Title 18,  
11 Section 3553(a) factors which it needs to consider, as  
12 has been the directive by Congress to the Commission.

13 I will say, obviously, one of those factors  
14 that the court considers in each one of these decisions  
15 is the interests of the defendants who have been  
16 sentenced and/or will be sentenced and/or are serving  
17 sentences, as well as the interests of the public, in  
18 general. This hearing, of course, is designed to  
19 assist the Commission in its deliberation on  
20 retroactivity. To date, the Commission has received  
21 over 33,000 letters and/or written comments from  
22 individuals on the subject. I will say that it is nice  
23 to have received so many comments from so many  
24 individuals across the country on this particular -- on  
25 issues involving both crack cocaine sentencing, as well

1 | criminal history. We thank all of those who have taken  
2 | the time to give us their comment. We thank those of  
3 | the individuals who are present today who will give  
4 | public statements on the issue. This will certainly be  
5 | helpful to the Commission as we deliberate on these  
6 | important issues, as we do on all the issues before the  
7 | Commission, and so we certainly thank the public and  
8 | those individuals who have taken their time to be here  
9 | with us today with regards to their comments. And at  
10 | this point, I would like to ask any other member of the  
11 | Commission if they would like to make any statements  
12 | before we start and we'll start with Commissioner Steer  
13 | and then we'll go back and forth here if anybody wants  
14 | to make any statements on behalf of themselves.

15 |           COMMISSIONER STEER: Mr. Chairman, I look  
16 | forward to the testimony of the witnesses.

17 |           CHAIR HINOJOSA: Judge Castillo, did you  
18 | want --

19 |           JUDGE CASTILLO: No. Thank you.

20 |           COMMISSIONER HOWELL: I would like --

21 |           CHAIR HINOJOSA: Commissioner Howell.

22 |           COMMISSIONER HOWELL: I want to echo the  
23 | comments that you made, Chairman Hinojosa, in welcoming  
24 | the witnesses here today. I think that I'm very proud  
25 | of the cocaine report, crack report, that the

1 Commission put out. I think it helped fulfill our  
2 important mission here, that Justice Breyer commented  
3 on in the remedial opinion in Booker, that the  
4 Sentencing Commission remains in place, writing  
5 guidelines, collecting information about actual  
6 district court sentencing decisions, undertaking  
7 research and revising the guidelines accordingly.

8           And I think that we took a very important  
9 step with our crack amendment by fixing, to a certain  
10 extent, the guideline contribution to the crack powder  
11 disparity issue. We fixed the guidelines with the  
12 crack amendment and Congress allowed us to do that by  
13 not acting and allowing our amendment to go into  
14 effect.

15           But I want to make clear that we are under no  
16 false illusion that this crack amendment is a cure-all,  
17 as you said, it's only a partial remedy to the crack  
18 powder disparity and only on a going-forward basis for  
19 those crack offenders sentenced under the guidelines  
20 after November 1, 2007. Whether we make that partial  
21 remedy apply retroactively is the question before us  
22 and as you've said, we've had over 30,000 comments with  
23 strong sentiment on both sides of the issue. I just  
24 want to raise one point that's particularly important  
25 to me and since Judge Walton is sitting in front of us,

1 | it stems from some of the testimony he gave us almost  
2 | exactly a year ago when we had our crack hearing before  
3 | we made our crack amendment. And what Judge Walton  
4 | told us last year was, and I quote Judge Walton, "The  
5 | attitudes of some of the general population about the  
6 | unfairness of our drug laws has had a coercive impact  
7 | on the respect many of our citizens have about the  
8 | general fairness of our nation's criminal justice  
9 | system," and he went on to tell us that "the failure to  
10 | fix the crack powder disparity has left many to believe  
11 | there is an indifference to the real and perceived  
12 | unfairness of the policy because of the population  
13 | disproportionately impacted by it.

14 |           As a nation that prides itself on treating  
15 | all who appear before our courts of law with fairness  
16 | and equality, the time has come to address a vexing  
17 | problem for those of us who are entrusted to administer  
18 | the system and those who suffer the consequences of the  
19 | policy." Those were really powerful words and they  
20 | remain uppermost in my mind as we decide on the  
21 | retroactivity decision, because what we want to do is  
22 | bolster respect for our criminal justice system by our  
23 | actions and not undermine that. So I want to join the  
24 | Chairman in thanking all the witnesses for being here  
25 | and appreciate the assistance of all the witnesses who

1 | are testifying plus the written comments in assisting  
2 | us in making our decision.

3 |           CHAIR HINOJOSA: Commissioner Horowitz.  
4 | Commissioner Friedrich. Commissioner Ferry. Well,  
5 | we're ready to start with the first panel, which is the  
6 | Judicial Perspective, and we do thank Judge Walton for  
7 | being present, the Honorable Reggie Walton, who's been  
8 | a U.S. District Judge for the District of Columbia  
9 | since the year 2001 and was appointed by Chief Justice  
10 | Rehnquist to the Criminal Law Committee of the Judicial  
11 | Conference in the year 2005. From 1989 to 1991, he  
12 | served as an associate director of the Office of  
13 | National Drug Control Policy and is a Senior White  
14 | House Advisor on crime. Judge Walton, again, on behalf  
15 | of the Commission, we thank you for taking time from  
16 | your busy schedule to be here with us today.

17 |           MR. WALTON: Good morning, Mr. Chairman,  
18 | Your Honor, members of the Commission. It is an honor  
19 | and a pleasure to have the opportunity to be here with  
20 | you on behalf of the Criminal Law Committee. I first  
21 | want to ask that my written statement be made a part of  
22 | the record. It coincides with the letter submitted by  
23 | Judge Castillo. I will try and keep my remarks brief  
24 | so that I can leave as much time for questioning as you  
25 | would like. I begin and end my comments with the

1 | underlying reason for why you took the action that you  
2 | took, which was very courageous on your part, because I  
3 | know there has been a lot of pressure, from both sides  
4 | of the aisle, as to which position you should take and  
5 | I commend you for what you did because I think it is a  
6 | first good step in addressing a problem that I believe  
7 | does have fundamental unfairness to it and expressly  
8 | from the standpoint of the African-American community,  
9 | considering the disproportionate number of African-  
10 | American people, primarily African-American males, who  
11 | have been incarcerated for significant periods of time  
12 | as a result of their involvement in crack cocaine. I  
13 | don't in any way excuse the behavior.

14 |           I think that individuals who sell drugs do,  
15 | in fact, perpetrate a harm on society and I think  
16 | society has a right to exact a certain level of  
17 | punishment as a result of that, but I think that the  
18 | process, first and foremost, has to be perceived as  
19 | fair and I think the step that you took at least starts  
20 | to work towards arriving at that goal. I think,  
21 | obviously, it's important that Congress address this  
22 | issue and seek to resolve it because I do think that  
23 | the disparity brings negative attitudes about the  
24 | criminal justice process from a segment of our society  
25 | that most needs the input of the criminal justice

1 | system in order to address the many problems that exist  
2 | in those communities that I'm talking about. I know  
3 | that there are strong arguments against making this  
4 | change retroactive. I struggled with whether that was  
5 | the appropriate position to take, initially taking the  
6 | position that maybe we should not weigh in, as a  
7 | judiciary, as to what should be done, but after much  
8 | debate and much soul searching on my part, I ultimately  
9 | reached the conclusion that if the reason for the  
10 | change, which is the reason, was to address what was  
11 | perceived to be a real and fundamental problem in the  
12 | fairness of the sentencing guidelines, I just don't see  
13 | how, in good faith, one can say that just because  
14 | someone was sentenced on October 30th, that they get a  
15 | certain sentence, whereas someone who's sentenced on  
16 | November 1st receives a different sentence.

17 |           I appreciate the concerns about the impact  
18 | that it would have, conceivably, on the judiciary and  
19 | obviously with the significant calendar that I deal  
20 | with on a daily basis, that's a concern. But I don't  
21 | believe that the court, as an institution, can take the  
22 | position that if a change was adopted to address a  
23 | fundamental unfairness in the sentencing process, that  
24 | we, as judges, should say that well, we're going to be  
25 | overloaded or we're going to be worked to a greater



1 | extent and because of that, that change should not be  
2 | made retroactive. I just think that that's a  
3 | fundamentally unsound position for the court to take  
4 | because we're in the business of trying to do justice  
5 | and I think if we're going to do justice, that means  
6 | not just justice in the future, but rectifying  
7 | injustices that occurred in the past.

8 |           I also had concerns about the impact it would  
9 | have, potentially, on our probation departments if we  
10 | had a large influx of people coming back into the  
11 | community who were anticipated to be back in the  
12 | community at that time, and after consultation with the  
13 | advisory group from the probation departments who  
14 | weighed in on the issue, I'm convinced that while it  
15 | would be somewhat of a burden, that they have the  
16 | capacity to deal with the influx of additional  
17 | individuals who they would have to supervise.

18 |           I do think that the major concern, and it's a  
19 | legitimate concern, is the issue of public safety  
20 | because I think, first and foremost, whenever a policy  
21 | is enacted that has -- that addresses the issue of  
22 | sentencing, that public safety has to be one of the  
23 | most important factors that you consider and I do have  
24 | concerns as to whether, if we have a significant  
25 | increase of individuals coming into the community --

1 | and we are talking about at least, in the first year  
2 | and maybe the second year, a sizeable number of people  
3 | coming back into the community before it was  
4 | anticipated -- whether that would have a serious impact  
5 | on the crime problem. And while that remains a concern  
6 | that I have, and I know many other members of the  
7 | Criminal Law Committee have, we ultimately reach the  
8 | conclusion that since this is not an automatic  
9 | retroactive application of the change and that judges  
10 | are going to have to make reason, decision as to  
11 | whether the reduction is afforded to individuals who  
12 | qualify for it, that with that in play and with maybe  
13 | some guidance from the Commission itself as to when  
14 | it's appropriate to grant that two-level decrease, that  
15 | while there's a concern about public safety, that the  
16 | bottom line, need to address a fundamental unfairness,  
17 | outweighs that concern.

18 |           And I think -- first and foremost, I think  
19 | it's important that we not take the position that every  
20 | crack offender is the same. They are not. I think we  
21 | all we have to do is think back a few years ago to the  
22 | young lady down at the University of Hampton. I can't  
23 | remember her last name, but her first name, I believe,  
24 | was Kimba and she got caught up in a situation that she  
25 | should not have been involved in, but unfortunately,

1 she got involved in that situation. She came from a  
2 good family. She was basically a good girl. But she  
3 got involved with a person who was involved in drugs,  
4 who enticed her to get involved. Apparently it came  
5 out that she had been physically abused and she did  
6 things that were totally contrary to her upbringing and  
7 she received a 22-year sentence. Was a 22-year  
8 sentence necessary to address that young lady? I  
9 suggest no.

10 So here we have somebody who had just had a  
11 child, who now was going to be locked up until that  
12 child would become an adult. I think that's not  
13 something that should happen in our criminal justice  
14 system. Yes, punishment was appropriate, but for  
15 someone like that, punishment of a lot lesser severity,  
16 in my view, would've been adequate to punish her and to  
17 send the message that that behavior is not going to be  
18 tolerated.

19 And I think there are many individuals who  
20 fit that same mold, so I don't think we can group  
21 everybody together. Yes, if you're talking about an  
22 offender who was trafficking in large amounts of  
23 cocaine and that having, obviously, a very serious  
24 impact on society, if you're talking about an  
25 individual who's engaged in violence or possession of

1 | weapons during the commission of the crime, those are  
2 | legitimate factors that maybe you want to address by  
3 | way of a policy statement as to whether this reduction  
4 | should apply to them. But I do think that fundamental  
5 | fairness, in the end, has to control the decision and  
6 | should dictate whether this becomes retroactive or not  
7 | and in my view, it should and in my view, we have to  
8 | give the judges the credit of factoring in these  
9 | various considerations and making a determination as to  
10 | whether this particular individual would, in fact, pose  
11 | a community if they come back into the community two  
12 | years or whatever prior to when it was anticipated.

13 |           With that, I'll leave as much time as you  
14 | would like to try and answer your questions, but I do  
15 | think that, from the standpoint of sending the message  
16 | to those in our society who sometimes believe that our  
17 | society really doesn't care about them, I think it's  
18 | important that we send a message that we do and that  
19 | while we're not going to tolerate aberrant behavior on  
20 | the part of anybody, that we're going to treat  
21 | everybody who comes into our court of law equally.

22 |           CHAIR HINOJOSA: Who's got the first  
23 | question?

24 |           JUDGE CASTILLO: Judge Walton, first of all,  
25 | thank you for your testimony. I certainly appreciate

1 | it. I also appreciate the fact that you are one of the  
2 | few people that's testifying today that has held a  
3 | position of national responsibility in our country's  
4 | struggle with drug addiction. Now, our chair is trying  
5 | to lead our commission in a responsible way to deal  
6 | with this issue of retroactivity. One of the things  
7 | that has been troubling to me is the suggestion that is  
8 | being repeated in the media that we have purposely  
9 | delayed addressing the issue of retroactivity for some  
10 | type of political gain.

11 |           What we're trying to do is operate in a  
12 | responsible way so that the people that are responsible  
13 | for any reentry issues can also act in a desired way.  
14 | What would you suggest to judges and probation officers  
15 | and people in charge of the Bureau of Prisons in terms  
16 | of dealing with the issue of retroactivity at this  
17 | point? Should they be doing something or should they  
18 | just be waiting to see when and if we vote on this  
19 | issue?

20 |           MR. WALTON: No. We, in fact, have asked the  
21 | probation people to start to look at this issue and to  
22 | start to dialog with the Bureau of Prisons about what  
23 | could be done if this does become a reality, in  
24 | ensuring that when it does occur, that processes will  
25 | be in place to address the greater influx of

1 individuals who will come into the system. There have  
2 been some initial analysis done as to what additional  
3 resources in certain districts may be necessary in  
4 order to address the influx, so I think that all  
5 concerned should be gearing up for the potential that  
6 conceivably this will become a reality. I don't think  
7 we should wait until it occurs and then try and  
8 scramble around and put in place a system that may not  
9 be effective in addressing the situation.

10 JUDGE CASTILLO: So you would suggest that  
11 action be taken now?

12 MR. WALTON: Yeah. I think they should start  
13 to at least have working groups and start to look at  
14 the issue and assess what the impact will be and how  
15 they can best address it.

16 JUDGE CASTILLO: Judge Walton, you talked  
17 about crack cocaine sentencing policy in the crack  
18 amendments. Did the Criminal Law Committee have a  
19 position with regards to the criminal history  
20 amendments?

21 MR. WALTON: No, we did not address that  
22 particular issue.

23 CHAIR HINOJOSA: Vice Chair Steer.

24 COMMISSIONER STEER: Judge Walton, I thank  
25 you for your excellent statement and thanks to the

1 Criminal Law Committee for a very helpful letter that,  
2 I think, analyzes the many aspects of this issue in a  
3 very detailed and fair manner. You've mentioned the  
4 public safety issue and I think it's one that concerns  
5 all of us. What things can a judge do and the  
6 probation office and all of the parties concerned do to  
7 best address those concerns, on an individualized  
8 basis, to try to identify those individuals who need  
9 some additional supervision and put in place those  
10 things that are needed?

11 MR. WALTON: Well, I think the first thing  
12 that any judge should do before he or she decides to  
13 reduce a sentence is carefully review the individual  
14 who they have before them, to assess what their prior  
15 history is, is there a history of prior violent  
16 behavior, is there a history of prior possession of  
17 weapons behavior is there a history of prior drug  
18 dealing? I think it would obviously be helpful to know  
19 what that individual's institutional situation has  
20 been, whether that individual has been a model prisoner  
21 or whether they've engaged in acts that would suggest  
22 that they would continue to engage in such acts when  
23 they come back into the community. I think that,  
24 obviously, there needs to be some period of transition,  
25 so I would hope that individuals coming back would

1 transition back into the community through halfway  
2 houses so that they would have that opportunity for  
3 three, four, five, six months to transition back. I  
4 think it may be important -- for example, if I had  
5 somebody who I thought there was some level of risk  
6 that I was letting back, I might be inclined, as an  
7 individual judge, to require that that person report to  
8 me every six months so that I would -- that person  
9 would know that they were going to have to face me and  
10 they were going to have to show me that they're  
11 conducting themselves appropriately. Sure, that's  
12 additional work, but that's what we're here to do. So  
13 I think there are things that we can do to let it be  
14 known to individuals who come back, that they're  
15 expected to conduct themselves appropriately and if  
16 they don't, justice will be harsh.

17 COMMISSIONER STEER: You're describing a  
18 process of perhaps modifying conditions of supervision.

19 MR. WALTON: Yeah.

20 COMMISSIONER STEER: Would that generally  
21 require the presence of the defendant or not?

22 MR. WALTON: I would think not. I don't  
23 think, if you're going to afford, in effect, a reduced  
24 sentence to an individual but you're going to impose  
25 additional conditions, I would think that you wouldn't



1 | necessarily have to have that individual before you.  
2 | At least, you wouldn't have to bring them back at the  
3 | expense of the Federal Bureau of Prisons, into the  
4 | courtroom in order to announce those changes. I think  
5 | it probably would be prudent, however, once that  
6 | individual is released, to issue an order to require  
7 | that once they're back into the community that they do  
8 | appear before the court so the court can directly  
9 | address them and let them know what these new  
10 | conditions are and what the expectations are of the  
11 | court regarding their behavior once they're back in the  
12 | community.

13 |                   CHAIR HINOJOSA: Vice Chair Sessions.

14 |                   JUDGE SESSIONS: Judge Walton, I just -- I  
15 | want to express my appreciation for you coming today  
16 | and also your comments about courage, because it comes  
17 | from a person whom I admire for just that  
18 | characteristic, the real courage that you've shown in  
19 | your career. And you focused in exactly on my question  
20 | and that is the burden on judges and probation  
21 | officers. Some people look at this question about  
22 | retroactivity and say well, there's an automatic  
23 | reduction of a certain period of time for crack  
24 | defendants across the country and of course, that is  
25 | not what this is about. This is about giving judges

1 | the discretion and the burden to analyze again, in  
2 | light of these changes to the guidelines, again,  
3 | whether or not a person should be released early and  
4 | that places a very heavy responsibility on all of the  
5 | judges across the country. My question is whether you  
6 | think -- and particularly, in those jurisdictions, like  
7 | the Eastern District of Virginia, which has a high  
8 | number of cases, whether you think courts can and are  
9 | willing to take on that ultimate responsibility?

10 |           MR. WALTON: I believe that's the case. I,  
11 | in fact, have two friends who are judges on the Eastern  
12 | District who I spoke to not long ago in reference to  
13 | this issue and they know, because of their numbers, it  
14 | will be an added burden to a greater extent than other  
15 | districts, but they, nonetheless, both indicated that  
16 | they're willing to take on that challenge.

17 |           And in my experience and in my discussions  
18 | with judges all throughout the country, I believe that  
19 | judges are prepared to take on that responsibility  
20 | because, as I say, if judges believe, and I think most  
21 | judges do, that the fix was something that needed to  
22 | occur to address a fundamental fairness, I believe that  
23 | most judges -- in fact, I would hope all judges -- are  
24 | willing and able to step up to the plate and take on  
25 | that additional burden.

1 CHAIR HINOJOSA: Commissioner Howell.

2 COMMISSIONER HOWELL: As you noted, we're all  
3 concerned about the public safety issue and you alluded  
4 to this in your testimony and in some of the written  
5 comments we've received have suggested that in the  
6 policy statements that the Commission issues along with  
7 any retroactive decision, if we decide that, we should  
8 restrict eligibility for the two points off the  
9 guideline offense level to offenders who do not have  
10 guns associated with their offense or violence  
11 associated with their offense and I was interested in  
12 the, you know, very thorough, thoughtful letter from  
13 the CLC, that the Criminal Law Committee didn't proffer  
14 that as one of their recommendations to the Commission.  
15 And I just wanted to wanted to know if you could  
16 address why it is that the Criminal Law Committee  
17 decided not to make a recommendation to the Commission  
18 to restrict eligibility for a reduction in sentence  
19 along the lines that some from state and local and  
20 federal law enforcement have suggested?

21 MR. WALTON: To be honest, I don't know if  
22 that was really something that came under  
23 consideration. I, in fact, thought about that last  
24 night as I was thinking about what I would say. I  
25 don't, I think, reach the point of concluding that we

1 | should necessarily categorically exclude everybody.  
2 | Now, maybe if you're talking about someone who not only  
3 | was involved in drug trafficking, but also was involved  
4 | in very violent behavior associated to that drug  
5 | trafficking, someone -- I mean, we had an individual  
6 | here in Washington who was prosecuted not long ago who  
7 | was implicated in somewhere around 25, 30 murders.

8 |           For an individual like that, I could  
9 | understand how it may be appropriate to conclude that  
10 | he is ineligible for this reduction. But generally, I  
11 | wouldn't say that that should categorically be the  
12 | situation. People do change. And I think we end up,  
13 | as a society -- and I don't think anybody would say I'm  
14 | light on crime. I'm sort of, I guess, maybe losing the  
15 | image that I've had as a top sentencer as a result of  
16 | the some of the positions I've taken in this regard.

17 |           COMMISSIONER HOWELL: I think you'll always  
18 | have a reputation as a thoughtful jurist.

19 |           MR. WALTON: But I do think that the reality  
20 | is that we have a lot of people in our presence who  
21 | have reached the point where they could be released  
22 | back into society and would not be a potential threat.

23 |           And we pay an astronomical amount of money to keep  
24 | those people locked up for times beyond when they need  
25 | to be locked up, when we could be using that money to

1 | maybe educate our kids and put programs in our  
2 | communities so those kids don't end up in the prison  
3 | cells that are being occupied by those who don't need  
4 | to be there. So I don't like the idea of a categorical  
5 | rejection of everybody. I could see how you may want  
6 | to, as I say, zero out certain people who you think do  
7 | pose too great of a threat, but by and large, I think  
8 | that should be exercised with caution.

9 |           COMMISSIONER HOWELL: Thank you.

10 |           CHAIR HINOJOSA: Commissioner Horowitz.

11 |           COMMISSIONER HOROWITZ: Judge, the -- first  
12 | of all, thank you for coming and speaking to us. In  
13 | the letter, the CLC references the possibility of the  
14 | Commission thinking through the Booker issues, the  
15 | Hicks decision, that's something that you've obviously  
16 | not touched on in your testimony today. Do you have  
17 | any thoughts about that, either formal from the CLC or  
18 | as a district judge who's going to have to deal with a  
19 | number of sentencings?

20 |           MR. WALTON: I mean, that's a concern. As  
21 | you know, Judge Cassell, in his letter, did address  
22 | that, at least to some degree, and suggested that maybe  
23 | a policy statement from the Commission might address  
24 | that, at least to some degree, but I think at bottom,  
25 | there is going to be a legal battle that will be waged

1 as to whether pre-Booker sentence defendants who  
2 received the reduction are then placed in the position  
3 of a post-Booker defendant and therefore the  
4 ramifications of Booker come into play. And that,  
5 obviously, is somewhat of a concern because if that is,  
6 in fact, what the legal landscape ends up being, it  
7 would have a greater impact on the workload of the  
8 courts.

9           But again, I guess I just say, you know, we  
10 were hired to do this job. Nobody asked us to do it.  
11 It's a great job in a lot of ways and it's a challenge  
12 that I think most of my colleagues -- I know I would be  
13 willing to take on. Sure, it may make us work harder,  
14 but to address a fundamental unfairness and to provide  
15 the relief that you have provided to those who are  
16 deserving, I think there's a sufficient justification  
17 for doing so even though the concerns that you express  
18 and reference, the Booker, may be a reality.

19           COMMISSIONER HOROWITZ: Can I ask just one  
20 other question, also. The Supreme Court heard argument  
21 in October on the Kimbrough case which deals with the  
22 crack powder ratio. It's obviously unclear how that  
23 case will come out. As a district judge, would you be  
24 inclined to wait for that decision from the Supreme  
25 Court given the potential ramifications it could have

1 | on the crack powder sentencing and your authority in  
2 | that regard or do you think that's something that you  
3 | would not be inclined to wait for, assuming you were  
4 | doing resentencings?

5 |           MR. WALTON: You mean if you decided to --

6 |           COMMISSIONER HOROWITZ: Right. Assuming we  
7 | decided to make it retroactive. Is that something you  
8 | think you would additionally wait for, potentially,  
9 | obviously, as late as June for Supreme Court's  
10 | decision?

11 |           MR. WALTON: Probably not for those offenders  
12 | who the change would have an immediate effect on. I  
13 | don't think I should delay the decision as to what I do  
14 | in their cases. For those whose -- you know, the  
15 | retroactivity impact would not have an effect until  
16 | after the Supreme Court makes its decision, in those  
17 | situations, I might be inclined to wait.

18 |           COMMISSIONER HOROWITZ: Thank you.

19 |           CHAIR HINOJOSA: Commissioner Friedrich.

20 |           COMMISSIONER FRIEDRICH: Judge Walton, thank  
21 | you for coming here today. Thank you for your time and  
22 | your expertise. We appreciate it very much. The  
23 | Criminal Law Committee has recommended a possible  
24 | policy statement would be that the court should simply  
25 | consider the change in the crack guideline made by the

1 | Commission. Some of the other points you've made here  
2 | today, such as the possibility that judges like you  
3 | would consider having defendants report periodically,  
4 | to deal with the public safety issue or modifying  
5 | conditions of release. Are those things that you think  
6 | would be best captured in a policy statement by the  
7 | Commission or are those things that the Criminal Law  
8 | Committee would consider recommending to the individual  
9 | courts?

10 |           And secondly, if I can make one -- ask you  
11 | one more question related to that, to what extent do  
12 | you think the modifications in supervised release, to  
13 | what extent can that capture or replicate the same sort  
14 | of comprehensive assessment that occurs before a  
15 | release, currently, in the Bureau of Prisons? To what  
16 | extent can judges, by modifying conditions for release  
17 | to include home confinement or community confinement,  
18 | to what extent can they replicate the same sort of  
19 | comprehensive risk assessment that currently occurs in  
20 | prison?

21 |           MR. WALTON: Judges probably would not be  
22 | able to make that type of assessment without some  
23 | input, I would think, from the Bureau of Prisons. I  
24 | would think that would be necessary because the  
25 | individual may not have been before the court for some



1 | period of time. The pre-sentence report would be  
2 | somewhat dated. I mean, obviously their behavior in  
3 | the community would not have changed, but they've been  
4 | incarcerated for a number of years and I think you  
5 | would have to have some input from the Bureau of  
6 | Prisons as to what the institutional adjustment of the  
7 | individual has been in assessing what type of  
8 | additional modifications in the conditions of  
9 | supervised release would be appropriate. Your first  
10 | question was?

11 |           COMMISSIONER FRIEDRICH: Was in terms --  
12 | you've recommended a potential policy statement that's  
13 | relatively narrow and you've presented some other  
14 | ideas, both in the testimony and here today. Should we  
15 | consider a broader policy statement or are these things  
16 | that you think that the courts, on their own, should do  
17 | through Criminal Law Committee recommendations or the  
18 | like? Or is this something we, the Commission, should  
19 | consider incorporating into policy?

20 |           MR. WALTON: I've looked at some of the other  
21 | submissions that were made to the Commission. I know  
22 | there are some who say that you should not do anything  
23 | by way of a policy statement. I, personally -- and  
24 | this is not the view of the committee, because it  
25 | wasn't addressed beyond what we discussed that's in the

1 | letter, but I personally view -- I personally believe  
2 | that we, as judges, take very seriously the policy  
3 | statements that you issue in reference to guidelines  
4 | and I think it would have greater force if it came from  
5 | you and I personally would appreciate that type of  
6 | assistance from the Commission in my assessment as to  
7 | which individuals I thought were appropriate for the  
8 | reduction. So I would personally encourage that type  
9 | of guidance from the Commission.

10 |           CHAIR HINOJOSA: Commissioner Ferry.

11 |           COMMISSIONER FERRY: If I may, I have two.  
12 | One is a follow-on to what you just asked, or what you  
13 | just answered. And let me say good morning. It's  
14 | always good to see you again, Judge. You indicated  
15 | that you may like to have updated input from the Bureau  
16 | of Prisons. What format would you anticipate receiving  
17 | that input in, from AUSAs or report from the Bureau of  
18 | Prisons, what would you anticipate doing?

19 |           MR. WALTON: I would anticipate that our  
20 | probation officers would dialog with the Bureau of  
21 | Prisons and serve us an updated pre-sentence report  
22 | with the information about what the individual's  
23 | institutional adjustment had been. Obviously, if the  
24 | government wanted to weigh in -- because one of the  
25 | things I emphasized as we were debating this whole

1 | issue, which you will see in the letter, was the fact  
2 | that the Justice Department would need to be notified  
3 | about the fact that we were considering this issue, so  
4 | if the department wanted to weigh in and express their  
5 | opposition, they would have that opportunity.

6 |           COMMISSIONER FERRY: My second question  
7 | relates to one that Commissioner Horowitz asked  
8 | regarding the Booker question and I'm curious to know  
9 | either -- whether or not the Criminal Law Committee,  
10 | itself, discussed this and what its opinion was or if  
11 | you have any individual opinions on the idea that if  
12 | Booker applies retroactively, it could inject some  
13 | unwarranted disparity in the system, that is that all  
14 | courts have universally held that Booker does not apply  
15 | retroactively but yet, if a court were to determine  
16 | that in the context of this 3582(c) hearing that the  
17 | defendant could argue the Booker factors, the idea that  
18 | these defendants would get, arguably, a benefit that  
19 | other defendants who had been previously sentenced were  
20 | not able to get and the type of disparity that injects  
21 | into the system. Did you have any discussions or does  
22 | the Criminal Law Committee have any conclusions  
23 | regarding that?

24 |           MR. WALTON: We had some discussions in  
25 | reference to that, but I don't think there was any

1 | consensus as to what the potential impact would be. I  
2 | think that it is a concern of many of the members of  
3 | the committee and obviously, the cases that have looked  
4 | at the issue to date have taken the position that if  
5 | you're going to resentence, that Booker does come into  
6 | play. However, as I recall, I think it's the Hicks  
7 | case, said something about maybe a policy statement  
8 | from the Commission could conceivably have an impact on  
9 | what factors the judge could take into account.

10 |           I think it's going engender, unquestionably,  
11 | a legal battle. I think that's a reality. And where  
12 | judges ultimately come out is going to, you know, I  
13 | think be ultimately resolved by the courts of appeals  
14 | and maybe, ultimately, by the Supreme Court. But I  
15 | really, I think, can't give you a definitive  
16 | perspective.

17 |           It's an issue that may come before me, so I  
18 | don't want to opine, is that, you know, how I would  
19 | rule on that, but it is, you know -- it does, as I say,  
20 | previously raise some level of concern, but ultimately,  
21 | I think, you know, the need for the perception and the  
22 | reality of fundamental fairness outweighs that concern.

23 |       And the other point I want to make in that regard,  
24 | which I didn't indicate specifically, but I do think  
25 | it's profound, also, that, for example, in reference to

1 | LSD -- now, admittedly, the numbers were not the same.  
2 | When the change in the guidelines regarding LSD became  
3 | into law, it was, ultimately, made retroactive. And  
4 | again, I think if this is not made retroactive, I think  
5 | there will be many in the community who will say well,  
6 | again, you see what happens when it affects a certain  
7 | segment of our society, the benefit is awarded to them.  
8 | When it affects another segment of our society, it's  
9 | not. And I just think that that's a message that we  
10 | can't send our society if we want all or part of our  
11 | society to respect our criminal law system.

12 | CHAIR HINOJOSA: Commissioner Reilly.

13 | COMMISSIONER REILLY: Thank you, Judge, and  
14 | thank you. It's good to see you and appreciate very  
15 | much your input. I suppose that every day of the week  
16 | we at the -- of what's left at the U.S. Parole  
17 | Commission, make decisions with regard to the impact  
18 | our decisions have on individual lives and we always  
19 | look at this issue of treatment, because when we talk  
20 | about the offenders that I think we are all talking  
21 | about, which are the nonviolent offenders who have been  
22 | put in prison for extended periods of time, we really  
23 | want to know how they've programmed. We want to know  
24 | the institutional record, we want to know what  
25 | treatment they've had and we want to know whether they

1 | have programmed well in that treatment. And element --  
2 | the distributors, the major distributors of drugs,  
3 | looking at the individual, who you indicated, got  
4 | caught up in the system -- and I think there a couple  
5 | of young lawyers that I read about the other day from  
6 | Howard University that got caught up in it and are  
7 | doing a long sentence. You know, how do we build in, I  
8 | think, into whatever we decide to do or the Commission  
9 | decides to do, some sort of a statement that says that,  
10 | you know, we want to know how this person has done,  
11 | sure, within the institution, but if they were a user  
12 | of cocaine, were they successful in the treatment they  
13 | received?

14 |           And is somebody willing to sign off that that  
15 | has been dealt with, because to just turn them back on  
16 | the street again, as we have seen, ourselves, both with  
17 | the supervisory lessees from the district, who usually  
18 | let go through at least three sanctions before we  
19 | revoke them, if they have not programmed, if they've  
20 | not had treatment that they've been successful at, then  
21 | I think it's a lost cause to put them back out there  
22 | and we're obviously not talking about the violent one,  
23 | we're talking about the person who just has an  
24 | addiction and how do we deal with that? I mean, how do  
25 | we build that into whatever's done, if it is done, that

1 | will guarantee that when you're looking at it, the  
2 | courts are looking the decision they have to make, that  
3 | this has been accomplished? And I have to tell you --  
4 | and this is no criticism by anybody. I've seen the  
5 | growth of this system over a period of years here, from  
6 | 56,000 to 200,000 people in 214 prisons at the federal  
7 | level, but treatment has been an issue and we've had so  
8 | many people now in the system, you can't provide the  
9 | treatment and I think that's a big question.

10 |           And if it weren't for a lot of the private  
11 | sources out there who are able to extend a hand and do  
12 | that, I don't know what we would do in this country.  
13 | We couldn't do it because it doesn't seem that we're  
14 | able to do it, at least in the government, so I guess  
15 | I'm struggling -- we struggle with it every day. We  
16 | just had safe surrender here in the District. We had  
17 | over 530 people come in and surrender for various  
18 | issues.

19 |           We were very involved in that. Many of those  
20 | people, it was like a whole new world to them, that  
21 | they had been -- the warrant that was on them had been  
22 | lifted. Some of them was child support, some of them  
23 | traffic offenses, whatever. We had 14 of our own from  
24 | the Parole Commission. But it allows them to lead a  
25 | new life and certainly, that's what I think all of us

1 | who are in public service want to do and I commend you  
2 | for your position as a federal judge to come forward  
3 | and speak on this. And I think we're all struggling  
4 | with it and certainly we're struggling -- we've got to  
5 | struggle, as Americans, with this population issue. I  
6 | don't see how we can continue to build prisons and take  
7 | money away from other important social resources that  
8 | we have and so is the treatment issue something your --  
9 | is a major concern to you in terms of whether they get  
10 | it and whether they programmed and whether it was  
11 | successful and whether it's even available?

12 |           MR. WALTON: I mean, that's obviously a  
13 | significant problem because the reality is that we know  
14 | a sizeable portion of our prison population have an  
15 | addiction problem, whether it be alcohol or drugs and  
16 | we don't have enough treatment capacity in our prisons.  
17 | And while I think, obviously, we should seek to treat  
18 | people for addiction when they're incarcerated, the --  
19 | a treatment they may receive in that setting may not  
20 | really reflect their ability to adjust when they're  
21 | back in the community, so if you have somebody who's  
22 | had an addiction who receives treatment, I would think  
23 | that you'd still want to continue some level of  
24 | treatment regiment once they come back into the  
25 | community because the same community pressures and



1 | circumstances that caused him to gravitate towards that  
2 | behavior, which may not exist in the same -- to the  
3 | same degree in the institutional setting are going to  
4 | still be in play once they come back into the  
5 | community. So even if they have been successful -- and  
6 | I think that's something that should be considered -- I  
7 | think we still have to consider to what extent we have  
8 | intervention once they come back into the community.

9 |           I mean, one of the things that I learned when  
10 | I worked in the White House Drug Office is that  
11 | treatment can be successful. Many times it's not  
12 | successful. But the longer you keep a person in  
13 | treatment, the greater likelihood you're going to be  
14 | successful, but because of the large number of  
15 | individuals we have who have an addiction problem and  
16 | the limited resources we have to provide treatment,  
17 | we've created these 30-day, these 90-day wonders.

18 |           In reality, we know -- I mean, it looks good,  
19 | that we're treating all these people, but in reality we  
20 | know that those type of programs, by and large, don't  
21 | work. We need programs that are long-term because it  
22 | takes a long time for people to change their behavior  
23 | and their mindset about the use of drugs. And until  
24 | we're willing to commit those type of resources, we're  
25 | not going to have the level of success that otherwise I

1 | think we can have in trying to impact the problem of  
2 | addiction and even under the best of circumstances,  
3 | even with the best resources that you have,  
4 | unfortunately, you're going to have people who are  
5 | going to go back to the use of drugs regardless of what  
6 | you do, but I do think, for the population we're  
7 | talking about, that we've got to think about treatment,  
8 | what somebody has done in reference to treatment and  
9 | having available for them treatment when they come back  
10 | into the community.

11 |           JUDGE CASTILLO: Judge Walton, can I just  
12 | follow up on treatment for one second. It's alluded to  
13 | in the press that a whole bunch of individuals are  
14 | going to be released. Will those individuals still be  
15 | under criminal justice authority and have treatment  
16 | available to them or not? What's your view on that,  
17 | Judge Walton?

18 |           MR. WALTON: Well, they would still be on --  
19 | I would assume, still be on supervised release and --

20 |           JUDGE CASTILLO: So if they needed treatment  
21 | and if treatment resources were available at the  
22 | federal level, would that be something a judge would  
23 | do, presuming these is retroactivity and the judge did  
24 | allow for retroactivity?

25 |           MR. WALTON: Yes, I would hope so. I mean, I

1 | think, as was indicated by Commissioner Reilly, if  
2 | we're going to release individuals who we know still  
3 | have an addiction propensity -- I guess you're always  
4 | going to have that, but if they still have an addiction  
5 | and we don't address that, I think the handwriting's  
6 | going to be on the wall. They're going to be back in  
7 | the process.

8 |           CHAIR HINOJOSA: Judge Walton, the chair gets  
9 | the very last question. There's some allusion here in  
10 | the questions and your answers with regards to a policy  
11 | statement, for example, on firearms. As you know, this  
12 | amendment just affects the base offense level. We have  
13 | enhancements with regards to use of firearms. Many of  
14 | these individuals may have been convicted with regards  
15 | to the mandatory consecutive five-year minimum with  
16 | regards to possession of a firearm.

17 |           There are enhancements with regards to if you  
18 | have an organizing role or manager or supervisor role  
19 | or leader role and so those enhancements have been  
20 | built into the sentences. Would it be necessary to  
21 | have a policy statement with regards to that when the  
22 | only -- if you have either a system in place or a  
23 | policy statement that only addresses the base offense  
24 | level when there's already been enhancements and the  
25 | individuals, with using firearms and/or having a major

1 | role in the offense, have already received a higher  
2 | sentence?

3 |           MR. WALTON: Well, I don't think those  
4 | factors would necessarily or should be necessarily  
5 | determinative as to whether the reduction is afforded,  
6 | but I think they are at least things that courts should  
7 | take into consideration, yes. If these factors have  
8 | already been considered and had an impact on what the  
9 | judge decided to do in reference to the sentence that  
10 | was given on the drug charge, itself, then obviously if  
11 | that was factored, it should be doubled. But I still  
12 | think it's something that the judge may want to  
13 | consider.

14 |           I mean, judges may have given a lesser  
15 | sentence, for example, in reference to the weapons  
16 | offense if there was no violence involved, especially  
17 | when it comes to what the sentence was on the drug  
18 | offense and may have decided well, I'll give -- because  
19 | I've got to give this huge sentence, pre-Booker,  
20 | regarding the sentencing guidelines of a drug offender,  
21 | I'm not going to maybe give the level of sentence I  
22 | would've given regarding the weapons offence. So I  
23 | think, you know, judges go, as you know, through those  
24 | gymnastics in making an assessment as to what the  
25 | appropriate sentence is.

1 CHAIR HINOJOSA: In the end, that individual  
2 judge would have to make the decision --

3 MR. WALTON: Right.

4 CHAIR HINOJOSA: -- if this was  
5 retroactive --

6 MR. WALTON: Right.

7 CHAIR HINOJOSA: -- as to whether to give an  
8 effect to it.

9 MR. WALTON: Absolutely.

10 CHAIR HINOJOSA: Judge Walton, we certainly  
11 thank you for taking time from your busy schedule and  
12 for sharing your thoughts and the Criminal Law  
13 Committee's thoughts with us. As always, we appreciate  
14 our relationship with regards to the advice we receive  
15 from the Criminal Law Committee.

16 MR. WALTON: Thank you for having me.

17 CHAIR HINOJOSA: Thank you very much. Okay.  
18 If the next panel would please start coming up here.  
19 The next panel is the Practitioners Perspective. We've  
20 got five excellent practitioners before us.  
21 Mr. David Debold currently co-chairs the Commission's  
22 Practitioners Advisory Group. Mr. Debold practices in  
23 the litigation department of Gibson, Dunn and Crutcher.  
24 We've got Ms. Lisa Freeland, who currently serves as  
25 the Federal Public Defender for the Western District of

1 | Pennsylvania. Mr. Stephen Sady, who is the Chief  
2 | Deputy Federal Public Defender in the Oregon Federal  
3 | Defender Office, where he has been an attorney  
4 | since 1981. We've got Mr. Barry Boss, who currently is  
5 | the co-chair of the American Bar Association's Criminal  
6 | Justice Section Sentencing Committee and was a former  
7 | co-chair of the Commission's Practitioners Advisory  
8 | Group. And Ms. Carmen Hernandez, who is the president  
9 | of the National Association of Criminal Defense Lawyers  
10 | and past chair of the NACDL's Federal Sentencing  
11 | Committee, who is in private practice here in  
12 | Washington, D.C. And Mr. Debold, we'll start with you,  
13 | sir. If you would like to make an opening statement,  
14 | sir?

15 |           MR. DEBOLD: Yes. Judge Hinojosa and members  
16 | of the Commission, I'm honored to appear on behalf of  
17 | the Practitioners Advisory Group and to urge the  
18 | Commission to make retroactive the crack and criminal  
19 | history amendments. In our group's prepared remarks,  
20 | we note how each amendment fits sparely within the time  
21 | honored criteria for making an amendment retroactive.  
22 | With respect to the crack amendment, in particular,  
23 | first, the purpose of the amendment. The purpose is to  
24 | provide relief from problems associated with the 100 to  
25 | one ratio that, in the Commission's own words, are so

1 | urgent and compelling that interim relief is warranted.  
2 | Second, the magnitude of the change. This also  
3 | strongly argues in favor of retroactivity. Without  
4 | retroactivity, defendants sentenced within months of  
5 | one another with identical offense conduct, will be  
6 | sentenced using guideline ranges that are significantly  
7 | different purely because of this amendment. Over 2300  
8 | defendants who could invoke this amendment were it made  
9 | retroactive, were sentenced between October 1, 2006 and  
10 | June 30, 2007. Fully one-third of those who might  
11 | benefit from this amendment were it made retroactive,  
12 | almost 7,200 were sentenced within the 30 months after  
13 | the Supreme Court's decision in Booker.

14 |           Given that the amendment was prompted by  
15 | problems with the ratio that the Commission has  
16 | recognized for years, that is, since the vast majority  
17 | of these inmates had been sentenced, consistent  
18 | treatment of those sentenced before and after November  
19 | 1st of 2007 is appropriate. Third, in those cases  
20 | where a defendant is eligible for retroactive  
21 | application of the amendment, calculation of the new  
22 | range would be -- would pose no difficulty. So what are  
23 | the reasons to resist retroactivity? Most that have  
24 | been articulated are no more than attacks on the wisdom  
25 | of the amendment for prospective purposes. Yes, those

1 | with the longest sentences would have the strongest  
2 | arguments for receiving the largest reductions, but  
3 | that is merely a recognition that the 100 to one ratio  
4 | has distorted sentences the most at the high end of the  
5 | drug quantity table. Yes, a large number of inmates  
6 | would have a strong argument for prompt release and if  
7 | judges agreed, it would be a reflection of how many  
8 | inmates would've received lower sentences that were  
9 | sufficient but not greater than necessary to serve the  
10 | purposes of 18 U.S.C. 3553(a)(2) if this amendment had  
11 | been in place earlier.

12 |           As for the fear of what I'll call a jolt to  
13 | the system, the immediate release of a number of --  
14 | large number of defendants, it's important to remember,  
15 | as we just learned, that we are leaving the ultimate  
16 | decision of how soon to release to Article 3 judges who  
17 | share an interest, a strong interest, in ensuring that  
18 | they will not see these defendants soon again at a  
19 | supervised release revocation hearing. The courts,  
20 | with assistance from probation officers in the Bureau  
21 | of Prisons can easily accommodate the need to ensure  
22 | that an inmate be ready for release even if it means  
23 | that less than a full two-level reduction for those  
24 | near the end of their terms would be warranted. Will  
25 | retroactivity require an investment of time and



1 | resources? Well, when over 19,000 inmates are eligible  
2 | for a reduction, it is no small feat to process those  
3 | requests. But the proper focus should be on the ease  
4 | of applying the amendment on a case-by-case basis. To  
5 | the extent the task here is more involved than with  
6 | previous retroactive amendments, it is because the  
7 | number of persons deserving of a reduced sentence is  
8 | much greater than ever before.

9 |           The shortcomings of the 100 to 1 ratio have  
10 | been known for many years. The Commission, with this  
11 | amendment, has provided modest relief while at the same  
12 | time respecting the statutory 100 to 1 ratio. There  
13 | are more than 19,000 inmates for whom the statutory  
14 | minimum does not require the sentence they are now  
15 | serving.

16 |           There are more than 19,000 inmates for whom a  
17 | lower guideline range would apply under an amendment  
18 | that was adopted after more careful and studied  
19 | deliberation, after more years of study and analysis  
20 | than probably any other provision in the history of the  
21 | federal sentencing guidelines. There are more  
22 | than 19,000 inmates for whom the Commission can  
23 | honestly say this sentence that these inmates are  
24 | serving may not need to be as long as it is to achieve  
25 | the legitimate purposes of sentencing. And there are

1 | more than 19,000 inmates for whom the courts should  
2 | have the discretion, not a mandate, but the opportunity  
3 | to reconsider the sentence in light of the Commission's  
4 | accumulated research and analysis. If our system of  
5 | criminal justice and its participants must make a  
6 | modest investment in each of these cases so that  
7 | justice can be done, it will be time, money and  
8 | resources well-spent. The Practitioners Advisory Group  
9 | urges the Commission to make these amendments  
10 | retroactive.

11 | CHAIR HINOJOSA: Thank you. Ms. Freeland.

12 | MS. FREELAND: Thank you, Judge Hinojosa. My  
13 | name is Lisa Freeland and I'm the Federal Public  
14 | Defender for the Western District of Pennsylvania and  
15 | I'd like to thank you, Judge Hinojosa, and the rest of  
16 | the Commission for inviting me here today to testify at  
17 | this public hearing on behalf of federal and community  
18 | defenders on this very important issue. You've read  
19 | all of our written testimony, opening statements and  
20 | all of us sitting at this table here are here to  
21 | encourage you to provide retroactive application of  
22 | this amendment and I don't want to be repetitive. I  
23 | want to leave time for your questions, but there are a  
24 | couple of points that I think, from the defender's  
25 | perspective, need to be underscored even though they've

1 | already been presented in writing. As I know you're  
2 | aware, the reason that we're here today is because you  
3 | have made a considered judgment that the 100 to 1 ratio  
4 | should not stand. It cannot coexist in sentencing with  
5 | fairness and equity and that there are tens of  
6 | thousands of people who are serving excessively severe  
7 | and unjustifiably long sentences, not just long  
8 | sentences, but sentences in which this amendment  
9 | demonstrates are longer than necessary to serve the  
10 | goals of punishment and to, in fact, undermine the  
11 | objectives of punishment, in the Commission's view.

12 |           All of the reasons that this Commission has  
13 | cited in favor of proposing and promoting this  
14 | amendment apply with equal force to its retroactive  
15 | application and I'd just like to echo both what Mr.  
16 | Debold has said and what Judge Walton said about many  
17 | of the detractors from this amendment. It's really not  
18 | an attack on retroactive application, it's an attack on  
19 | the decision which has already been made, that this  
20 | two-level reduction is appropriate to serve the ends of  
21 | punishment and the goals of this commission. This  
22 | commission has identified the amendment as a partial  
23 | remedy to deal with the problems associated with the  
24 | 100 to 1 ratio and I would suggest that the idea that  
25 | this is a remedy contemplates retroactive application

1 | because the only way that the Commission can even  
2 | partially remedy the past injustices of more than a  
3 | decade of sentencing under the 100 to 1 ratio is to  
4 | apply it retroactively. There simply is no other way  
5 | to provide a remedy unless your decision reaches those  
6 | who are already incarcerated and are already serving  
7 | the sentences which the Commission has deemed  
8 | unjustifiable.

9 |           Only then, only through retroactive  
10 | application, will every crack offender -- we hear a lot  
11 | about consistency and disparity. The Commission has an  
12 | opportunity to ensure that every crack offender receive  
13 | a sentence which serves the goals of punishment and  
14 | that's what we're here to talk about. No commission,  
15 | no judge imposing a sentence can go beyond, can expect  
16 | the sentence imposed can do any more than serve the  
17 | goals of punishment as we know them and this  
18 | commission's judgment is that this reduction serves  
19 | those ends.

20 |           I understand that with change comes fear.  
21 | There was a lot of fear about what would happen after  
22 | the Supreme Court's decision in Booker in federal  
23 | defenders' offices, in United States Attorneys'  
24 | offices, in the courtrooms around the country, there  
25 | was fear that this decision would bring federal

1 | sentencing to its knees. Those fears were largely  
2 | unjustified. But I understand that with change comes  
3 | fear. What I'd like this commission to understand and  
4 | I hope the Commission will be able to do is to resist  
5 | the colored perception and the lack of clarity that  
6 | fear brings to a decision-making process.

7 |           I pray that the Commission will maintain  
8 | clarity, maintain clarity of purpose, a purpose it has  
9 | demonstrated through passing this amendment and not be  
10 | detracted and deterred by the predictable fears that  
11 | this amendment's retroactive application will bring our  
12 | criminal justice system to its knees and lead to the  
13 | wholesale release of dangerous offenders to the streets  
14 | of our cities and towns.

15 |           Although I am a public defender and my role  
16 | in the criminal justice system is representing the  
17 | individual -- the rights of the defendants, I'm also a  
18 | member of the public and I am concerned with public  
19 | safety, but I believe that based on decades of data  
20 | collection, research, evaluation and this commission's  
21 | considered judgment that a two-level reduction will not  
22 | prospectively negatively impact the public safety, that  
23 | its retroactive application will also not affect the  
24 | public safety. Everything that the Commission has said  
25 | about the 100 to 1 ratio over the last decade compels

1 | the decision that it be applied retroactively. I agree  
2 | with Judge Walton that there is an inevitable burden on  
3 | the courts, but I hope this commission will maintain  
4 | focus on the real issue, which is not whether there  
5 | will be extra work for judges, for defenders, for  
6 | prosecutors and probably officers, but whether that  
7 | extra work is warranted.

8 |           We're talking about a burden on the system,  
9 | it's true, but we are not talking about an undue  
10 | burden, especially given the fundamental unfairness  
11 | that exists in our current system and our ability to do  
12 | something about it today. If this commission is  
13 | concerned about burdening the courts and easing the way  
14 | for the application of this amendment prospectively as  
15 | well as retrospectively, it will apply it  
16 | retroactively.

17 |           The only way to ease the burden on the courts  
18 | is for this body to give the courts guidance on how to  
19 | apply this amendment. There will be litigation about  
20 | whether the amendment is retroactive, even if the  
21 | Commission does not act. That's something that cannot  
22 | be avoided, but what can be avoided is protracted  
23 | litigation about a question that this body has the  
24 | power to decide today. We can't decide today what will  
25 | happen if courts choose to apply Booker upon

1 | resentencing. We can't decide what to do about those  
2 | courts that don't. We can't do anything about judges  
3 | that may not want to apply the reduction because as you  
4 | know, the fact that the amendment is retroactive if you  
5 | make it retroactive does not compel a reduction. There  
6 | will be litigation, as Judge Walton recognized, but  
7 | there doesn't have to be unnecessary and needless  
8 | litigation and unnecessary and needless litigation will  
9 | be the result if the Commission fails to act.

10 |           Make no mistake, the question of  
11 | retroactivity will be litigated. It'll be litigated by  
12 | professionals, it'll be litigated by pro se prisoners,  
13 | but it will be litigated and it will be an unnecessary  
14 | burden, since this commission can act. Another fear  
15 | that has been expressed by some that have filed  
16 | comments is the fear of the wholesale release of  
17 | dangerous offenders to the streets.

18 |           And I think -- I don't want to spend too much  
19 | time on this because I know that everyone understands  
20 | that no one will be released to the streets because  
21 | every federal sentence is followed by a term of  
22 | supervised release and we've talked a little bit this  
23 | morning about how supervised release can help to ease  
24 | the fears about dangerous individuals being returned to  
25 | our streets. I have to say that because the Commission

1 | has decided that the two-level reduction represents a  
2 | just sentence, there is no just reason to keep people  
3 | in prison who are serving sentences that don't take  
4 | into account this reduction. People perspectivevely  
5 | receiving the benefit of this reduction will also  
6 | receive shorter prison sentences, will also be coming  
7 | out of prison earlier than was previously expected by  
8 | the Department of Justice, but if you are correct and  
9 | this reduction reflects what must be done to serve the  
10 | ends of punishment, no release from the retroactive  
11 | application of this amendment will be premature, it  
12 | will be precisely what's called for by justice.

13 |           The Probation Chiefs Advisory Group has told  
14 | the Criminal Law Committee that it believes it can  
15 | handle the influx of supervised releasees if the  
16 | amendment is made retroactive. This assessment on  
17 | their part means that they are not concerned that their  
18 | agencies will crumble if the amendment is made  
19 | retroactive, but it also represents a statement that  
20 | the probation officers around this country believe that  
21 | their staff is able to protect the public as it does on  
22 | a daily basis with individuals released from federal  
23 | prison if this commission acts and additional people  
24 | are released prior to their expected date. In my  
25 | district, I've already communicated with our probation



1 | officer. I know that my colleague, Steve Sady, is  
2 | going to talk about that now. We are preparing around  
3 | the country for this and my experience in my district  
4 | has been that there is an atmosphere of cooperation  
5 | that will continue. We understand that this has the  
6 | potential to burden the system, to burden the courts,  
7 | and we are willing to work with our United States  
8 | attorneys, our Clerks of Court, our Chief Judges and  
9 | our probation officers to ensure that any burden on the  
10 | courts is handled as efficiently and effectively as  
11 | possible. Finally, I'd like to commend the Commission  
12 | and I know that, as a federal defender, I often do not  
13 | find myself in this position and those of you who know  
14 | me, know this to be true. But I do.

15 |           This is an issue that's very important to me  
16 | and I want to commend the Commission not only the  
17 | decision to propose and promote this amendment this  
18 | year, but on its decades of attempts to bring justice  
19 | in this area of sentence -- in this area of sentencing.  
20 | It's decades of data collection, research and  
21 | evaluation that has put it in the position to be able  
22 | to propose and promote this partial remedy. On behalf  
23 | of the defenders, I urge the Commission not to allow  
24 | its previous efforts to be diminished and to allow this  
25 | amendment to be applied retroactively so that it can

1 bring justice to all, not just a few.

2 CHAIR HINOJOSA: Thank you, Ms. Freeland.  
3 Mr. Sady.

4 MR. SADY: Good morning. I'm Steve Sady, the  
5 Chief Deputy Federal Defender for the District of  
6 Oregon and I'd like to thank you for the opportunity to  
7 testify regarding implementation of retroactive  
8 amendments. Twelve years ago the Commission  
9 promulgated a retroactive amendment on marijuana  
10 guidelines and the District of Oregon had a  
11 disproportionate number of people who were potentially  
12 affected. The court in Oregon adopted a protocol for  
13 handling very large numbers of cases that I think have  
14 been helping us to give guidance on how we can most  
15 efficiently implement a retroactive crack amendment.

16 The successful implementation of the  
17 marijuana amendment depended on three basic areas. One  
18 was good communication; another, cooperation among the  
19 affected parties; and the third was good faith in the  
20 cooperation and trying to get to fair results in  
21 individual cases. Federal defenders are committed to  
22 making sure that each individual gets the maximum  
23 ability of representation, the maximum reasonable  
24 result in a retroactive context. That also does not --  
25 permits us to act in a group manner, basically trying

1 | to streamline procedures where it's reasonable and  
2 | effective. The first step that we did in implementing  
3 | the marijuana retroactive amendment was just trying to  
4 | identify who the affected people were. That involved  
5 | communication with the U.S. Attorney's Office, the  
6 | probation office, the Bureau of Prisons, to make sure  
7 | that we had the right group identified. So first we  
8 | had to identify the group.

9 |           Second thing we did was move towards making  
10 | sure that each individual had counsel through an  
11 | appointment of counsel, generally to our office for an  
12 | initial screening, and authorizations for release of  
13 | information to allow conferring with whoever the prior  
14 | counsel was and also to make sure that we had  
15 | authorization to look at and evaluate pre-sentence  
16 | report and statements of reasons, which we obtained  
17 | with the cooperation of the probation office.

18 |           A third part that we did, which I think was  
19 | essential and is a process that's already started in  
20 | the crack retroactivity question is educating clients.  
21 | So for the period of time for the month or so prior to  
22 | November 1st, 1985, we sent letters, we had phone  
23 | calls, we met in groups with the folks in the prisons.  
24 | We would provide a general explanation of what it  
25 | consisted of, what the limitations were, what the

1 | reality was, what the potential for a retroactive  
2 | amendment for individuals in a group setting. We  
3 | invited general questions in the group setting so that  
4 | rumors and false expectations were minimized. Through  
5 | the transparency, we were able to keep rumors and wild  
6 | expectations to a minimum. We then met individually  
7 | with the specific client; had our worksheet, which  
8 | we've already adopted for the crack retroactivity, to  
9 | be able to get a basic set of how -- what, reasonably,  
10 | could we expect to get maximized for this particular  
11 | client.

12 |           After the gathering of information and  
13 | educating of the clients, we met with the United States  
14 | Attorney's office and the United States Attorney's  
15 | office, my counterpart, had been consulting with the  
16 | individual prosecutors in cases and basically coming up  
17 | with what they thought would be a reasonable way of  
18 | implementing a retroactive guideline because, of  
19 | course, once the Commission has stated that this is how  
20 | it should apply, that they are executing. And we got  
21 | together and decided how close we were and how we  
22 | computed what the results should be and how close they  
23 | were. Well, there were a certain number of cases  
24 | where, right from the beginning, we were on the same  
25 | page. Whatever else -- and remember, back in that

1 | epoch, there was no limitation on what we could ask  
2 | for, what we could think we should do. We were trying  
3 | to recapitulate what would've happened if the marijuana  
4 | correct guideline had been in effect at the time of  
5 | sentencing. So we were feeling fairly free about what  
6 | we could ask for in terms of getting justice in the  
7 | individual case. We found a remarkable number of the  
8 | cases we were in agreement on.

9 |           Some, we were close and send them back to the  
10 | prosecutor, send them back to the defense lawyer, come  
11 | back and have some more negotiation. In a remarkable  
12 | number of the cases, we were able to get to an  
13 | agreement of what the client, defense counsel and the  
14 | prosecutor thought was a fair disposition. On those  
15 | cases, in the week before the effective date, we were  
16 | able to send letters to each individual judge stating  
17 | -- providing the background of that individual case and  
18 | why the parties come to a certain agreement.

19 |           Attached to the letter was a motion that we  
20 | requested to be filed with the coordination with the  
21 | clerk's office on that day, if Congress allowed the  
22 | amendment to go into effect and that document was --  
23 | attached to that document was a proposed order which  
24 | simply said here's the -- amending the judgment to read  
25 | the new sentence and all other parts of the judgment

1 remaining in effect. On November 1st, 1995, judges in  
2 the District of Oregon signed 121 orders that day and  
3 that morning, the clerk's office had coordinated with  
4 the Bureau of Prisons, who provided wonderful  
5 cooperation throughout in terms of making sure we knew  
6 projected release dates, could make sure that most  
7 people most immediately affected were treated with a  
8 priority. Those -- the clerk's office was able to  
9 send, to the right prison, to the right fax number, so  
10 that people knew exactly when that order was changed on  
11 November 1st. The Bureau of Prisons had also been  
12 copied on the proposed change.

13           They had already recalculated so they were  
14 able to make, if that went into effect, they knew who  
15 should go home that day, who -- they knew who should  
16 start being transferred into community corrections to  
17 start that process if they were within a certain amount  
18 of their -- the new release date. And on that morning,  
19 after that -- with that procedure, the 121 judgments  
20 went into effect. Many people met in the parking lot  
21 with their families and went home and it was with a  
22 minimum amount of dislocation for the court system.  
23 Each individual was considered -- came to a result that  
24 they were comfortable with. The number of cases that  
25 needed litigation issues, those issues were handled

1 | separately without particular strain to the court and I  
2 | think it provides a very good model for implementing  
3 | the crack retroactive amendments. We have circulated,  
4 | through every federal defender, a packet with the  
5 | worksheets and the interview sheets and suggested  
6 | procedures. I know they're being started in both  
7 | informal and formal steps, certainly been adopted in  
8 | Oregon that we're already -- you say the word, we're  
9 | ready to move. And the -- I believe, that's at least  
10 | informally it's happening in the Eastern District of  
11 | Virginia and other places with large numbers of cases  
12 | that need to be addressed.

13 |           As you can imagine, November 1st, 1995 was  
14 | one of my best days as a federal defender. It was also  
15 | one of my worst, because while the predominantly white  
16 | marijuana growers were being joyously embraced by their  
17 | families in the Sheridan parking lot, my African-  
18 | American clients, who I knew were serving over-  
19 | incarceration, sentences more than necessary to serve  
20 | the legitimate purposes of sentencing, they stayed.  
21 | This is a day where the Commission can remedy that, at  
22 | least partially, and to do that is fair, necessary and  
23 | very doable.

24 |           CHAIR HINOJOSA: Thank you, Mr. Sady.  
25 | Mr. Boss.

1           MR. BOSS: Thank you, Judge, members of the  
2 Commission. I want to thank you on behalf of the  
3 American Bar Association for hearing us today on this  
4 extremely important issue and I will brief, because I  
5 know we have limited time and I want to make sure that  
6 Ms. Hernandez speaks her piece. I think the Commission  
7 recognizes that there is actually a very fine line  
8 between imprisoning the innocent and over-punishing the  
9 guilty. Both impact our fundamental notions of  
10 fairness and due process. It's recognized in the Brady  
11 Doctrine. We not only have to give exculpatory  
12 information that relates to guilt/innocence, but we  
13 have to do it with regard to sentencing.

14           This commission and the commissions that  
15 preceded you recognized, from a very early point in the  
16 process, that individuals convicted of crack offenses  
17 were being over-punished and it began in the  
18 early 1990s, culminating, I believe, in 1995 with the  
19 suggested amendment to try to right what everybody  
20 recognized was a wrong; it was an over-punishment of a  
21 certain category, a large category, of individuals.  
22 Maybe not all of them. Maybe there were some  
23 individuals who deserved the large sentence, but the  
24 judges, on an individual basis, even if the amendment's  
25 made retroactive, can make that determination because,



1 | of course, the reduction is discretionary on the part  
2 | of each individual judge. In recognizing the  
3 | tremendous number of defendants who have been over-  
4 | punished, we recognize that a moral imperative to  
5 | correct that in this commission is to be commended for  
6 | actually getting it done. But the moral imperative  
7 | that so motivated the Commission and so many of us here  
8 | to correct this problem also suggests and requires that  
9 | the amendment be made retroactive.

10 |           Commissioner Howell, in her opening remarks,  
11 | noted that this is not a cure-all. This is the first  
12 | step. What is important is we communicate to other  
13 | policy makers, to Congress, which has obviously slower  
14 | to act than the Commission in this regard, the  
15 | importance of this moral imperative. The Commission  
16 | will undermine that message if it does not make this  
17 | amendment retroactive.

18 |           What are we saying about the importance of  
19 | this amendment if we're not willing to stand up for it  
20 | and say it is so important and so essential, that it  
21 | needs to made retroactive. Finally, I want to briefly  
22 | touch on this issue about management because I think  
23 | Mr. Sady has laid out something that we've all seen in  
24 | practice will work. But I also would encourage the  
25 | Commission not to try to micromanage this process in --

1 particularly in this very condensed process of  
2 determining retroactivity. I don't think the  
3 Commission is in a position to make specific policy  
4 suggestions about how to administer what can be a very  
5 complicated process and on an individual basis is best  
6 resolved by the individual judge.

7           The Commission has been somewhat reticent to  
8 overhaul the guidelines to reflect the Booker decision  
9 and now I understand there's concern that Booker may  
10 apply at these resentencings. But I would really  
11 discourage the Commission from, at this point, trying  
12 to come up with very, very complicated and  
13 sophisticated Booker policy which may impact much more  
14 than this retroactive amendment in its very limited  
15 context where we haven't had the full opportunity for  
16 study and input.

17           I believe the Commission should overhaul the  
18 guidelines to reflect Booker in things like 6(b)(1.2),  
19 which still have the shall language that 11(c)(1)(c)  
20 plea can only be imposed where it complies with the  
21 guidelines and needs to be changed, as do a number of  
22 other provisions. But I would encourage the Commission  
23 to do that as part of a broader overhaul and at that  
24 point, if the Commission wants to address this issue of  
25 how retroactive amendments should be promulgated and

1 | implemented and Booker should be applied in that  
2 | context, that would be the appropriate context for  
3 | doing it. So I want to, as I said, give Ms. Hernandez  
4 | a chance to talk. We really commend the Commission for  
5 | taking this action. Nothing, I think, has been more  
6 | important over the last 10 years than to correct this  
7 | wrong and on behalf of the ABA, we thank the  
8 | Commission.

9 |           CHAIR HINOJOSA: Thank you, Mr. Boss.  
10 | Ms. Hernandez.

11 |           MS. HERNANDEZ: Good morning, Commissioners.  
12 | It's a pleasure to be here once again and I agree with  
13 | everything that my predecessors on this panel have  
14 | stated. I, too, want to start by commending the  
15 | Commission. I think -- you know, Commissioner Steer's  
16 | probably the only Commissioner who was here in 1995.  
17 | I was representing the federal defenders at that time.

18 |           I think the Commission, with respect to crack  
19 | cocaine, has worked as what everyone who supported the  
20 | Sentencing Reform Act envisioned the Commission to be,  
21 | an expert body that looked at the evidence, that was  
22 | able to marshal all the studies out there, all the  
23 | facts, and was able to come out with a report that  
24 | everyone could understand what that particular crime  
25 | was about and what the appropriate sentence was about.

1 | I think -- and you have maintained it, despite the  
2 | post-1995 Congressional kickback, one might refer to  
3 | it, when they were not happy with the Commission's  
4 | proposal to go one-to-one. You have done -- you've  
5 | looked at the evidence. You've said this is the  
6 | evidence; Congress, you do with it as you see fit, but  
7 | you have not changed the facts to fit the political  
8 | climate and so I commend you.

9 |           I think you've been incredibly brave and I  
10 | think your decision earlier this year to propose a  
11 | reduction, a two-level reduction was, you know, the  
12 | most brave act of all the ones you've done. And I  
13 | think every commission, from the years I've been  
14 | observing, every commission comes to that point in time  
15 | where they have to make the real hard decision. I  
16 | think Judge Murphy's commission did that with the  
17 | post-PROTECT Act departure decisions that it made.

18 |           It was under a lot of political pressure to  
19 | decimate, in essence, the notion of what unwarranted  
20 | disparity and what guideline departure was all about  
21 | and you stood your ground and said this is what our  
22 | position is, this is what the evidence shows, this is  
23 | what we think our obligation is, and I think you've  
24 | done it again with the crack cocaine. So I commend you  
25 | for doing that. You did the right thing back in 1995;

1 | you've done the right thing throughout these years and  
2 | I am absolutely certain that you will do the right  
3 | think again today. Having said that --

4 | CHAIR HINOJOSA: Can we go on to questions,  
5 | then?

6 | MS. HERNANDEZ: Let me just say a few things.  
7 | No. No, Your Honor.

8 | CHAIR HINOJOSA: You were on a roll there.  
9 | I've never heard so many positive things from you,  
10 | Ms. Hernandez.

11 | MS. HERNANDEZ: I know.

12 | CHAIR HINOJOSA: Stop now. We'd be feeling  
13 | just great.

14 | MS. HERNANDEZ: I've been often told by many  
15 | judges, asked whether I really want to snatch defeat  
16 | from the jaws of victory and I usually answer yes. No.  
17 | You know, the one thing -- I don't think that there's  
18 | -- I don't think there's an issue on administrative  
19 | burden. All the parties who have -- who would suffer  
20 | the administrative burden have come to you and said  
21 | there is no burden. The courts, the courts have come  
22 | and said when we're balancing administrative burden  
23 | with what's right, they're telling you it's a no  
24 | contest. What's right has got to win. The cost of  
25 | this, frankly, every one-year reduction per defendant

1 | is going to more than offset whatever it's going to  
2 | cost the courts to handle this. So I think the only  
3 | argument that the Department of Justice can validly  
4 | present to you is the argument of the danger to the  
5 | community, so let me address it. And I think the best  
6 | way to address it is what happened after the  
7 | Supreme Court decided the Bailey decision, which  
8 | involved 924(c).

9 |           That involved every defendant in those cases,  
10 | involved the defendant charged with using a firearm in  
11 | connection with a drug offense or a crime of violence.  
12 | So it isn't like crack, where only 25 percent of the  
13 | defendants have a gun bump. And a number of those  
14 | don't even -- don't involve defendants who personally  
15 | carried the gun but just, you know, are part of a  
16 | conspiracy.

17 |           In the 234(c) context, which I know was not a  
18 | guideline context, but it was a Supreme Court context  
19 | and because it was an interpretation of a statute, it  
20 | was applied retroactively and every court in this  
21 | country had to reassess those cases and I was an  
22 | assistant federal defender in the District of Columbia  
23 | at the time. There were about 500 cases in that  
24 | district alone where 924(c) case came back to be  
25 | reviewed. And frankly, it got resolved. The one or

1 | two attorneys who were involved with it, I think, ended  
2 | up in the hospital pulling out their hair, but that was  
3 | a burden that the criminal defense bar is willing to  
4 | bear. But what happened in those cases, similar to  
5 | what Steve Sady described with marijuana, it was  
6 | quickly resolved in conjunction and working with the  
7 | U.S. Attorneys offices. They said some cases we're  
8 | going to oppose.

9 |           Plus, in every one of those cases, because  
10 | a 924(c) conviction was being withdrawn, the gun bump  
11 | now came into play because at the time and it  
12 | continues, you cannot impose a 924(c) consecutive five-  
13 | year and also a two-level gun bump if it's a drug  
14 | offense. So in every one of those cases involving a  
15 | drug case, which was most of them, you withdrew  
16 | the 924(c), but now you had to recalculate the  
17 | guidelines to add the two-level gun bump.

18 |           And quickly, the prosecutors involved in  
19 | those cases and the defense attorneys involved in those  
20 | cases set up a pattern. In some cases, they agreed to  
21 | them; in some cases, they didn't. Quickly, the courts  
22 | of appeals resolved how to address the issues. You  
23 | want questions. I'm being told to shut up. But I  
24 | think the 924 -- the Bailey cases are the most  
25 | comparable -- or the way to address what the government

1 | is arguing about. And again, I think it's a  
2 | mischaracterization in the press and by the government  
3 | to say that you, the Commission, are going to  
4 | release 19,000 people. No such thing. The only  
5 | persons that are going to be released are going to be  
6 | released after an adversarial hearing, if that is  
7 | required, in front of a federal judge who will decide  
8 | the merits of the case. And in the marijuana case  
9 | even, cases, I remember a number of cases where --  
10 | judges said no, we're not going to release defendants  
11 | even though it's a retroactive application. They want  
12 | me to, you know --

13 | CHAIR HINOJOSA: Basically, they're using  
14 | their prerogative of saying we used up all your time.

15 | MS. HERNANDEZ: All right, okay. You know,  
16 | I --

17 | CHAIR HINOJOSA: They didn't time themselves,  
18 | but you are timed and so I think we're ready for  
19 | questions.

20 | MS. HERNANDEZ: Just say two things,  
21 | Your Honor. I do want to support, also, retroactivity  
22 | in the criminal history amendment and I want to commend  
23 | the Commission, again, for its work in this area.

24 | CHAIR HINOJOSA: Thank you, Ms. Hernandez.  
25 | Who has the first question? Vice Chair Steer.



1                   COMMISSIONER STEER: Well, all of you have  
2 been helpful. Mr. Sady, I think the Commission  
3 particularly would find the -- protocol to be helpful.  
4 It's a two-part question. Is the protocol steps  
5 written down other than you have described it? If so,  
6 could we have a copy? More importantly, with respect  
7 to the marijuana plans, you had six months to prepare  
8 because that decision on retroactivity, as you know,  
9 was made current with the submission of the amendment  
10 to Congress. I appreciate the fact that federal  
11 defenders have already been at work in the case the  
12 Commission makes this amendment retroactive. Not all  
13 districts have federal defender offices. How much  
14 time, realistically, is needed before procedures can be  
15 put in place to handle this the most efficient way  
16 possible if the Commission makes the amendment  
17 retroactive?

18                   MR. SADY: I think that's a very important  
19 question and interestingly, although we had the six  
20 months beforehand, I don't think that we started  
21 planning it until late August and into September and in  
22 going through our archives, I was seeing that a number  
23 of the letters that we were sending to the clients were  
24 dated early October, so we needed a very short, very  
25 intense, but very short period of time in order to put

1 | that together. Everybody, when they were all on the  
2 | same page, trying to cooperate and make this happen,  
3 | were able to do it in a very efficient and a short  
4 | period of time because everybody knew that we needed to  
5 | try to get it into effect, because there were people  
6 | who should be out now and so that provided some  
7 | incentive for speed and also, as far as the allocation  
8 | within the offices, it was generally -- I took the lead  
9 | in the defender office.

10 |           The -- I had a counterpart at the U.S.  
11 | Attorney's office and we sort of funneled the  
12 | information from the other, so that made it go a lot  
13 | easier and faster, so the period of time that we needed  
14 | to prepare was relatively short and as I've said, I  
15 | think that we are already preparing, taking the steps.  
16 | I think probation offices -- our probation office was  
17 | right there.

18 |           We were not trying to egg them along. They  
19 | were -- had their lists and we helped them by going  
20 | through their list, running Inmate Locater, doing the  
21 | reverse order function of Bate and all of a sudden,  
22 | there we have -- you know, everybody's potential  
23 | release date by who are the ones that we have to make  
24 | sure we deal with first, although we did that also in  
25 | the marijuana situation, we had everybody dealt with no

1 matter when they were within that very short period of  
2 time before the implementation date. For districts  
3 that don't have a federal defender, I -- many of them  
4 have community defenders and I believe it's very few at  
5 this point, but I'm sure the defenders would be  
6 cooperative in dealing with that and one of the things  
7 that we're doing, I met with all of the groups at  
8 Sheridan with the folks who were affected, potentially  
9 by the crack retroactivity, but we can meet with -- but  
10 I think when I'm -- this Thursday I'm hoping to meet  
11 with all the folks from other districts to help them --  
12 make sure they have representation in their home  
13 districts because they're hearing the same things in  
14 the prison.

15           We want to make sure the same information is  
16 getting out so that people are not having that anxiety  
17 that they are missing out on something or that they're  
18 being taken advantage of somehow by not having  
19 representation. So we are going to be helping and I  
20 think the best part of the protocol that we've sent  
21 around to the other federal defenders with prisons to  
22 assist people getting assistance in their own district  
23 and that's, of course, something the federal defenders  
24 are great with doing as far as cooperating between the  
25 districts. As far as the protocols being in writing, I

1 | have sent around a memo to all the federal defenders  
2 | setting out what I believe are the advantages and  
3 | disadvantages of the procedures. The attachments are  
4 | full of the model forms that we've used, basically, the  
5 | exact same letters and motions and proposed orders.  
6 | Those materials are easily available. The material, as  
7 | far as the protocols can easily be adapted for  
8 | presenting to the Commission.

9 |           COMMISSIONER STEER: Mr. Sady, a follow-up to  
10 | that question, then. With the rest of these protocols,  
11 | Oregon is obviously in the 9th Circuit.

12 |           MR. SADY: Yes.

13 |           COMMISSIONER STEER: You've got the Hicks  
14 | decision there. In the 4th Circuit, you've got a  
15 | different circuit decision; the 3rd Circuit, possibly,  
16 | also agreeing with the 4th Circuit on the issue --  
17 | Booker and its applicability to 3582(c). And so the  
18 | protocol, when you meet with these clients, what  
19 | discussions would you have with regards to  
20 | possibilities in the 9th Circuit or --

21 |           MR. SADY: Well, since I've already met with  
22 | them -- we've already met with the people and had  
23 | initial interviews. I want to be careful not to betray  
24 | any attorney/client secrets, however --

25 |           COMMISSIONER STEER: Well, you're a very good

1 | lawyer, so I would --

2 |           MR. SADY: So in a more hypothetical and more  
3 | general approach to folks, there are certainly -- it's  
4 | the same advice I give on the marijuana, which is there  
5 | are a number of things that we may be able to do here.  
6 | There is not a limit. It's going to the discretion of  
7 | the court. What can we reasonably expect under the  
8 | facts of this case and a reasonable result that the  
9 | U.S. Attorney can agree with? Perhaps -- because that  
10 | gives us the element of certainty or that we may be  
11 | able to convince the judge of that would be willing to  
12 | sacrifice the element of certainty to.

13 |           So it's not all that different from what I do  
14 | all the time with my trial-level cases. I'm trying to  
15 | assess what I can possibly -- what the best for my  
16 | client will be and I will want to do that in every case  
17 | where the equity is warranted. I would certainly want  
18 | to make sure that those facts are known to everyone and  
19 | so that we can try to get the best result and hopefully  
20 | by agreement because we just -- we love a sure thing,  
21 | at least the agreement of the opposing party, if we can  
22 | get it. If we don't have agreement and we don't think  
23 | that's the fair result, we litigate. That's what we  
24 | do. But it's -- I don't think it's greatly different  
25 | than what we've already seen and that's also been my

1 | experience in talking to people at Sheridan.

2 | CHAIR HINOJOSA: Judge Castillo.

3 | JUDGE CASTILLO: All of your testimony has  
4 | been helpful, but I'm going to address my question to  
5 | Ms. Hernandez to even out her time. You've referenced  
6 | our reports and here's the question. We've received  
7 | all kinds of letters, some opposed, some in favor. The  
8 | ones that are opposed reference the fact that there is  
9 | about to be this huge release of major crack dealers  
10 | and the ones that are in favor reference the fact that  
11 | who is being affected are low-level crack defendants.  
12 | You've looked at our reports, we've issued numerous  
13 | ones. We've tried not to gloss these reports. Where  
14 | do you think the truth lies as to what type of  
15 | offenders are really covered in this 19,000-person  
16 | group?

17 | MS. HERNANDEZ: Well, I think your statistics  
18 | have always reflected the very few crack defendants are  
19 | those that we would call real kingpins. For the  
20 | majority, based on your statistics and certainly, it's  
21 | my experience, as a criminal defense attorney, the  
22 | majority are street-level dealers because five grams of  
23 | crack is not, you know -- and 50 grams of crack are  
24 | generally the street-level dealers or you know,  
25 | addition of multiple smaller sales or you know, people

1 | having a crack party. One judge here in the District  
2 | of Columbia referred to it as it's almost like keg  
3 | party. But they aggregated all the crack and therefore  
4 | the people ended up looking at either five, seven,  
5 | eight years. The majority of crack defendants are not  
6 | kingpins and I can guarantee you that those kingpins,  
7 | if those cases come up and if there was, you know, a  
8 | violent gang leader, I don't know what federal judges  
9 | you know, but most federal judges I know are not going  
10 | to release those particular people into the community  
11 | unless the facts are justified.

12 |           You know that a number -- your statistics  
13 | reflect it and my experience and every criminal defense  
14 | lawyer's experience reflects that most crack defendants  
15 | are not that high level of people. I mean, I think,  
16 | again, it comes down to in an adversarial system, let  
17 | those issues be resolved in a court of law. Those are  
18 | not the cases that are going to be resolved probably by  
19 | cooperation. And I want to say one other thing about  
20 | this. You know, Congress well knew, because you noted  
21 | the fact that you were having a retroactivity hearing  
22 | before November 1st. Congress well knew that this was  
23 | going to happen and this was a potential and they did  
24 | not reject it. In fact, there are bills before  
25 | Congress, in the Senate and the House, to equalize or

1 | to make even greater reductions than what the two-level  
2 | is. So I don't -- I mean, I don't think you need to  
3 | take this on your shoulders alone. These decisions  
4 | will be made -- the hard cases, the cases Your Honor is  
5 | talking about and that nobody necessarily wants on the  
6 | streets, are going to be made on a case-by-case basis.

7 | JUDGE CASTILLO: Thank you.

8 | CHAIR HINOJOSA: Ms. Howell, Commissioner  
9 | Howell.

10 | COMMISSIONER HOWELL: I have a two-part  
11 | question and Mr. Sady, thank you very much. And I  
12 | would echo Commissioner Steer's request that if we  
13 | could see a copy of whatever written protocol that  
14 | Oregon's been using, that would be enormously helpful  
15 | to us. This is my two-part question. First -- and  
16 | this if for, you know -- I guess, everybody on the  
17 | panel or the federal defenders, in particular.

18 | The Criminal Law Committee recommended, among  
19 | it's multiple recommendations, that if the Commission  
20 | decides on retroactivity, that we provide a list of all  
21 | of the eligible offenders whom we have identified as  
22 | part of the 19,500 people through all of our research  
23 | and comparison of statistics we have from the judicial  
24 | -- you know, from the federal judiciary with the Bureau  
25 | of Prisons, that we identify who we consider to be the



1 | eligible offenders and provide that to the appropriate  
2 | district court judges, if the sentencing judge is still  
3 | sitting. So my first question is do you agree with  
4 | that recommendation, that the Commission identify the  
5 | eligible offenders? And my second question is more to  
6 | Mr. Debold and Mr. Boss, where you have cautioned the  
7 | Commission about making policy statements similar to  
8 | ones that the Criminal Law Committee also recommended  
9 | that we make in connection with the retroactivity  
10 | decision.

11 |           And to avoid any pussyfooting around, what  
12 | criticisms do you have or comments or cautions do you  
13 | have specifically about the policy statement that the  
14 | Criminal Law Committee recommended, which states, "In  
15 | resentencing a defendant, in light of this retroactive  
16 | guideline change, the courts should only consider the  
17 | change in the crack guideline made by the Commission  
18 | and whether this change now suggests a lower sentence  
19 | in light of the factors set forth in 18 U.S.C. 3553(a)  
20 | to the extent that they are applicable." Is -- what  
21 | would be the problem with us adopting that policy  
22 | statement? So if you want to start with the first  
23 | question and then go to the second.

24 |           MR. SADY: On the first question, in 1995,  
25 | the Sentencing Commission was one of the bodies that

1 | provided input in the -- to get the list of identified  
2 | potential beneficiaries and I think that happening  
3 | again would be very helpful. Interestingly, all the  
4 | different bodies had incomplete lists. You had to sort  
5 | of combine them all to make sure you picked up  
6 | everyone. But I should -- I also want to say that to  
7 | the extent that that would delay implementation, that  
8 | with the other safety nets, that it should not be a  
9 | factor in delay of implementation of retroactivity. I  
10 | think that it would be helpful.

11 |           COMMISSIONER HOWELL: My second question.

12 |           MR. BOSS: I'll start. Mr. Debold can  
13 | supplement. I think that it would be unwise for the  
14 | Commission to promulgate that kind of policy statement  
15 | because what you'd be doing is really setting a  
16 | precedent for retroactivity policy from this point  
17 | forward. That is, you are going to determine,  
18 | essentially, that Booker, contrary to what Hicks says,  
19 | Booker is not going to apply at a resentencing pursuant  
20 | to retroactivity. I think those of us on the defense  
21 | panel probably have somewhat of an abysmal reaction,  
22 | but regardless of what we think about the merits, I  
23 | don't think that in this condensed period, where we  
24 | haven't had the opportunity for full fact finding and  
25 | input from the public, from practitioners, that this is

1 | the time to make what is essentially Booker policy.  
2 | For the first time, the Commission, I think is really  
3 | going to take a substantive part of Booker in terms of  
4 | whether it applies at this kind of resentencing,  
5 | because that's what the application essentially does.  
6 | It says Booker doesn't apply. You consider the 3553(a)  
7 | factors only in determining whether the two point  
8 | reduction would exist for this particular defendant.

9 |           In other words, you don't take into account  
10 | the full 3553(a) factors in determining how much of a  
11 | reduction to give. That's a pretty major step for the  
12 | Commission to be taking and I think it calls into  
13 | question actually whether it's legal, whether it's  
14 | constitutional under our new sentencing system. And I  
15 | think the notion of doing it in this very condensed  
16 | period is not good policy. I think that we should --  
17 | it's something that maybe should be suggested. It  
18 | should be considered over the long haul, given adequate  
19 | input and consideration by a lot of other people  
20 | besides Mr. Debold and myself.

21 |           COMMISSIONER HOWELL: Do you think it would  
22 | be superfluous, then, because the courts are already  
23 | going to consider assessing all the 3553(a) factors and  
24 | the safety of the community in making an evaluation in  
25 | any resentencing of an eligible offender?

1 MR. BOSS: Of course.

2 COMMISSIONER HOWELL: So that you think that  
3 having a policy statement saying don't look at the full  
4 realm of Booker, you know, Booker considerations and  
5 variances as sort of not necessary?

6 MR. BOSS: I think, to that extent, it's  
7 certainly superfluous because every judge is going to  
8 do that, consider the full 3553(a) factors. But what I  
9 read that application note as doing is saying you  
10 consider all those factors only in deciding whether the  
11 two point reduction applies with a particular  
12 defendant. And I think what Hicks says is you look at  
13 it much more broadly and you come back and essentially  
14 consider all the factors in determining how much of a  
15 reduction to get.

16 CHAIR HINOJOSA: Mr. Debold, did you want to  
17 add anything to that response?

18 MR. DEBOLD: Just that, you know, I think  
19 judges will want to look at the totality of the  
20 circumstances and deciding whether to give the  
21 reduction and how much of a reduction and to put in an  
22 artificial constraint there would be unwise and I see  
23 no reason why the Commission would want to sort of  
24 dictate what things the court can consider. This is a  
25 -- unlike a lot of other decisions, a decision whether

1 | to reduce a sentence under 3553(c)(2) is an appeal to  
2 | the discretion of the court. There is a lot of  
3 | discretion there and I think that judges will be able  
4 | to figure out the appropriate reduction ought to be in  
5 | an individual case without that kind of additional  
6 | constraint.

7 | CHAIR HINOJOSA: Judge Sessions.

8 | JUDGE SESSIONS: Well, this comes by way of a  
9 | follow-up question, but maybe even stepping into a  
10 | debate. One of the responsibilities of the Sentencing  
11 | Commission is to make sure that there's not going to be  
12 | a massive impact upon the criminal justice system and  
13 | one of the arguments made by people who are opposed to  
14 | this retroactive application is that because of the  
15 | Booker decision, it is going to require the full  
16 | hearing and transport of -- full hearing regarding all  
17 | defendants and transport of all defendants back to  
18 | court for a full Booker hearing.

19 | The fact is there are a number of decisions  
20 | which are directly contrary to Hicks, Hudson being the  
21 | first one. There is now is, in the 3rd Circuit -- and  
22 | I could ask you about that decision -- which suggests  
23 | that Booker doesn't apply afterwards and now we're also  
24 | told that there's an 11th Circuit case which may say  
25 | the same thing. Now, why would you be opposed to the

1 Commission essentially giving some suggestion, as a  
2 part of retroactivity, which would essentially make  
3 sure that the guideline changes applied retroactively  
4 but did not significantly impact the criminal justice  
5 system?

6 MS. FREELAND: I mean, I hope you don't ask  
7 me about the 3rd Circuit's decision, because I was  
8 traveling to Washington while they were publishing it,  
9 but I think --

10 JUDGE SESSIONS: If you look at the footnote  
11 at the end of the opinion, I think --

12 MS. FREELAND: I will do that immediately  
13 after this hearing. But I think that -- I understand  
14 your concern with the impact on the courts. As an  
15 officer of the court and the head of an office, I'm  
16 concerned, as well, as the impact on my staff. But  
17 let's take it out of the retroactive application  
18 context and look at what we've seen from Booker in the  
19 past two years about the impact of Booker on the  
20 courts. The only thing that Booker has done has made  
21 the advisory guideline range that's calculated after  
22 going through the guidelines, is to make it advisory  
23 instead of mandatory. And there has not been an  
24 overwhelming or great impact on the courts by requiring  
25 judges to apply 3553(a) at sentencing. And not only

1 | has there not been the kind of impact that should cause  
2 | concern to this Commission, the results also should not  
3 | cause concern, because the advisory range, in the large  
4 | majority of the cases, has been followed. And so I  
5 | think looking at the two years of advisory guideline  
6 | sentencing, post-Booker, should quell all concerns  
7 | about the impact of applying Booker at these limited  
8 | resentencings. They've been applied in hundreds and  
9 | thousands of cases over the last two years, without  
10 | substantial impact. It's not going to make a different  
11 | now.

12 |           MR. SADY: And on transportation, one of the  
13 | things that we observed in the marijuana epic was that  
14 | there was virtually nobody who wanted to be transported  
15 | to court. I've already met with folks. One of the  
16 | first things I do is if we get to a resolution or  
17 | narrow the issues sufficiently, waiving any presence,  
18 | that's one of the things we want to do. And remember,  
19 | for most prisoners, they consider transportation diesel  
20 | therapy, something to be avoided if at all possible.  
21 | This is not something that folks generally want to do.

22 |       In the right case, I'm certainly going to maybe be  
23 | asking for that, but so far, I don't think it's going  
24 | to be something that's going to be a burden.

25 |           JUDGE SESSIONS: So you're suggesting that if

1 | you apply Booker, that would not require that each  
2 | individual inmate be transferred back to court?

3 |           MR. SADY: I see the same dynamic as in the  
4 | marijuana situation, where we would say, in this  
5 | particular case, the fair sentence, regardless of any  
6 | other factors, we come and say, you know, Booker --  
7 | here's my equities, prosecutor. This is why I think  
8 | this is a fair sentence to be three months lower than  
9 | the two-level would get you. I think that's right and  
10 | I think that's fair, too. It's technically, probably a  
11 | Booker sentence. It's certainly not anything that  
12 | anybody would want to come to court to talk about. And  
13 | I think that -- so that would be, I think, something  
14 | that could be waived. It's certainly been waived  
15 | massively in the past. And depending on the interests  
16 | of the client, that's what we're always looking at.  
17 | But how is this going to actually help the client?  
18 | There will be some situations, but I don't think it's  
19 | the overwhelming burden that the Commission may be  
20 | bearing.

21 |           JUDGE CASTILLO: Mr. Sady, just pursuing that  
22 | for a second. In Oregon, with regard to the marijuana  
23 | experience, how many of those cases, at resentencing,  
24 | were resolved by an agreed order?

25 |           MR. SADY: A hundred and twenty-one on the



1 | day that it went into effect. There are probably some  
2 | other --

3 | JUDGE CASTILLO: So percentage-wise?

4 | MR. SADY: We --

5 | JUDGE CASTILLO: Overall.

6 | MR. SADY: -- tried to look at that, trying  
7 | to read --

8 | JUDGE CASTILLO: Um-hum.

9 | MR. SADY: -- the redWall, our archive,  
10 | because we had forgotten a lot of this. But I think we  
11 | probably talked to maybe a couple of dozen --

12 | JUDGE CASTILLO: Um-hum.

13 | MR. SADY: -- other people who ended up  
14 | getting -- having individual consideration and then  
15 | individual either motions or deciding not to file a  
16 | motion. But it was probably about 80 percent.

17 | JUDGE CASTILLO: Eighty percent. Okay.

18 | MR. SADY: Really rough and anecdotal.

19 | JUDGE CASTILLO: Is it your prediction that  
20 | as many as 80 percent, or possibly even higher, of  
21 | these crack cases would be resolved, nationwide, by an  
22 | agreed order?

23 | MR. SADY: I do not know and there are some  
24 | differences. The marijuana involved -- well, it  
25 | generally came down to a six-level difference.

1 JUDGE CASTILLO: Um-hum.

2 MR. SADY: And the -- so there was not a --  
3 there were more people who --

4 JUDGE CASTILLO: Right.

5 MR. SADY: -- would automatically go home and  
6 so that cut down on litigation. But from my experience  
7 in talking to folks, I think that there is still going  
8 to be a significant number. There's -- how it's going  
9 to work out statistically, it's going to depend  
10 district to district. If you have a U.S. Attorney's  
11 Office that is, that is -- here's what the Commission  
12 is saying, it's trying to get to fair results. You're  
13 going to have cooperation and negotiation and a lot of  
14 the cases settled. You have folks who are -- say, we  
15 didn't think it was a good idea in the first place and  
16 we're going to fight it tooth and nail. You're going  
17 to have more disagreements and more need for  
18 litigation. But that's sort of the way it is now in  
19 any sense and context.

20 CHAIR HINOJOSA: Commissioner Horowitz, you  
21 had a question.

22 MR. HOROWITZ: Let me just follow up on the  
23 question of Judge Sessions, and any member of the panel  
24 can answer it. Assuming we decided to go with a  
25 retroactive application, every court that has

1 | considered Booker, and whether to apply it  
2 | retroactively or not to the people in jail as of that  
3 | day who had final appeals considered and evaluated, has  
4 | decided that it should not be applied retroactively.  
5 | We're now looking at a situation where a subsection of  
6 | those individuals may be entitled to resentencing on  
7 | our -- as to our crack amendment. As we consider  
8 | fairness issues, why should we allow that subset to  
9 | have the ability to have Booker applied retroactively  
10 | to them?

11 |           MR. SADY: I think it's largely a matter of  
12 | context, because we have to remember that, for that  
13 | group, there's people who are similarly situated, who  
14 | were sentenced the day before Booker, and the people  
15 | who were sentenced the day after Booker, who already  
16 | had that type of disparity. For given what the Supreme  
17 | Court ruled in Booker, I think that having uniform  
18 | fairness is better than having disparity where that  
19 | perpetuates an unfairness.

20 |           MS. HERNANDEZ: Commissioner, also -- and the  
21 | bottom line is the truth is that post-Booker sentences  
22 | are about the same. So even those courts -- even those  
23 | courts that -- first of all, you got Federal Rules of  
24 | Criminal Procedures.

25 |           MR. HOROWITZ: That I understand. I guess my

1 | question, though, is just explain to me the fairness.  
2 | I understand the fairness issue and the argument and  
3 | I'm just looking for what's the best argument to say we  
4 | should actually allow this group to be -- to get the  
5 | benefit of Booker --

6 |           MS. HERNANDEZ: Let me --

7 |           MR. HOROWITZ: -- when tens of thousands of  
8 | individuals remain in jail who don't have the benefit.

9 |           MS. HERNANDEZ: I would say 85 percent or  
10 | more of crack defendants sitting in jail are street-  
11 | level dealers sitting next to a kingpin or an importer  
12 | who is doing either less time or -- and because your  
13 | statistics reflect that crack sentences are higher than  
14 | any other sentences, no matter what the category. So  
15 | already you've got an unfairness. All you're going to  
16 | do is balance the unfairness. All you're going to do  
17 | is give them an opportunity to argue their case and  
18 | give --

19 |           MR. HOROWITZ: But when we set policy, we  
20 | don't do it just for one case. I mean, it's whether  
21 | it's criminal history. And so that's the issue with  
22 | regards to any policy statement. It isn't just on  
23 | crack cocaine, it's when we set a policy statement,  
24 | we're talking about all cases. And so you know, we,  
25 | like judges, have to consider the 3553(a) factors, not

1 | just based on our client, like some of you do, but on  
2 | the issue of what is fair and what complies with  
3 | the 3553(a) factors, including the issue of disparity.  
4 | And so if we do work on policy statements, they're  
5 | going to apply across the board, with regards to all  
6 | matters that would ever come up with retroactivity.

7 |           MS. HERNANDEZ: Respectfully, Your Honor, I  
8 | don't think the Commission --

9 |           CHAIR HINOJOSA: Respectfully always means  
10 | I'm going to disagree with you.

11 |           MS. HERNANDEZ: I am. I don't think the  
12 | Commission is going to decide whether 3553(a), whether  
13 | a retroactive guideline will be applied with the  
14 | full 3553(a), post-Booker. I think the courts are  
15 | going to decide that. Whatever the Commission says on  
16 | that, some court is going to say, we already know  
17 | the 9th Circuit has already ruled. So whatever you  
18 | say, all the 9th Circuit cases will be covered by your  
19 | decision. So respectfully, I don't think -- frankly,  
20 | that's another reason why I don't think you ought to go  
21 | -- come out with, for some of the reasons Barry said,  
22 | come out with a policy statement on this. This is a --  
23 | we know. I'm going to tell you right now, criminal  
24 | defense attorneys and pro se defendants are going to  
25 | challenge whatever you do on that score, and it's going

1 | to have been decided by the Courts of Appeals and by  
2 | the Supreme Court, in all the post-Booker cases that  
3 | are going up there. And the Supreme Court has yet to  
4 | decide the Booker retroactivity issue.

5 | MS. FREELAND: If I could take a stab?

6 | CHAIR HINOJOSA: Commissioner Friedrich.

7 | MS. FREELAND: If I could just take a stab at  
8 | answering your question? The limitations on  
9 | retroactive application of new rules of law is based on  
10 | the finality of sentences. We can't have new laws  
11 | coming in and disturbing finality. There shouldn't be  
12 | a concern about retroactive application, in this  
13 | context, where the Commission has already determined  
14 | that these final sentences should not be final, as they  
15 | were.

16 | Okay, they're going to be opened up because  
17 | this Commission has decided they were wrongly imposed.  
18 | They'll no longer be final, and when they're no longer  
19 | final, there should be no bar to retroactivity.  
20 | Retroactivity, as a legal concept, is based on finality  
21 | and we don't have final sentences any longer. And any  
22 | time a sentence is reversed, an individual conviction,  
23 | if there's a new rule of law that the courts find  
24 | should be applied retroactively, the same kind of  
25 | disparity is going to appear. It's the way our system

1 | works.

2 | CHAIR HINOJOSA: Commissioner Friedrich.

3 | MS. FRIEDRICH: Yes, I have one question for  
4 | Mr. Boss. You're testified that you don't think  
5 | additional fact finding will be necessary at  
6 | resentencing hearings under 35 -- under 3582. But if  
7 | you argue that Booker does apply to these resentencings  
8 | and prevail, won't there be a whole host of issues ripe  
9 | for adjudication, as defense attorneys make arguments  
10 | for variances, relying on 3553(a) factors that weren't  
11 | raised at the initial sentences?

12 | MR. BOSS: I think the point we were trying  
13 | to make was that there's not -- there doesn't have to  
14 | be any reevaluation of the quantity of cocaine based at  
15 | issue, and the guidelines themselves can be easily  
16 | recalculated. But you're certainly correct. To the  
17 | extent Booker applies, and I'm not taking the position  
18 | that it does or it doesn't, I think it's going to be  
19 | decided, probably, different by different courts. But  
20 | obviously you're right. To the extent that Booker  
21 | applies, it will be a more potentially complex fact-  
22 | finding procedure. But I think also we should consider  
23 | what Mr. Sady was saying, that no -- would be able to  
24 | avoid that. Because of working together, we'll be able  
25 | to come up with what both the defense and the

1 | prosecutor agree is a just result.

2 |           MS. FRIEDRICH: But you really think that's  
3 | realistic, that you're going to sit down with AUSAs and  
4 | they're going to agree? I mean, I would think, in most  
5 | if not all cases, you will be seeking more than a two-  
6 | level reduction, because you will be arguing if  
7 | you're --

8 |           MR. SADY: Depending on the facts of the case  
9 | and what you got the first time around.

10 |           MS. HERNANDEZ: Yeah. And some percentage of  
11 | cases -- is going to exceed their remaining sentence.  
12 | And it's not like you're going to have 19,500 cases  
13 | being argued. The Courts of Appeals are going to  
14 | quickly decide which circuits will allow -- it's just  
15 | like post-Booker. Within months, within a couple of  
16 | weeks, each circuit had decided how Booker was going to  
17 | be applied and it really came down to two or three sort  
18 | of models, and that's exactly how it's going to happen  
19 | here. There's going to be the 9th Circuit model,  
20 | there's going to be the 4th Circuit model, and maybe  
21 | that's it. So all the 4th Circuit cases aren't going  
22 | to have all these arguments being made. And Rule 43 of  
23 | the Federal Rules of Criminal Procedures say you don't  
24 | even -- a defendant's not even entitled to come to  
25 | court on a 3582(c)(2) resentencing. So some court will



1 | have to say that that rule is unconstitutional or  
2 | illegal, before any defendant will have to be brought  
3 | to court.

4 |           MR. BOSS: And Commissioner, one other thing  
5 | I didn't mention is, of course, as we all know, this is  
6 | the exact same concern we had when Booker came into  
7 | place in the beginning. What we all found out was  
8 | judges essentially imposed guideline sentences, anyway.

9 | So despite the fact that the analysis may be somewhat  
10 | more complicated, it seems like the result ultimately  
11 | comes out of the same place.

12 |           MS. FREELAND: And because of that result,  
13 | what we've seen is that the federal system has not  
14 | turned upside down and that, in the high 90s,  
15 | percentages of cases are still resolved by way of  
16 | negotiated pleas.

17 |           MS. HERNANDEZ: To our dismay, I may add.

18 |           MS. FREELAND: Post-Booker. Even with all of  
19 | these unlimited factual considerations available, we're  
20 | still pleading cases at 97, 98 percent of the time,  
21 | reaching agreements with the government.

22 |           CHAIR HINOJOSA: Commissioner Ferry.

23 |           MS. FERRY: Briefly. Mr. Sady, my question  
24 | is for you. I just want to make sure that I'm clear.  
25 | I believe we danced around the issue. But is it the

1 public defenders' position that Booker should apply  
2 at 3582(c) hearings? And if so, how do you address  
3 what Ms. Hernandez was just talking about, the right of  
4 the defendant to be present? Generally, pre-Booker  
5 case law indicates that whenever the court is making  
6 new factual determinations at a sentencing, then a  
7 defendant has a right to be present. If Booker were to  
8 apply, arguably, the court would be making new factual  
9 determinations that would require transport of the  
10 defendant. Is that your understanding as well?

11 MR. SADY: My understanding is that cases are  
12 best litigated based on individual facts, where the  
13 parties are presenting legal issues to judges and the  
14 judge makes a decision based on the policy and the law  
15 that applies to a certain set of facts. I think one of  
16 the real problems is trying to micromanage by  
17 hypothesizing what may happen in the future and trying  
18 to put into place a mechanism that tries to predict  
19 what might happen, so that bad things don't happen, and  
20 ending up with unintended negative consequences. The  
21 recommendation from the Federal Defenders has been to  
22 adopt a simple statement that was recommended, is that  
23 the parties cooperate to the maximum extent possible,  
24 consistent with their obligations to their clients, to  
25 impose -- to implement the retroactive amendments as

1 | efficiently as possible. Other than that, the  
2 | questions of what happens in an individual case,  
3 | whether in an individual case I'm going to be  
4 | advocating regarding Booker resentencing, and the scope  
5 | of any sentencing, is going to depend on individual  
6 | cases. There are cases where we are going to be able  
7 | to reach agreements. There's one that will result in  
8 | litigation. The litigation will depend on the  
9 | interests of individual clients. And that is, I think,  
10 | the way it should be and the way that it will be  
11 | implemented with the least complexity.

12 |           MS. FREELAND: And every resentencing that's  
13 | taken place after Booker, whether it was based on the  
14 | Booker decision or on some other error of law, Booker  
15 | has applied. I think that defendants, prosecutors and  
16 | judges will expect that, at any resentencing, the  
17 | Booker decision will apply, because it is the law  
18 | today.

19 |           CHAIR HINOJOSA: If not, I thank you all very  
20 | much for taking your time to be here. We appreciate  
21 | your thoughts.

22 |           MR. SADY: Thank you.

23 |           MS. HERNANDEZ: Thank you.

24 |           CHAIR HINOJOSA: If the next panel would come  
25 | up here, please? The next panel is the Executive

1 | Branch Perspectives. We have Ms. Gretchen C.F.  
2 | Shappert. Do I have your name correct, ma'am?

3 | MS. SHAPPERT: You do. Thank you.

4 | CHAIR HINOJOSA: Who has been the U.S.  
5 | Attorney for the Western District of North Carolina  
6 | since June of 2004; Mr. Sylvester E. Jones, who is the  
7 | Assistant Director for Witness Security and Prisoner  
8 | Operations for the U.S. Marshals Service; and we've got  
9 | Mr. Joe I. Cassily, who is the President Elect of the  
10 | National District Attorneys Association. And we  
11 | appreciate your presence. Ms. Shappert.

12 | MS. SHAPPERT: Thank you, Chairman Hinojosa  
13 | and distinguished members of the Commission. Thank you  
14 | for allowing me this opportunity to testify. It is an  
15 | honor to appear before you and give my perspective from  
16 | the Western District of North Carolina, with regard to  
17 | retroactive application of crack cocaine and criminal  
18 | history amendments, and why I and other members of the  
19 | Department of Justice oppose retroactivity.

20 | Specifically, I'm here on behalf, not only of  
21 | my office, but what we believe are the communities that  
22 | will be impacted by retroactivity. We believe that the  
23 | retroactivity will implicate retroactive application of  
24 | Booker, at least in some areas, unjustified burdens  
25 | upon the criminal justice system, and most importantly

1 | will impact fragile communities throughout the United  
2 | States and disproportionately in those districts where  
3 | we have the largest number of crack cocaine cases. As  
4 | you indicated, Mr. Chairman, I have been an United  
5 | States Attorney since 2004. Before that, I was an  
6 | Assistant District Attorney and an Assistant United  
7 | States Attorney. I was an Assistant United States  
8 | Attorney from 1990 until 2004.

9 |           I continue to carry a caseload as the United  
10 | States Attorney and indeed, I have had three jury  
11 | trials involving crack cocaine conspiracies this year  
12 | alone. But more than that, I was in Charlotte, in  
13 | 1988, as an assistant public defender when crack  
14 | cocaine first hit the Western District of North  
15 | Carolina.

16 |           So crack cocaine has marked most of my  
17 | professional career as a lawyer, and I have seen the  
18 | ravages the addiction, the drug-related violence and  
19 | the tremendous impact on communities when crack cocaine  
20 | takes hold. The Western District of North Carolina is  
21 | 32 counties; 2.9 million people; the second largest  
22 | banking center in America; the largest native American  
23 | population in the United States. I have 24 Assistant  
24 | United States Attorneys who do all of the criminal law  
25 | in my district, and I also am one of those, and I have

1 five that do all of the drug cases. As you are aware,  
2 if retroactivity applies, it will have a profound  
3 impact on my district. Last year we sentenced 118  
4 defendants for crack cocaine offenses, and by way of  
5 comparison, that is in comparison to 123 for  
6 methamphetamine. Drug cases represent 46.2 of the  
7 entire caseload per year in my office.

8 We have seen, in the past year and the past  
9 three years in Charlotte, a significant rise in the  
10 murder rate, an increase in violence. Indeed, the  
11 murder rate has gone up 44 percent since 2005 and has  
12 remained at that level. I am concerned about the  
13 impact upon my office and the ability we will have to  
14 continue our responsibilities, if in fact 536  
15 defendants in my district need to be sentenced because  
16 of retroactivity.

17 I've also seen the tremendous impact of crack  
18 cocaine in Charlotte. One of the first crack cocaine  
19 cases we had in Charlotte I actually handled as an  
20 assistant district attorney and then was a federal  
21 prosecutor when it was resolved. The Cecil Jackson  
22 gang. That is typical of many crack gangs. They did  
23 not have a large weight of drugs, but they enforce  
24 their turf with semiautomatic weapons, kneecap  
25 shootings and kidnappings. Ultimately the

1 Cecil Jackson gang was prosecuted in federal court. As  
2 an assistant district attorney, I was charging  
3 conspiracy to kidnap, knowing that we were not going to  
4 be able to hold these defendants very long.  
5 Fortunately the federal prosecutors came in; the  
6 defendants are still serving massive sentences.

7           That would not have happened but for federal  
8 involvement. I prosecuted in a neighbor in Charlotte  
9 called Greer Heights. Now Greer Heights, when we  
10 started in the 1990s with ATF and the Charlotte-  
11 Mecklenburg Police Department, was a Section 6/Section  
12 8 housing neighborhood, made up largely of elderly  
13 families and families with lots of small children.  
14 That community was overrun with drug dealers, crack  
15 dealers who had turned it into an open-air drug market.

16           When I went into that community to begin  
17 interviewing witnesses, neighbors came out of their  
18 homes to shake my hand. We actually convicted over 70  
19 defendants in that investigation and the average  
20 sentence served was over 200 months. When we began the  
21 trails of the defendants in the Greer Heights  
22 conspiracy, members of the community came and sat in  
23 the back of the courtroom to watch and provide moral  
24 support. I submit to you, members of the Commission,  
25 that some of the most serious victims of crack cocaine

1 appear in lower-income and largely African-American  
2 communities. And that is true not just in the Western  
3 District of North Carolina, it is true in many other  
4 parts of the country. For example, in Selma, Alabama,  
5 there was a crack organization known as the St.  
6 Phillips boys. They ran an open-air market. You're  
7 going to hear this afternoon from Ocie Acoff of Selma,  
8 who will talk to you of what it was like for people to  
9 have to sleep on the floors because they wanted to  
10 avoid the random violence and the random shootings that  
11 were going on in the neighborhood; it became a war  
12 zone.

13 In Selma, Alabama, ATF went in with local law  
14 enforcement and when they made arrests, neighbors lined  
15 up to shake hands and cheer and called the local radio  
16 stations to congratulate federal prosecutors and the  
17 law enforcement officers for going into those  
18 neighborhoods.

19 My point to you is this: crack cocaine is not  
20 a victimless crime. The victims are the people who are  
21 addicted to it, their neighbors and the communities.  
22 They create open-air drug markets where there is 24-  
23 hour-a-day dealing in relatively small quantities of  
24 crack that profoundly impact the community. In one of  
25 my communities, right now, Statesville, North Carolina,



1 | the drug dealers have developed a strategy of addicting  
2 | young children, eight, ten, twelve, fourteen-year-olds,  
3 | and turning them into sellers, knowing that we, as  
4 | federal prosecutors, typically do not go after  
5 | juveniles. Drive-by shootings are systemic.

6 |           And in many areas, including Statesville,  
7 | Shelby, Charlotte, Asheville and Selma, that I talked  
8 | to you about, we have only been able to make great  
9 | strides in fighting crack cocaine by being aggressive  
10 | in our prosecutions. Now some of you may ask, since we  
11 | know these individuals are ultimately going to get out  
12 | of jail, what is the difference about letting them out  
13 | a little bit early? Why does that make a difference?  
14 | Well, I would submit to you that it makes a great  
15 | difference, for several reasons.

16 |           First of all, these offenders are not low  
17 | level, they are not small time addicts. If you look at  
18 | your own statistics you will see that fully a third of  
19 | the population that we are talking about, the 19,500  
20 | defendants who would be subject to retroactivity, had  
21 | weapons or were involved with weapons, 11.7 percent had  
22 | aggravating roles, and fully 65.2 percent, two-thirds  
23 | of this population, was Criminal History Category 3 or  
24 | higher. Your studies have shown us that individuals in  
25 | the higher criminal history categories are more likely

1 | to recidivate, particularly in the first two years. So  
2 | the population that we are talking about, at  
3 | retroactive application of the guidelines, will be out  
4 | of prison early, more likely to re-offend, and will not  
5 | have the benefit of the typical reentry programs that  
6 | we associate with an efficient prison system.

7 |           The Bureau of Prisons estimates that it takes  
8 | at least 30 months, ideally, to prepare a defendant to  
9 | return to the community. They recommend that a  
10 | defendant receive at least 250 hours of core curriculum  
11 | training in six different areas of study, and that they  
12 | have community confinement or home detention or a  
13 | halfway house as a means of transitioning into the  
14 | community.

15 |           With retroactivity, many of these defenders,  
16 | probably at least 2200 at a minimum, will be eligible  
17 | for immediate release. Others will have their  
18 | sentences cut in such a fashion that they may not have  
19 | the full benefit of these programs to prepare them to  
20 | come back to their communities. You heard earlier  
21 | today, from Judge Walton, about the importance of  
22 | having resources dedicated to dealing with crack and  
23 | for protecting our communities, and let me tell you, we  
24 | currently have those resources and we are using those  
25 | programs. I want to talk to you a little bit about

1 Weed and Seed, because Weed and Seed, in my opinion,  
2 will be profoundly impacted if we have to deal with a  
3 large population of recidivists and retroactivity,  
4 providing these recidivists with an opportunity to  
5 return to their neighborhoods.

6           The Weed and Seed Program is based on the  
7 premise that we go into transition in fragile  
8 neighborhoods, and Weed and Seed, if you recall, was  
9 designed to deal with the crack problem. Weed and Seed  
10 is a process by which we weed out the criminal  
11 offenders, the crack dealers, the violent offenders,  
12 and we seed in community services in transition in  
13 fragile neighborhoods. It is a five-year program. The  
14 clock is ticking on each and every one of our Weed and  
15 Seed sites.

16           I have five Weed and Seed neighborhoods in  
17 the Western District of North Carolina, and in four of  
18 those communities we have seen a dramatic drop in  
19 violent and drug-related crime because of our Weed and  
20 Seed initiatives. My concern is that individuals who  
21 will be released early, if you make the guidelines  
22 retroactive, will be returning to these communities and  
23 potentially interfering with our ability to complete  
24 our progress with Weed and Seed. Let me tell you a  
25 little bit about Robert. Robert lives in the Pisca

1 | View (phonetic sp.) neighborhood in Asheville, North  
2 | Carolina. Robert is formerly homeless, although he's  
3 | highly intelligent. He's now married, he is raising  
4 | three children, and among the other things he does in  
5 | our Weed and Seed area is he runs our community garden,  
6 | the very same plot of land that was an open-air drug  
7 | market. As a result of Weed and Seed and community  
8 | commitment, it has been turned into an open-air garden  
9 | where the children play, the women hold their meetings,  
10 | and Robert tends vegetables that are sold and  
11 | distributed in the community.

12 |           When I was in Asheville two weeks ago, Robert  
13 | showed me the garden, the compost heap and the location  
14 | where they're planning to build a greenhouse, and he  
15 | told me about the work he's doing explaining organic  
16 | gardening to the children in public housing, and the  
17 | little boy who was astonished to learn that tomatoes  
18 | grew on vines and didn't grow in cans. Robert told me  
19 | that even some of the crack dealers in the neighborhood  
20 | have come up to him to shake his hand and comment about  
21 | the changes he and Weed and Seed are making in Pisca  
22 | View in Asheville. What I also think is important for  
23 | you to know is that Robert, every night, props his  
24 | tools along the fence in the Weed and Seed  
25 | neighborhood, and those tools have not been stolen.

1 This is the same community that has been ravaged by  
2 crack and gun and drug-related violence. But because  
3 of the efforts that we are making with Weed and Seed,  
4 that community is changing and I don't want to see that  
5 progress interrupted.

6 Let me tell you about Shelby, another very  
7 small community in the Western District of North  
8 Carolina, that, in 2005, had the second highest per  
9 capita rate of violent crime in North Carolina. It was  
10 a site of growing gang activity, a lot of gun play and  
11 crack distribution. We came in with Weed and Seed, and  
12 traditional racial barriers are dropping. We have  
13 community-based policing, and violent crime has  
14 plummeted. Again, this is largely the result of Weed  
15 and Seed. And yes, Shelby also has a community garden.

16 I want to talk to you briefly about  
17 Statesville, but you're going to hear from the director  
18 of our Weed and Seed Program this afternoon, Wade  
19 Ikard. Statesville is better known for good barbeque  
20 and local sports rivalries. But in the past couple  
21 years this very small southern town has been ravaged by  
22 crack cocaine dealing and gangs. When we came into  
23 Statesville with an idea of putting a Weed and Seed  
24 site in, I'll never forget our first meeting in that  
25 community, where the community stood on one side of the

1 | room and the police officers stood on the other and  
2 | neither the twain shall meet. But as a result of Weed  
3 | and Seed, we have been able to establish a police  
4 | athletic league, Hoops for Hope, that provides not only  
5 | for athletics but mentoring and tutoring for our  
6 | children, and a citizens police academy, where members  
7 | of the community have had an opportunity to interface  
8 | with the police and go to police training, and indeed,  
9 | one of our recent graduates, an African-American, has  
10 | now gone to work for the police department. The crime  
11 | rate is dropping in Statesville. And we've also used  
12 | aggressive code enforcement to make slum landlords  
13 | bring their property back up to code.

14 |           We didn't have drug treatment in Statesville  
15 | and we couldn't afford it, so we asked the leaders in  
16 | the faith-based community, would you provide us with a  
17 | coffee pot and a place to smoke and we would come in  
18 | with 12 step programs, and that's what we're now doing  
19 | in Statesville. I, again, am concerned that, if indeed  
20 | you make the penalties retroactive with regard to the  
21 | changes in guidelines, that we are going to see in  
22 | influx of the very people who are most likely to  
23 | re-offend and are most likely to upset these fragile  
24 | neighborhoods. As you know, the impact of 19,500  
25 | defendants in the criminal justice system will be

1 | profound. That is 25 percent of all defendants who  
2 | were sentenced in federal court in 2006 and represents  
3 | 10 percent of the entire criminal population. Five  
4 | hundred and thirty-six defendants that will need to be  
5 | re-sentenced in my district, if this is retroactive,  
6 | represents two-thirds of all the cases we prosecuted in  
7 | the Western District of North Carolina in 2006.

8 |           Think about, also, the impact of 1400  
9 | defendants on the Eastern District of Virginia. That  
10 | would be 80 percent of all the cases that they  
11 | prosecuted in the Eastern District in 2006. And other  
12 | districts have a comparable problem. I would  
13 | respectfully submit to you that the 800-pound elephant  
14 | in the room that my colleagues -- and I say this  
15 | respectfully -- that my colleagues in the Federal  
16 | Defender offices didn't want to talk about too  
17 | specifically, is the potential impact of Booker and the  
18 | potential disparities of the Booker application. As  
19 | you know, the 4th Circuit, in an unpublished, per  
20 | curium, one-page decision, has declined to follow the  
21 | lead of the 9th Circuit in its published Hicks  
22 | decision. But I would submit to you that Hicks is  
23 | instructive and Hicks does hold that Booker does apply  
24 | to 3585(c)(2) hearings, and the consequences of that  
25 | are profound. Having been an assistant public defender

1 | and understanding the responsibilities of zealous  
2 | advocacy, I am confident that if you make it  
3 | retroactive, every single defendant of those 19,500  
4 | will, number one, want to have a hearing, will want to  
5 | be back in the district for sentencing, and will want  
6 | the benefits, not only of the two-level reduction, but  
7 | of a full-blown resentencing hearing.

8 |           You heard about the experience of the  
9 | district of Oregon, in its program, in 1995, with  
10 | marijuana. I would remind the Commission that in the  
11 | entire United States, there were 536 marijuana cases  
12 | implicated by retroactivity, 536 for the country versus  
13 | 19,500 for crack. Likewise, you've heard about LSD.  
14 | That was less than 200. And oxycodone, that was less  
15 | than a hundred.

16 |           So the comparison is not even close. And  
17 | likewise, the difference is that, with regard to  
18 | resentencing for marijuana, or even the application of  
19 | the Supreme Court decision in Bailey and the  
20 | implications for resentencing there, none of those had  
21 | the factors that we had with 3553(a) and Booker. So it  
22 | is a very different world and a very different day.  
23 | You've also heard that there will be a cost savings if  
24 | we are able to free up these prison beds, and we know,  
25 | as I indicated, that crack defendants represent 10



1 | percent of the prison population. It is estimated that  
2 | each prisoner in the prison system costs about \$21.70,  
3 | and a lot of numbers have been bandied about as to what  
4 | the prison savings will be. I would respectfully  
5 | submit to you that there's no price you can place on  
6 | living in a safe neighborhood.

7 |           And indeed, my concern is first and foremost  
8 | not the administrative costs or the administrative  
9 | burdens on offices in government. My concern is the  
10 | impact on communities. It will be swift, it will be  
11 | sudden and it will be, in my opinion, irreversible,  
12 | particular in communities with Project Safe  
13 | Neighborhood and Weed and Seed, where we are under some  
14 | time pressures to try to implement and complete the  
15 | programs that we have in place.

16 |           As I indicated, my concern is about the  
17 | future and the unforeseen consequences of releasing  
18 | large numbers of convicted drug offenders into  
19 | vulnerable communities, in a relatively short period of  
20 | time. As I indicated, I have seen, in my own personal  
21 | practice, the consequences of crack cocaine. I've also  
22 | seen how difficult it is to eradicate crack once it has  
23 | taken hold in a community. And on behalf of the many  
24 | good people who are trying to continue the process of  
25 | restoring fragile communities and neighborhoods, I

1 | respectfully submit that the defendants who have  
2 | already been sentenced should be required to serve  
3 | their sentences as we move forward. Thank you.

4 | CHAIR HINOJOSA: Thank you, Ms. Shappert.  
5 | Mr. Jones.

6 | MR. JONES: Yes, sir. Good morning, Judge,  
7 | and good morning to the distinguished members of the  
8 | Commission. I want to thank you for the opportunity to  
9 | testify and provide the United States Marshals  
10 | Service's perspective on the potential impact of -- of  
11 | this amendment. First of all, let me just give a short  
12 | bio on myself.

13 | I've been in law enforcement for 25 years,  
14 | four of which as a police officer back in Illinois.  
15 | I'm in my 21st year with the Marshals Service. I'm  
16 | currently in my position as Assistant Director of  
17 | Witness Security and Prison Operations and I've been so  
18 | since -- in this position since June of 2004. Prior to  
19 | that, I served for about four years as the Assistant  
20 | Director of Judicial Security, and before that, I  
21 | served in a field office as a Chief Deputy. I've  
22 | served in three headquarters divisions and four field  
23 | offices for the Marshals Service. The new amendment to  
24 | crack cocaine sentencing guidelines would significantly  
25 | reduce the sentence of prisoners, and the Bureau of

1 Prisons custody will apply it retroactively. Nineteen  
2 thousand and five hundred prisoners could be eligible  
3 to be brought back into the Marshals Service's custody.

4 This, for the Marshals Service, will result in  
5 enormous financial and workload-related costs.

6 Additional consequences would be new pre-  
7 trial or sentencing reports, re-designation of some  
8 prisoners, the land deed judicial process for prisoners  
9 currently in custody, which is a problem for us now in  
10 some districts. The Marshals Service has in custody,  
11 as I speak to you this morning, 55,000 prisoners. Our  
12 population has more than doubled in the past decade,  
13 going from 28,000 to 56,000, in some cases. Southwest  
14 border districts are extremely overtaxed. One-third of  
15 the Marshals Service population is located in five  
16 southwest border districts.

17 The Marshals Service is responsible for  
18 housing, subsistence medical care, transportation, and  
19 production for court proceedings. We spend over a  
20 billion annually for federal prison detention costs,  
21 and that does not include the costs for our deputy  
22 marshals or other administrative personnel costs. The  
23 Marshals Service, as you may know, does not own or  
24 operate any detention facilities; we rely solely on  
25 others. Sixty-seven percent of our prison population

1 are in state and local facilities. Twenty percent are  
2 housed in prison facilities and the final 13 percent  
3 are housed in private jails. Lack of detention space  
4 throughout the country is a problem in many areas. We  
5 have emergency detention status in several of the top  
6 25 districts that the retroactive application could  
7 affect.

8           Emergency means that all bed space within a  
9 district is exhausted or terminated and the district is  
10 forced to use facilities in other districts to house  
11 their prisoners, sometimes requiring our Justice  
12 Prisoner and Alien Transportation System to land and  
13 provide air lift support. Emergency applies to  
14 Maryland, western North Carolina, South Carolina, and  
15 several Texas districts, which are southwest border  
16 districts. A district -- for example, a district has a  
17 population of 750 beds, but guaranteed bed space is  
18 only 540.

19           The remainder of their bed space depends on  
20 the availability in state and local facilities at any  
21 time. Districts have to juggle prisoners confidently  
22 from one facility to another. Prisoners needed in  
23 court are, of course, housed closest to the court.  
24 Prisoners moved to outlying facilities are -- they are  
25 moved to outlying facilities when they are no longer

1 | needed in court. Just for an example, our average per  
2 | diem rate that we pay for prisoners is \$65 a day. For  
3 | an example, ranges of the top 10 districts for  
4 | retroactive resentencing hearings: for eastern Virginia  
5 | it's \$30 to \$113, \$113 -- the higher number is always  
6 | the closest to the court; the middle of Florida, \$35 to  
7 | \$80; South Carolina, \$30 to \$56; western Virginia, \$37  
8 | to \$150; western North Carolina, \$30 to \$110; western  
9 | Texas, \$35 to \$60; eastern North Carolina, \$30 to \$80;  
10 | eastern Texas, \$35 to \$70; northern West Virginia, \$55  
11 | to \$69; and eastern Missouri, \$40 to \$75.

12 |           Housing costs alone could be approximately  
13 | \$38 million, not including medical costs, should all  
14 | 19,500 be brought back into our custody. The average  
15 | time in custody that we project, if we did have to take  
16 | prisoners back in, would be approximately one month.  
17 | It takes one to two weeks to bring a prisoner from  
18 | another location. Our Justice Prisoner and Alien  
19 | Transportation System stops in each region only once a  
20 | week or once every two weeks.

21 |           A prisoner's attorney or the AUSA may request  
22 | a prisoner to be brought in early to meet with them to  
23 | prepare for hearings. It'll take one to two weeks to  
24 | return those individuals back to the BOP facility or  
25 | origin. Additional factors may extend time in custody,

1 | such as pre-trial services may need to complete new  
2 | pre-sentence reports, prisoners may require re-  
3 | designation after resentencing. The transportation  
4 | costs could be as much as \$42.9 million. The JPATS, or  
5 | Justice Prisoner and Alien Transportation System, the  
6 | average cost to transport one way is approximately  
7 | \$1,100. Manpower costs. The Marshals Service produces  
8 | 770,000 prisoners in court each year.

9 |           Some prisoners, of course, we produce  
10 | multiple times. Another 19,500 productions would  
11 | require 92 additional work years or 92 additional FTEs  
12 | for us to handle that. The cost will be another \$13.6  
13 | million. So the sum of additional costs, should we  
14 | have to produce or take into custody all of the -- a  
15 | hundred percent of the 19,500, is a total of \$95  
16 | million; half of that, of course, \$47.5 million.

17 |           In summary, bringing 19,500 prisoners back  
18 | for resentencing hearings will result in an enormous  
19 | additional workload. It may require manpower and  
20 | funding to be diverted from task forces, protection  
21 | details, new initiatives such as the Adam Walsh Child  
22 | Protection and Safety Act. It will be a huge strain on  
23 | our already taxed transportation system. Prisoner  
24 | housing shortage in key areas of the country will be  
25 | compounded, and of course it would strain our manpower,

1 | which is already overextended due to the high volume of  
2 | drug terrorism and immigration cases.

3 |           CHAIR HINOJOSA: Thank you, Mr. Jones.  
4 | Mr. Cassily, sir.

5 |           MR. CASSILY: Thank you, Your Honor. Members  
6 | of the Commission, thank you for allowing me to appear  
7 | today to represent the interests of state and local  
8 | prosecutors who are represented by the National  
9 | District Attorneys Association. A little background on  
10 | myself.

11 |           I'm a 30-year state prosecutor. I've been  
12 | the elected prosecutor for Hartford County, Maryland,  
13 | for the past 25 years. During that time period, we  
14 | have cooperated extensively with state authority --  
15 | with federal authorities, DEA, ICE, and our local U.S.  
16 | Attorney's Office, in dealing with drug -- cocaine  
17 | problems in my jurisdiction. My jurisdiction is about  
18 | 250,000 people, with several areas which are severely  
19 | impacted by cocaine.

20 |           State and local prosecutors' interests in  
21 | this is both the impact on past cases that we've  
22 | already investigated with the federal authorities, and  
23 | with the upcoming cases that I think we'd be impacted  
24 | in our ability to take them to the federal prosecutor.  
25 | Let me talk first about the impact on past cases.

1 Generally, when we work cases and we do a lot of this  
2 with our local U.S. Attorney's Office, I'm always  
3 surprised -- I was surprised to hear people talk about  
4 the number of street-level dealers that are in the  
5 state and the federal system, because my experience is  
6 generally, with all due respect to my federal  
7 counterparts here, when they're finished cherry-picking  
8 the cases that they want, we're stuck with the street-  
9 level dealers and we get to prosecute the street-level  
10 dealer and they get the really serious people.

11           And I'm not being -- I'm not trying to  
12 denigrate anybody with that comment, but we're the ones  
13 that end up with the low-level, run-of-the-mill guys.  
14 They get the really scary people who tend to intimidate  
15 witnesses, who tend to have their boy show up and hang  
16 around the courthouse, and those types of things, so  
17 that the folks that you're dealing with are not the  
18 local street-level, deal-a-dime-bag, go get high for a  
19 few hours and get lost type of folk. They're the  
20 people who run those people.

21           So when divided these folks up, one of the  
22 things -- one of the factors that went into the choice  
23 of a forum of whether state or local prosecutors would  
24 handle this was the consideration of the sentencing at  
25 the time that we chose who was going to prosecute this



1 person. So we made a certain decision based on the  
2 guidelines and the fact at the time that we divided  
3 these people up, and that we looked at perhaps enhanced  
4 stated sentencing for repeat offenders or enhanced  
5 state sentences for use of a firearm. And because at  
6 that time the federal sentences would probably be more,  
7 we elected to go with federal prosecution in those  
8 cases.

9           And now we're coming back years after that  
10 decision has been made by the prosecutor and saying,  
11 well, we're going to change that variable, and I would  
12 ask you not to do that. I think that the state  
13 prosecutors involved in this made that decision, relied  
14 on that, gave up their prosecutorial prerogative to  
15 pursue these people, with an understanding that this  
16 decision would last and this would be the way it would  
17 go.

18           Moreover, my experience is that often, in  
19 cases where there were problems with prosecution, the  
20 federal prosecutors, in fact, already made adjustments  
21 and allowed people to plea out to reduce weight, so  
22 that if you're bringing these people back for  
23 resentencing, the question is are they being sentenced  
24 for the weight that the pled out to, or are they being  
25 sentenced to the weight that they actually had, and is

1 | that evidence going to be introduced? In other words,  
2 | if there was a plea agreement, the plead out to a  
3 | reduced weight, for a reduced sentence, is that going  
4 | to reopen that plea agreement and allow us to introduce  
5 | evidence of the actual weight that the defendant  
6 | involved with at this point in time?

7 |           I can see an irony, actually, that it might  
8 | be the public defenders who would argue that Booker  
9 | wasn't -- isn't applicable to these sentences, because  
10 | all they want to do is impress on you that, just do the  
11 | math calculation and reduce it by two levels, hand them  
12 | their reduced sentence and let them out the door.  
13 | Don't worry about the fact that there may be other  
14 | evidence that could be introduced against my client,  
15 | which would now be difficult to get. And this is where  
16 | we get into the effect of -- on current cases. My  
17 | local -- or my Maryland U.S. Attorney has a limited  
18 | number of prosecutors.

19 |           State and local prosecutors handle roughly 95  
20 | percent of all criminal prosecutions in the United  
21 | States, so that the cases that we're taking to the  
22 | federal prosecutors that we really need them to take,  
23 | often we can't get them to take because of limited  
24 | resources. When these cases come back, if you make  
25 | this retroactive, I think it's going to really impact

1 | on the availability of Assistant U.S. Attorneys,  
2 | because, first of all, the sentencing judge may no  
3 | longer be available, so it's going to have to be  
4 | resentenced. It's going to be appointed with a new  
5 | judge. The Assistant U.S. Attorney that handled the  
6 | case may no longer be available, so a new Assistant  
7 | U.S. Attorney is going to have to relearn this case.

8 |           The investigators may no longer be available  
9 | and therefore evidence is going to have to be dug out  
10 | and reviewed by new investigators and by new U.S.  
11 | assistants. And civilian witnesses, to the degree that  
12 | they're called for, may have to be located again by  
13 | investigators, interviewed by prosecutors, and called  
14 | in for sentencing. This is all going to impact on the  
15 | availability of those U.S. Attorneys to handle the new  
16 | cases that we're bringing them that we're asking them  
17 | to prosecute.

18 |           And I really think that the -- having sat in  
19 | on some of these federal sentences, before Booker, when  
20 | the guidelines were much more mandatory, most of the  
21 | time the sentencing hearing largely turned on the  
22 | weight that was involved and a lot of other evidence  
23 | that might've been available for sentencing, because  
24 | sentences were pretty predictable. Prosecutors didn't  
25 | bring in lots of other evidence, because let's not piss

1 | the judge off, taking a lot of extra time here. Let's  
2 | just get to what we need to prove, get the guy  
3 | sentenced and move on to the next case. Now if we  
4 | reopen this, I think there's going to be a lot of other  
5 | evidence that prosecutors are going to want to present,  
6 | and because a lot of those -- that evidence is going to  
7 | come from my state investigators.

8 |           Most of the cases that we send down do not  
9 | involve DEA or ICE or FBI agents testifying. They  
10 | involve my local police department, my sheriff's  
11 | department, my state police officers, being called back  
12 | in as witnesses. So you're going to impact ongoing  
13 | investigations by calling my people back, having them  
14 | pull out five and ten-year-old cases, to review those  
15 | cases and the facts, and perhaps pulling out cases that  
16 | they didn't investigate in the first place, because,  
17 | again, the investigators are gone.

18 |           But I think this is going to have a serious  
19 | impact on how we, as state prosecutors and state law  
20 | enforcement, work in terms of dealing with our federal  
21 | counterparts to put these kind of cases on. And I  
22 | think in many instances, evidence that is no longer  
23 | available, or witnesses that are no longer available,  
24 | will not be there to give the true picture to the new  
25 | federal sentencing judge to really get the appropriate

1 sentence that should've been handed or should be handed  
2 out in these cases when they come back. And I would  
3 ask -- and I understand the sense that there was a  
4 great inequity in the sentencing of cocaine cases. But  
5 knowing the people that we've sent to the Feds for  
6 sentencing, nobody's in there doing time unfairly.

7           These were people that needed to do that kind  
8 of time, and had they not gotten that kind of time  
9 federally, we very may well have pursued them in state  
10 court, for enhanced state sentencing, for repeat  
11 offenders, repeat dealing, conspiracy, all of the other  
12 types of things that we might've elected to go after  
13 them for, had we not gone with the state -- with the  
14 federal forum. So I would urge the Commission, for all  
15 of those considerations, not to make this a retroactive  
16 application. Thank you.

17           CHAIR HINOJOSA: Thank you, Mr. Cassily. And  
18 I do want to correct something that perhaps maybe  
19 there's a misimpression left when we hear the different  
20 panels who have spoken. The Commission has been very  
21 clear that the approximately 19,000 number that we have  
22 used is based on a model of a pre-Booker system. We  
23 don't want to leave anybody with the misimpression that  
24 we have not been clear about that, that that number is  
25 a number that would be effected if we had the

1 | pre-Booker system with regards to making the amendment  
2 | retroactive. Obviously, if we have a Booker system,  
3 | that number would be different and in all likelihood  
4 | higher. Judge Castillo.

5 |           JUDGE CASTILLO: Ms. Shappert, you say in  
6 | your written testimony and you said here orally,  
7 | "retroactive application of the crack amendment will  
8 | result in serious and often violent drug dealers being  
9 | returned unexpectedly early to their reviving  
10 | communities."

11 |           MS. SHAPPERT: Um-hum.

12 |           JUDGE CASTILLO: Isn't there a good chance  
13 | that your office, led under your great leadership, will  
14 | be able to convince colleagues of mine to keep in  
15 | violent and serious drug dealers? Isn't there a good  
16 | chance that you could win those battles?

17 |           MS. SHAPPERT: That will be their marching  
18 | orders. But here's the problem.

19 |           JUDGE CASTILLO: No, I'm not saying they're  
20 | marching orders. I'm saying, don't you think that  
21 | judges would keep in violent and serious drug  
22 | offenders? That's my question to you.

23 |           MS. SHAPPERT: I think they will in some  
24 | instances, but I think there are a couple things that  
25 | are coming --

1 JUDGE CASTILLO: So you're saying -- hold it.

2 MS. SHAPPERT: Okay.

3 JUDGE CASTILLO: In some instances --

4 MS. SHAPPERT: Yes, I think --

5 JUDGE CASTILLO: So in some instances --

6 MS. SHAPPERT: Yes.

7 JUDGE CASTILLO: -- which I would assume to  
8 be a minority of the time, judges will make the right  
9 decision.

10 MS. SHAPPERT: No, I would not say in a  
11 minority of the time. That would be unfair to our  
12 judges. I think --

13 JUDGE CASTILLO: Well, I think it would be  
14 too, so --

15 MS. SHAPPERT: I would not --

16 JUDGE CASTILLO: -- why don't you quantify --

17 CHAIR HINOJOSA: I think --

18 JUDGE CASTILLO: Why don't you quantify how  
19 many --

20 CHAIR HINOJOSA: Could I just --

21 JUDGE CASTILLO: Yes, I will.

22 CHAIR HINOJOSA: We need to go ahead and let  
23 the witness finish and then we can proceed with the  
24 next --

25 JUDGE CASTILLO: Well, I just had to defend

1 | our colleagues, in terms of in some instances. Go  
2 | ahead.

3 | CHAIR HINOJOSA: Well, we --

4 | MS. SHAPPERT: I would tell you that we have,  
5 | in my opinion, exceptionally good judges --

6 | JUDGE CASTILLO: Um-hum.

7 | MS. SHAPPERT: -- in the Western District of  
8 | North Carolina, who try to follow the law to their best  
9 | ability. I have great confidence in them and if I  
10 | suggested otherwise, that was not my intention. I  
11 | think judges will attempt to make findings and apply  
12 | the law as it's written. I, at the same time, believe  
13 | that there will be disparity across the country,  
14 | because there are many different judges.

15 | The prosecutors who originally handled the  
16 | cases will not be available. The witnesses who were  
17 | involved in the case will not be available. Cases  
18 | where there was a plea agreement and no appeal,  
19 | transcripts from the original proceedings will not be  
20 | available. They will have to be re-transcribed. So my  
21 | concern is not the integrity of the bench. My concern  
22 | is the tremendous strain upon the system and the  
23 | inability of prosecutors to present all of the  
24 | information that needs to be presented.

25 | JUDGE CASTILLO: Thank you.



1 CHAIR HINOJOSA: Commissioner Howell.

2 COMMISSIONER HOWELL: To follow up a little  
3 bit on what Judge Castillo said, I have to say that,  
4 you know, we're all concerned and we're interested in  
5 what you have to say and what the Department has to say  
6 about the administrative burdens of processing for the  
7 19,500 eligible offenders who we've identified, which  
8 may be both an overstatement and an understatement, but  
9 in terms of recalculating their sentence if we make the  
10 amendment retroactive.

11 But I have to say that I have been quite  
12 troubled by the Department's letter, where they talk  
13 about "the unexpected release of 20,000 prisoners or  
14 more," because it's not going to be a release. It  
15 gives the impression that 20,000 crack offenders are  
16 going to be put out on the streets in one fell swoop,  
17 and I think you would agree that that is a totally  
18 wrong impression to give.

19 MS. SHAPPERT: If anybody has that  
20 impression, I agree with you, that is wrong. That is  
21 not what we are suggesting.

22 COMMISSIONER HOWELL: And in addition, you  
23 have talked about the 536 offenders identified by the  
24 Commission, which again may be an over and an  
25 understatement.

1 MS. SHAPPERT: Yes.

2 COMMISSIONER HOWELL: And those 536 people  
3 are also not going to be released in one fell swoop.  
4 It's over probably 30 years.

5 MS. SHAPPERT: Well, here's the thing. We  
6 know that 536 people will be eligible for resentencing.  
7 We know that each of them is probably going to want to  
8 have a sentencing hearing of some variation or another.  
9 Notwithstanding Rule 43, they're going to want to be  
10 in the district, that if possible, they're going to  
11 want an appointed counsel, and if possible, they're  
12 going to want to talk about rehabilitation in prison,  
13 any changes in their family circumstance or situation,  
14 and we will have, if Booker does apply, a lopsided  
15 Booker proceeding where we consider all of the  
16 minimizing factors but not the aggravating factors that  
17 would've been available at the original sentencing.

18 COMMISSIONER HOWELL: And I understanding the  
19 administrative issues with the resentencing for the --

20 MS. SHAPPERT: Yes.

21 COMMISSIONER HOWELL: -- 536. But by our,  
22 you know, estimate, the most number from your  
23 district --

24 MS. SHAPPERT: Um-hum.

25 COMMISSIONER HOWELL: -- out of the 536 who

1 | might even be eligible, if a judge decides that a  
2 | reduction in sentence is appropriate, would be about  
3 | 40, 42, maybe, people in your district alone, which is  
4 | a far different subset of the 536 that would be  
5 | released.

6 |           MS. SHAPPERT: The problem is going to be  
7 | those same people who will be getting out early would  
8 | not have had the same services in the Bureau of  
9 | Prisons, would not have the same transition into  
10 | society that we think is optimal or that we in the  
11 | federal system aspire to. It increases the chances of  
12 | recidivism and the Commission has identified that this  
13 | population is more inclined to recidivate, based upon  
14 | the aggravated criminal histories.

15 |           COMMISSIONER HOWELL: Well, let me ask you  
16 | the same question that I asked the panel before you  
17 | from the defenders, which is that the Criminal Law  
18 | Committee, that gave an awful lot of thought in their  
19 | submission to us, suggested a policy statement.

20 |           MS. SHAPPERT: Um-hum.

21 |           COMMISSIONER HOWELL: And if the Commission  
22 | decides to make the crack amendment retroactive, can  
23 | you speak for the Department as to what the  
24 | Department's position would be on the Criminal Law  
25 | Committee's policy statement proposal?

1 MS. SHAPPERT: Speaking for the department,  
2 as you know, we believe Booker should not be  
3 retroactive or applied to 3582(c)(2). If the  
4 Commission is going to apply the guidelines  
5 retroactively, we would encourage the Commission to  
6 make a policy statement as clear and specific and as  
7 refined -- and I don't have the specifics and we would  
8 be -- we would endeavor to assist in any way we can.  
9 But we would encourage you to be clear. We think that  
10 is more conducive to an efficient administration of  
11 justice.

12 CHAIR HINOJOSA: Judge Sessions.

13 JUDGE SESSIONS: I appreciate your comments,  
14 Ms. Shappert. I think it's probably fair to say that  
15 your comments could also have been relevant to our  
16 initial decision to apply two-level reduction to crack  
17 cocaine cases in the future. I would assume, from the  
18 nature of your comments, that that would've been your  
19 position because of your feeling about crack in the  
20 communities. The issue before us now, of course, is  
21 not that. It's a question of retroactivity. And  
22 you've heard Judge Walton testify about respect in the  
23 community for the criminal justice system, particularly  
24 involving those communities that are impacted by crack  
25 cocaine. We have reduced penalties for marijuana. We

1 | have reduced penalties for oxycodone. We have reduced  
2 | penalties for LSD. All of those defendants primarily  
3 | -- those offenses primarily involve white defendants.  
4 | Here we have a situation, an offense which involves  
5 | predominantly African-American defendants. And to what  
6 | extent do you think our refusal, if we were to refuse  
7 | to apply it retroactively, would impact the community  
8 | respect, or lack thereof, of the criminal justice  
9 | system within the African-American community?

10 |           MS. SHAPPERT: Let me preface it by saying,  
11 | first of all, the Department of Justice opposed  
12 | retroactivity in all of those other situations, with  
13 | regard to LSD, marijuana and the other drugs. So the  
14 | Department has been consistent. Secondly, I think that  
15 | it's important to remember that we need to remember  
16 | that we focus on conduct in prosecution. We prosecute  
17 | conduct. We don't prosecute based upon race.

18 |           The other thing is, with regard to the  
19 | modification of penalties and retroactivity in the LSD  
20 | and marijuana situation, you did not have the Booker  
21 | effect looming out there, and I do believe it will --  
22 | it will potentially harm the criminal justice system if  
23 | large numbers of individuals who are likely to damage  
24 | poor, largely African-American communities, are in fact  
25 | released early, people who are most likely to

1 | recidivate. That's what I'm concerned about.

2 |           JUDGE SESSIONS: So if we pass a policy  
3 | statement which in some ways modified or mollified the  
4 | impact of Booker and resentencing, then I would expect  
5 | that at least the severity of your statements would be  
6 | reduced or mollified as well.

7 |           MS. SHAPPERT: The Department continues to  
8 | believe that the guidelines should not be retroactive  
9 | because of the consequences of letting people out who  
10 | don't have the benefits of treatment and training in  
11 | prison. But I would encourage the Commission, if the  
12 | Commission is going to make them retroactive, to make  
13 | the clearest policy statement it can, understanding, as  
14 | we do, that Hicks and Forty Estremera call into  
15 | question how binding the policy statements of the  
16 | Commission will be.

17 |           MR. CASSILY: Can I just comment, too, that  
18 | -- I mean, having listened to the panel before us, no  
19 | one on that panel, none of the defense counsel, was  
20 | prepared to just say, oh, we'll accept that and that  
21 | won't be a basis for litigation. So I think that that  
22 | will create just as much litigation and they're all  
23 | saying that, in the best interest of the client,  
24 | they're going to fully litigate their client's right to  
25 | Booker, anyway. So I'm not clear that the Commission's

1 | desire to limit that will have an effect whatsoever.

2 |           CHAIR HINOJOSA: Does anybody else have any  
3 | questions?

4 |           COMMISSIONER FRIEDRICH: I have one question.  
5 | Ms. Shappert, the courts have estimated that they will  
6 | need to add approximately, I think they said, 95 new  
7 | probation officers to account for the surge in cases  
8 | that retroactive application of the amendment would  
9 | cause. Has the Department done any similar sort of  
10 | analysis? And I pose the same question for Mr. Jones,  
11 | whether you all had a chance to try to calculate to  
12 | what extent you would need to add prosecutors or  
13 | marshals, in order to continue to be proactive in the  
14 | areas of violent crime and terrorism and other  
15 | important initiatives.

16 |           MS. SHAPPERT: Well, as you know, over half  
17 | of the individuals implicated are in the 5th, the 11th  
18 | and the 4th Circuit, so we're talking about a  
19 | disproportionate impact on certain circuits. The  
20 | Department has not offered any additional resources and  
21 | I seriously doubt, though I don't know this for a fact,  
22 | I doubt that I would be getting additional prosecutors,  
23 | because this is going to be a temporary problem of a  
24 | span of years, probably within -- whatever the  
25 | decision, we're talking a one to ten-year period as

1 | opposed to a systemic situation where I would be  
2 | entitled to additional prosecutors. So would I like  
3 | more help? Yes. Am I aware of any plans to provide  
4 | additional help to districts that would be impacted? I  
5 | am not.

6 |           MR. JONES: In response, Commissioner, to the  
7 | question as far as the Marshals Service, as I mentioned  
8 | in my summary of the testimony, which I provided a  
9 | written copy, we just -- our analysis shows that we  
10 | would probably need 92 people to offset the call to  
11 | produce that amount of prisoners, notwithstanding that  
12 | it'll be that amount. I'm not certain what that amount  
13 | would be. But if it was 19,500, we'd look at 92. And  
14 | we have not factored that in as far as any -- you know,  
15 | within the President's budget call.

16 |           And so that's what we're saying that if we  
17 | have to tap into existing resources, that it may affect  
18 | some of the other initiatives that we have underway,  
19 | such as the Adam Walsh sexual offender act. I do want  
20 | to add that, within the 4th Circuit and specifically  
21 | South Carolina and North Carolina, there was a couple  
22 | -- the districts in those circuits are hurting right  
23 | now, as far as the bed space. We are moving -- in  
24 | South Carolina we're moving prisoners. We're housing  
25 | their prisoners as far away as Tennessee. And we're



1 | working, definitely, with the districts in North  
2 | Carolina to house their already taxed prisoner load.  
3 | And the only thing I wanted to mention was I heard  
4 | earlier, in testimony, that prisoners may not want to  
5 | get involved and be transported back, you know, for the  
6 | hearing, but I would -- from my experience of moving  
7 | prisoners, as a deputy marshal, they always enjoy a  
8 | chance to get out of jail and take a ride and get some  
9 | different food and have some other things in place, a  
10 | chance of scenery and --

11 |           CHAIR HINOJOSA: Mr. Jones, sometimes the  
12 | complaint is that they have been taken away from a drug  
13 | care program or some other, or from their working  
14 | program, that they may be involved in the prison system  
15 | and that, therefore, they're taken away and go to the  
16 | county jail system and that it takes a long time. And  
17 | then to try to get back into the drug program or the  
18 | workforce, or any of the other programs that they're  
19 | involved in, that it would cut into it. Those are the  
20 | complaints that we hear in the courtroom when we do  
21 | call prisoners in for resentencings or other matters.

22 |           MR. JONES: Yes, sir.

23 |           CHAIR HINOJOSA: Or sometimes when there are  
24 | witnesses in cases.

25 |           MR. JONES: Sure. And I'm aware of those

1 | complaints.

2 |           COMMISSIONER FRIEDRICH: I have one  
3 | additional question to Ms. Shappert. You've expressed  
4 | some legitimate concerns about early reentry of  
5 | prisoners should this amendment be made retroactive,  
6 | and I'm wondering if you -- the Department has any  
7 | reaction to the Criminal Law Committee's recommendation  
8 | that probation officers seek to modify conditions of  
9 | release for offenders, so that there would be a period  
10 | of time where they would be at a halfway house or home  
11 | confinement, where some of the reentry types of things  
12 | that occur in prisoner could occur in this instance.  
13 | Do you think those would be effective or do you still  
14 | have concerns?

15 |           MS. SHAPPERT: I have not seen any position  
16 | by the Department on that. I do know the Bureau of  
17 | Prisons says that to prepare someone for a halfway  
18 | house usually takes 11 to 13 months, but it can be  
19 | truncated to a period of five to six months, but it  
20 | does require some planning time, and my concerns about  
21 | the lack of planning time continue.

22 |           COMMISSIONER FRIEDRICH: Um-hum.

23 |           CHAIR HINOJOSA: I have the last question.  
24 | Mr. Cassily, you made the point about how if someone  
25 | was brought back and there had been a plea agreement,

1 | but it would certainly be understood that certainly you  
2 | couldn't reopen the sentencing hearing to give somebody  
3 | a higher sentence based on another weight. You meant  
4 | in relationship to whether the reduction would be  
5 | granted at all or --

6 |           MR. CASSILY: Well, I think my point was,  
7 | then, is the evidence that the -- in fact, the amount  
8 | that was involved was greater than that which he pled  
9 | to. The defendant pleads to a certain amount. Is he  
10 | going to then object to the fact that because it was  
11 | understood, basically, that this would result in this  
12 | specific type of sentence. Now that he's being brought  
13 | back to be resentenced, based on the fact that, for  
14 | that amount, he might get less time, will the  
15 | prosecutor be able to introduce evidence of the actual  
16 | amount that was seized, or involved in that specific  
17 | criminal case, to keep the sentence from being reduced?

18 |           CHAIR HINOJOSA: If there's no other  
19 | questions, thank you all very much. And we're ready  
20 | for the next panel. Have a seat, please. Next we have  
21 | the Academic Perspective. We've got Anne Piehl, who  
22 | joined the faculty at Rutgers in 2005. Professor Piehl  
23 | is an associate professor in the Department of  
24 | Economics, and a member of the Rutgers Criminal Justice  
25 | Program, research associate at the National Bureau of

1 | Economic Research. And we've got Professor  
2 | Steven Chanenson, who is a professor at Villanova  
3 | University School of Law. Professor Chanenson was a  
4 | law clerk to Judge Kravitz of the 11th Circuit, as well  
5 | as Supreme Court Justice William Brennan, Jr.  
6 | Ms. Piehl.

7 |           MS. PIEHL: Thank you, Judge and  
8 | commissioners, for the opportunity to appear before you  
9 | today, regarding the issue of crack cocaine guideline  
10 | amendments and its retroactivity. In my academic work,  
11 | I assess policies from the perspective of a  
12 | representative citizen. I've heard already that we've  
13 | had representatives from various agencies that would be  
14 | impacted by such a policy change. But what I want to  
15 | do is take a slightly broader perspective, thinking  
16 | about society at large. And the way I'm going to do  
17 | this is by the framework of benefit cost analysis.  
18 | Okay.

19 |           Benefit cost analysis is a widely accepted  
20 | approach to totaling up all of the consequences of a  
21 | proposed policy change. Benefit cost analyses are  
22 | required in many areas of federal government work, and  
23 | OMB has many circulars on how it's to be done, and it's  
24 | often required of grantees, et cetera, by the federal  
25 | agencies. The purpose of this kind of analysis is to

1 | aid decision making by comparing the impacts of  
2 | proposed policies. Its particular value as an analytic  
3 | frame is that it incorporates all the consequences of a  
4 | policy choice and emphasizes the tradeoff. And the way  
5 | this is done is by putting things into a common metric,  
6 | money. Now some people are offended sometimes by  
7 | economists' willingness to monetize certain costs and  
8 | benefits, but I find it is useful to think about these  
9 | tradeoffs simultaneously and make it explicit where the  
10 | tradeoffs are and that's what I want to do today.

11 |           Now, one thing that benefit cost analysis is  
12 | not very good at is thinking about fairness or  
13 | distributional concerns, and you've had a lot of input  
14 | in that regard already, so I don't need to repeat that.

15 |       But it is important to recognize that any benefit cost  
16 | analysis should be accompanied by a discussion of  
17 | fairness and distributional concerns and it should be  
18 | considered just one input into a decision-making  
19 | process.

20 |           Now, I didn't have time nor the access to the  
21 | necessary data to do a complete cost benefit analysis  
22 | for my testimony today, but what I'd like to do is make  
23 | a couple of highlights of what a thorough analysis  
24 | would look like. So the bottom line, as has been  
25 | discussed earlier, from the Commission's research is,

1 | you know, for our purposes today, thinking about 19,500  
2 | people being resentenced perhaps at a reduction of 27  
3 | months. This impact is staggered temporarily and  
4 | dispersed geographically. So what the policy does is  
5 | move up the release dates. What's the impact of that,  
6 | if it were to be adopted? Well, what it saves is 16  
7 | million bed days. Okay. So that's the 19,500 inmates  
8 | times 27 months times 30 days per month.

9 |           So the question is how do you value the  
10 | savings of those 16 million bed days for society? In  
11 | technical terms, what we want to think about for  
12 | benefit cost is what's the incremental, incremental  
13 | change to social costs of no longer using that resource  
14 | in that way? Now, we heard earlier an estimate of \$20  
15 | per day and that really comes from just the incidental  
16 | costs of incarcerating an inmate for a day. So that  
17 | would be extra food, some healthcare, that kind of  
18 | thing.

19 |           Okay. That's the appropriate number if  
20 | you're thinking about sentencing a single inmate for a  
21 | single day. But when you think about a broader-scale  
22 | change, you want to use a much larger number, because  
23 | you would be able to avoid certain construction costs.  
24 | You might be able to delay hiring, et cetera, if you  
25 | had a smaller prison population. So what's an

1 | appropriate measure of that? One way to get a measure  
2 | is to take the federal prison system's budget and  
3 | divide by the number of inmates there. That gives you  
4 | an estimate of about \$63 per inmate day. That's not an  
5 | unreasonable number, but I still think that that's too  
6 | low because it ignores capital construction costs.

7 |           Okay. So in the academic literature, when  
8 | people are doing benefit cost analyses, they're not  
9 | necessarily trying to get the right number but they're  
10 | trying to get in the right ballpark, and about \$40,000  
11 | a day -- \$40,000 a year, or \$110 per day, is the one  
12 | that is sort of favored by researchers now. All right.

13 |       So if you multiple that out at \$110 per day, you end  
14 | up with \$1.7 billion of social cost savings. If you  
15 | prefer a lower number like \$70, you would end up with  
16 | something close to \$1 billion.

17 |           All right. So we've heard a lot of about  
18 | some of the costs of the impacts on the administrative  
19 | units, but those will obviously be much smaller in  
20 | magnitude than this particular cost of incarceration.  
21 | So on the other side, what -- so it's a benefit to your  
22 | representative citizen, a reduction of tax dollars.  
23 | What is the primary cost? Well, it think the primary  
24 | cost would be a potential increase in crime. You have  
25 | people being released differentially. What are the

1 | crime impacts? Well, we mostly tend to think of the  
2 | consequences of sentencing as effecting deterrents and  
3 | incapacitation. There are other purposes of  
4 | sentencing, but they don't have the same kind of  
5 | impacts that I'm measuring here. Deterrents will be  
6 | unaffected by retroactivity, right, because you've  
7 | already -- the new amendment has already gone into  
8 | place, so well-informed inmates are -- well-informed  
9 | potential offenders are already responding to that  
10 | circumstance.

11 |           So deterrence is not an issue here. So let's  
12 | turn to incapacitation. It's a little bit more  
13 | complicated. We will be letting people out, but one of  
14 | the incapacitation benefits from sentencing, say, a  
15 | drug dealer, usually is that you remove them from the  
16 | community. These people have already been removed and  
17 | whatever their slot was in the business of crack  
18 | distribution has long ago been filled.

19 |           So the incapacitation loss from moving up  
20 | release dates is really that incremental extra time  
21 | that people will be on the street, that they wouldn't  
22 | under the status quo. All right. So to me, the most  
23 | interesting impact is that if people are released 27  
24 | months earlier than scheduled, they're going to be  
25 | younger than they would otherwise, right, and we all



1 know that crime is very strongly associated with age.  
2 So I did some calculations from the Bureau of Justice  
3 Statistics' recidivism study and found that we expect,  
4 when people age a couple of years, there'd be a one to  
5 two percent increase recidivism over a three-year  
6 period. Now, I consider that to be an overestimate of  
7 the additional crime that would happen, because of what  
8 was just being discussed in the last panel.

9           Judges will have an opportunity, at  
10 resentencing, to not provide this relief to people who  
11 are -- have shown themselves to be of high risk of  
12 recidivating. So by my calculations, this results in  
13 an overestimate again, but a projection of maybe 390  
14 additional crimes. Okay. So that has to be traded off  
15 against the one to two billion dollars in cost savings,  
16 if you were doing this as -- you know, in the framework  
17 that I, that I propose.

18           So if you want to value those crimes, each of  
19 those crimes would have to be valued at a social cost  
20 of about \$4 million to make this be a breakeven, right,  
21 which is higher than we would use for any crime other  
22 than murder. And it's important to recognize that  
23 recidivism rates are much higher for property crimes  
24 than they are for violent offenses. Finally, you might  
25 want to consider what impact there might be of a mass

1 | release of inmates, this kind of suddenness of a group  
2 | of a releases. As has been noted, we're really  
3 | thinking about moving up the bulge of releases and  
4 | having 2500 extra releases in the first year, and then  
5 | having a lower rate after that. So this should be --  
6 | you know, it's a large number in terms of an increase,  
7 | denominated by certain values.

8 |           But relative to the 45,000 that are released  
9 | every year from the Federal Bureau of Prisons, it  
10 | doesn't seem like anything that's kind of out of the  
11 | ordinary. And for communities who are receiving  
12 | inmates daily from state prisons and from jail  
13 | facilities, I don't think it's going to be noticeable.

14 |       Not that it won't have an impact, but it's not going  
15 | to be kind of a very large impact. And with the social  
16 | cost savings from the incarceration, it might be  
17 | possible to reallocate those to some kind of other  
18 | prevention efforts.

19 |           So in conclusion, I want to say that benefit  
20 | cost analysis shows that the proposed retroactivity  
21 | will substantially reduce the cost of incarceration on  
22 | the order of one to two billion dollars, and this is  
23 | particularly important in the context of the high  
24 | levels of overcrowding in the federal system. So it is  
25 | not unreasonable to think that this could defer some

1 | prison construction or hiring. So I think this could  
2 | actually be a realized savings. So from the  
3 | perspective of an American citizen, there will be  
4 | small, perhaps, increases in crime across the country,  
5 | but the consequences I think favor -- represent a win  
6 | if you think about the taxpayer savings. It's not  
7 | always true that economic efficiency and fairness  
8 | considerations operate in the same direction, and  
9 | policymaking is particularly difficult when they  
10 | conflict, right? In this case they go together and I  
11 | urge you to support the retroactivity.

12 |           CHAIR HINOJOSA: Thank you, Professor Piehl.  
13 | Professor Chanenson, sir.

14 |           MR. CHANENSON: Chairman Hinojosa, members of  
15 | the Commission, I find myself in the unenviable  
16 | position of being between all of you and lunch, but I  
17 | will -- I will, keeping that in mind, try to be as  
18 | brief as a law professor can. In my comments today --

19 |           CHAIR HINOJOSA: Just don't call on us.

20 |           MR. CHANENSON: Yeah. The fact that you're  
21 | all sitting in the front row is something unheard of.  
22 | In comments today, I hope to convince you that simple  
23 | justice, both real and perceived, counsel in favor of  
24 | making Amendment 706 retroactive in some form, and that  
25 | there are several ways to achieve that goal, all of

1 | which involve the Commission doing what it does best,  
2 | providing guidance. The United States Sentencing  
3 | Commission, as you well know, is facing this very  
4 | important issue. It is one that combines both pure  
5 | policy and practical procedure, implicating matters of  
6 | both equity and efficiency. But as I said, you know  
7 | that already.

8 |           You have known that since at least 1995 and  
9 | for more than a decade this Commission, constituted  
10 | with different members appointed by different  
11 | presidents, confirmed by Senates of different parties,  
12 | has all endorsed the idea that something, at least up  
13 | until last week, was amiss and still is amiss with  
14 | respect to our sentencing for cocaine base or crack.  
15 | In fact, each of your many thorough reports on crack  
16 | cocaine sentencing has emphasized that a faithful  
17 | commitment to the principles of the Sentencing Reform  
18 | Act demands modification.

19 |           And while passing Amendment 706, you stated  
20 | clearly that, while justice demands further reforms and  
21 | explained that what you're taking is a partial action,  
22 | you stressed, "the problems associated with the 100 to  
23 | 1 drug quantity ratio are so urgent and compelling,  
24 | that this amendment is promulgated as an interim  
25 | measure to alleviate some of those problems." As you

1 know well, by your own guidelines, 1B1.10, the  
2 Commission looks at three things in deciding whether or  
3 not to make a guideline change, a reduction,  
4 retroactive; the purpose of the amendment, the  
5 magnitude of the change, and the difficulty involved,  
6 rather, in applying that change. The first two of  
7 those, in my opinion, clearly support a retroactive  
8 amendment -- application, rather, of Amendment 706.

9           The third is more complicated, but taken  
10 together, I believe they all counsel in favor of  
11 retroactive application. The purpose of this amendment  
12 is to take a step toward righting a significant and  
13 longstanding wrong that was depriving many defendants  
14 of their liberty well beyond what was justified by  
15 Congress' statement of valid sentencing purposes. The  
16 Commission cannot fully realize and effectuate the  
17 purpose of righting that wrong, unless there's at least  
18 a possibility for retroactive application in the  
19 appropriate cases.

20           Concerning the magnitude, the Commission has  
21 adopted the benchmark from the Senate report  
22 accompanying the Sentencing Reform Act of 1984,  
23 focusing on around six months as being big enough to be  
24 worth the effort. This average change of approximately  
25 27 months is certainly well above that. Difficulty --

1 | it was a little difficult for me to try and sort it  
2 | out. One logical concern, when you think about  
3 | difficulty of application, is the ability of the judge  
4 | to reevaluate the defendant's sentence in light of the  
5 | newly revised guideline. On that basis alone,  
6 | Amendment 706 should not be too difficult to apply,  
7 | because the sentencing judge originally had to come to  
8 | some conclusion about the amount of crack involved.

9 |           Let me take one moment just to comment on  
10 | something that Mr. Cassily mentioned with respect to  
11 | cases being pled out. And there was some -- a somewhat  
12 | puzzling reference to this in Assistant Attorney  
13 | General Fisher's letter as well. It is not, to my  
14 | knowledge, the policy of the Department of Justice, it  
15 | was certainly not my practice when I served as an  
16 | Assistant United States Attorney, to engage in fact  
17 | bargaining.

18 |           So while there may be other things that were  
19 | swirling around that may be of some relevance to the  
20 | judge, positive or negative, whether to exercise the  
21 | judge's discretion under 3582, I would be surprised to  
22 | learn that the judge was not aware of all of the  
23 | quantity of crack that the government felt it had  
24 | enough evidence to bring forward. That kind of  
25 | information is not supposed to be kept from the court

1 | and in fact, as we all know, the Department of Justice  
2 | takes a strong stand on that, so I think that really  
3 | should not be a concern. But difficulty can be looked  
4 | at more broadly. We have to ask ourselves whether  
5 | we're thinking about some of the practical details that  
6 | you've heard about today, and to get to that, I'd like  
7 | us to pretend, perhaps, that we're in law school for a  
8 | moment and go back to the statute.

9 |           When we look at 3582(c), what you see is  
10 | Congress providing a few situations, and just a few, in  
11 | which a sentencing judge may make changes after  
12 | imposing a sentence. It seems to me, contrary to some  
13 | of the loose language in a variety of opinions, and I  
14 | respectfully disagree with the panel's opinion in  
15 | Hicks, that a 3582(c)(2) proceeding is not a  
16 | sentencing. 3582(c) proceedings are not mentioned, or  
17 | course, in the Federal Rule of Criminal Procedure 32,  
18 | the standard rule for sentencing.

19 |           And in fact, Rule of Procedure 43(a)(2)  
20 | requires defendants to be present at sentencings, but a  
21 | few lines down the page, 43(a)(2) -- 43(b)(4) -- pardon  
22 | me -- states, the defendant need not be present when  
23 | the proceeding involves the correction or reduction of  
24 | a sentence under Rule 35 or 3582. This would be a  
25 | peculiar resentencing indeed, if it could happen sua

1 | sponte, as 3582(c)(2) proceedings could. So what  
2 | exactly is the congressional vision of 3582(c)? In my  
3 | opinion, it is an equitable mitigation device granted  
4 | by Congress to the judiciary, subject to significant  
5 | regulation and control by this Commission. It's a form  
6 | of equitable sentencing relief that Congress authorized  
7 | the Commission and the District Court, acting  
8 | separately, to grant.

9 |           The District Court is authorized, but not  
10 | required, to grant equitable sentencing relief in the  
11 | form of an imprisonment reduction if three conditions  
12 | are satisfied. First, the defendant must've been  
13 | sentenced to a term of imprisonment based on the  
14 | sentencing range subsequently lowered by the  
15 | Commission; second, either the defendant, the director  
16 | of the Bureau of Prisons, or the court must move to  
17 | lower the sentence; and third, the contemplated  
18 | reduction must be consistent with applicable policy  
19 | statements issued by the Commission.

20 |           Without all three of these conditions, the  
21 | District Court has no authority to reduce the  
22 | imprisonment term at all. Congress provided even more  
23 | specific guidance on this power that the Commission has  
24 | to authorize sentence reductions, when it promulgated  
25 | -- pardon me -- 28 U.S.C. 994(u). That provision



1 | states in part that the Commission shall specify in  
2 | what circumstances and by what amount the sentences of  
3 | prisoners may be reduced. Thus it appears to me that  
4 | this Commission has not only the express authority, but  
5 | an expressed statutory duty to regulate with  
6 | specificity the circumstances in which terms of  
7 | imprisonment may be reduced.

8 |           Many courts have acknowledged, to one degree  
9 | or another, that 3582(c)(2) proceeding is not a "do-  
10 | over sentencing, " though few courts have really  
11 | attempted to articulate the full contours and  
12 | implications of these sentencing reduction proceedings.

13 |       And no court admittedly has apparently adopted what  
14 | seems to me to be the obvious interpretation of  
15 | 3582(c). And before United States versus Booker, that  
16 | ambiguity was arguably harmless enough, facing more  
17 | mandatory guidelines as a default position.

18 |           The is, in my opinion, no longer so harmless.  
19 |       As you know, United States versus Hicks has held that  
20 | Booker applies to 3582(c) proceedings. It seems  
21 | inappropriate for many reasons to me, primarily, as I  
22 | said, because 3582(c) is not a resentencing in which  
23 | guidelines apply. It is a clemency-like, equitable  
24 | sentencing reduction proceeding where a minimum nature  
25 | and maximum extent of the reduction is, according to

1 | statute, regulated by the Commission. So Hicks, in  
2 | short, concludes that once the Commission deems a  
3 | guideline to be retroactive, a fairly normal Booker  
4 | resentencing follows. But presumably even Hicks would  
5 | not allow, as Judge Hinojosa pointed out correctly, for  
6 | an increased sentence, given the express language of  
7 | 3582(c).

8 |           Curiously, in my opinion, Hicks also rejects  
9 | the idea that the Commission's policy statements could  
10 | provide a hard limit on the District Court's power to  
11 | reduce a sentence consistent with Booker, although  
12 | arguably that portion of Hicks is dicta. Even if  
13 | Booker somehow applies to 3582(c), the Commission  
14 | should have the power to place an absolute ceiling on  
15 | the amount of the sentencing reduction. This is not  
16 | making guidelines, so called, mandatory again. It is,  
17 | rather, limiting the extent of the clemency-like,  
18 | equitable sentencing reduction that the District Court  
19 | can bestow. That's a law professor's view.

20 |           We all know how many people listen to law  
21 | professors. So what happens if all of the courts  
22 | decide contrary to my truly compelling argument that  
23 | Booker applies? Well, what can the Commission do then  
24 | and what should it do? Well, I believe that the  
25 | Commission can and should provide more specific policy

1 | statements, no matter what level of legal force they  
2 | carry. Even if they are simply deemed to be advisory,  
3 | these policy statements can be helpful. The Commission  
4 | can make clear, I think, as it has already, but it  
5 | could stand to be made even more blunt, that the  
6 | Commission, I believe, would not want a retroactive  
7 | amendment -- application, rather, of Amendment 706 to  
8 | yield a sentence lower than two full levels below the  
9 | sentence previously imposed.

10 |           It can at least discourage judges from  
11 | granting reductions for certain offenders. I agree  
12 | completely with Judge Castillo that experienced judges  
13 | know what they're doing. But part of what our entire  
14 | structured sentencing system is about, is trying to  
15 | provide guidance and interaction between the trial  
16 | court and the Commission and the Court of Appeals and  
17 | Congress.

18 |           So I think there is nothing inappropriate  
19 | with the Commission providing that kind of guidance,  
20 | and of course, in a post-Booker world, if Booker  
21 | somehow applies, the District Court can reject it. I  
22 | think the Commission would be well served to also  
23 | promulgate procedural policy statements along the lines  
24 | that either the Criminal Law Committee or the defenders  
25 | have talked about encouraging working with each other,

1 | as well as encouraging judges to solicit the views of  
2 | the Bureau of Prisons concerning an individual's  
3 | specific reentry needs. The Department of Justice,  
4 | though, highlights a potential problem, when it notes  
5 | there may be uncertainty and a lack of uniformity  
6 | concerning the applicability of a legal standard if  
7 | some courts follow Hicks and others do not.

8 |           Now of course there is going to be  
9 | uncertainty with any retroactive application of a  
10 | guideline in a post-Booker world. It is arguably a  
11 | larger problem in the context of Amendment 706 because  
12 | the volume of cases is so high. Misapprehension, not  
13 | ungrounded, should not though spark paralysis and do  
14 | retroactivity. I go back to my initial position with  
15 | respect to the purpose that is involved here. You've  
16 | set that out clearly and I think the Commission should  
17 | not break from its longstanding position.

18 |           There are other options. I'll touch on them  
19 | briefly because, admittedly, they do wander into the  
20 | realm of academia. You can provide a more muscular  
21 | response, or at least call an inter-branch  
22 | collaboration to provide a more muscular response to  
23 | the Department of Justice's considerations and  
24 | concerns. For example, with the help of Congress,  
25 | Congress can reduce this uncertainty and lack of

1 | uniformity in several ways. First, as I have written  
2 | elsewhere and bored literally dozens of people who've  
3 | read it, Congress can and should create a Court of  
4 | Appeals for sentencing. This would afford greater  
5 | consistency and guidance for all aspects of federal  
6 | sentencing, not to handle every last sentence, but to  
7 | help provide a unified judicial voice on matters of  
8 | sentencing.

9 |           By speaking with one appellant analytic  
10 | voice, the judiciary would communicate more effectively  
11 | with the Commission. And Congress, on a more targeted  
12 | basis, Congress could direct that all 3582(c) appeals,  
13 | assuming they are appealable, and there's a  
14 | disagreement about that, but most courts believe that  
15 | they are, can go to a specific Court of Appeals, either  
16 | an existing one, or a special court staffed with  
17 | existing federal judges on a staggered term basis could  
18 | be created.

19 |           Another possibility would be for Congress to  
20 | direct that all such motions be heard in the first  
21 | instance by a special trial court, and if  
22 | transportation issues are that serious, the court could  
23 | move to large institutions in order to minimize that.  
24 | All of these possibilities would serve to make the  
25 | retroactive application of the guidelines more uniform,

1 while maintaining an individualized determination of  
2 how to proceed in each case. There is, of course, an  
3 even simpler method to bring reasonable uniformity and  
4 procedural ease to the process of resolving these  
5 claims. It still requires the guidance of the  
6 Commission, but Booker would not be an issue. Even if  
7 you agree with Hicks, hard limits on who would receive  
8 a reduction could still be established in advance, and  
9 individualized determinations could still be made.  
10 Drawing inspiration from President Ford's clemency  
11 board, the President could issue an executive order  
12 directing the Parole Commission -- there's still enough  
13 of you left, sir --

14 COMMISSIONER REILLY: Right.

15 MR. CHANENSON: -- the Parole Commission to  
16 review the cases of defendants sentenced under the  
17 former guidelines for crack. This is not inconsistent  
18 with what the Parole Commission still does and would  
19 obviate many of the procedural discussions and issues  
20 that we have had today. No matter what the Commission  
21 chooses to do concerning retroactivity of Amendment  
22 706, it has the opportunity to improve the overall  
23 state of criminal sentencing by how it does what you  
24 choose to do. We ask United States District judges to  
25 explain their reasoning so we can better understand the

1 federal sentencing structure. Greater understanding  
2 can lead to substantive improvements, increased public  
3 respect for as well as acceptance of the criminal  
4 justice system. While much remains to be done to  
5 improve transparency at the trial court level,  
6 including, in my opinion, the provision of greater  
7 access to data, including judge-specific information on  
8 sentencing, the Commission has an opportunity here to  
9 lead by example.

10           The Commission should clearly and publicly  
11 explain its reasoning, regardless of whether it makes  
12 the crack amendment retroactive. Especially in light  
13 of this broad public interest in the crack amendment,  
14 this is the perfect time to begin a new and rigorous  
15 tradition of explanation. I have great faith in all of  
16 you, that you take your responsibilities seriously and  
17 will continue to give this issue deep thought toward  
18 whatever decision you make.

19           Tell us about it. Tell us in a manner  
20 acceptable to all -- accessible -- pardon me -- to all,  
21 why one argument was persuasive over another and help  
22 us understand what this signals for the future. You  
23 can serve as a shining example to the hundreds of  
24 federal judges who must make equally challenging  
25 individual sentencing decisions every day. I guess I'd

1 | like to, before I get peppered with questions, which  
2 | law professors don't like, I want to just address two  
3 | other things that came up in earlier questions. There  
4 | was an issue raised by Judge Castillo, about the fact  
5 | that the Commission has kind of bifurcated this  
6 | process, passing the amendment and now dealing with  
7 | retroactivity.

8 |           Of course, as you know, this has been the  
9 | practice in a number of previous instances, not all,  
10 | and admittedly I think your internal procedures  
11 | encourage you to decide it as a package. There are  
12 | reasons to take this on a step-by-step basis. And most  
13 | importantly, this was not a surprise to anyone. This  
14 | hearing was announced long before November 1. Your  
15 | statistical data was set out there, indicating that in  
16 | the neighborhood of 19,500 people could be considered  
17 | for application of a retroactive amendment, so I don't  
18 | think that's anything that should give you pause.

19 |           Finally, Commissioner Horowitz mentioned, and  
20 | he asked Judge Walton, as I believe, whether the  
21 | Commission should wait for the Supreme Court to decide  
22 | Kimbrough. In my opinion, you should not. No one  
23 | knows what the Supreme Court is going to do. They no  
24 | longer have the tradition of re-listing and re-listing  
25 | that they did years ago. But I am reminded of



1 something and you'll see this as a blatant suck-up that  
2 it is. But years ago I appeared before  
3 Judge Castillo in a very different capacity, as an  
4 Assistant United States Attorney, at several  
5 sentencings, and I was always struck by how  
6 Judge Castillo, in many ways, articulated and embodied  
7 the parsimony provision of 3553, where he would tell a  
8 defendant -- and you would always get a fair sentence  
9 from Judge Castillo.

10 But he would tell a defendant that you've  
11 done something wrong, this is what the punishment is,  
12 but I am not going to be responsible for you serving  
13 one more day in prison than you deserve. This  
14 Commission has determined that crack offenders do not  
15 deserve to be sentenced for as long as they have been.  
16 If it is your determination to apply this  
17 retroactively, you should do it now. With that, I  
18 thank you for your time.

19 CHAIR HINOJOSA: Thank you very much,  
20 Professor. Vice Chair Steer.

21 COMMISSIONER STEER: Thank you both for your  
22 testimony. Professor Chanenson, I'm very pleased that  
23 your -- with your analysis on the applicability of  
24 Booker. It certainly is in accord with my thinking and  
25 I think probably the thoughts of most of us who have

1 | looked at the law and the legislative history and  
2 | thought about it. You mentioned a number of possible  
3 | things that could be done. One, of course, would to be  
4 | strengthen the Commission's policy statement. I wonder  
5 | if you would be willing to work with the Commission and  
6 | its staff, in the case the Commission wants to go in  
7 | that direction.

8 |           Secondly, what would you think about  
9 | legislation that the Commission might Congress to enact  
10 | that would make it clear, even clearer, if that is  
11 | necessary, that Booker does not apply for these kind of  
12 | remedial limited -- I think you're absolutely right.  
13 | They're not a resentencing of these remedial actions.

14 |           MR. CHANENSON: Of course I always stand  
15 | ready to help in any way that I can and I would be  
16 | honored to work with Commission staff on any of these  
17 | matters. As far as the possibility of new legislation,  
18 | I think that, again, I agree with you. It seems fairly  
19 | clear to me what 3582(c) is and it's not a bad idea at  
20 | all. But if the courts are going to disagree over it,  
21 | I'm not sure. I mean, it's certainly possible to make  
22 | it clearer. I think it's a viable option. But if  
23 | Congress is going to get involved, which I know is a  
24 | big step, perhaps there would be additional things that  
25 | the Commission might ask Congress to do in addition to

1 | clarifying this.

2 | CHAIR HINOJOSA: Judge Castillo.

3 | JUDGE CASTILLO: Thank you both for being  
4 | patient and standing by for your testimony. It was  
5 | very helpful. Professor Chanenson, good to see you in  
6 | a different capacity. It strikes me that we've been  
7 | talking all morning to some members of the general  
8 | public about this Hicks issue without really explaining  
9 | it. Hicks would entitle a criminal defendant at  
10 | retroactivity, if retroactivity is decided upon, to  
11 | argue at resentencing that they're entitled to an  
12 | entire new, fresh look at all of the sentencing  
13 | factors. But there have been some courts that have  
14 | rejected Hicks, including the 4th Circuit, right?

15 | MR. CHANENSON: That's my understanding,  
16 | although the 4th Circuit was not expansive in its  
17 | reasoning and --

18 | JUDGE CASTILLO: Um-hum.

19 | MR. CHANENSON: -- I hope I was traveling  
20 | when the 3rd Circuit issued its opinion. No matter  
21 | where I was, I haven't seen it.

22 | JUDGE CASTILLO: To your knowledge, has any  
23 | court accepted Hicks as binding precedent? Any Circuit  
24 | Court?

25 | MR. CHANENSON: No, no Circuit Court of which

1 I am aware of. There are some isolated District Courts  
2 that have found it at least persuasive, being outside  
3 the 9th Circuit.

4 JUDGE CASTILLO: So it's only precedent in  
5 the 9th Circuit?

6 MR. CHANENSON: To my knowledge.

7 JUDGE CASTILLO: And the 9th Circuit happens  
8 to be a circuit with about maybe 500 of these affected  
9 crack cases, is that about right?

10 MR. CHANENSON: That's my recollection, yes,  
11 sir.

12 JUDGE CASTILLO: And the 4th Circuit, which  
13 has rejected Hicks in this one-page opinion, has about  
14 over 5,000 of these 19,000 cases, right?

15 MR. CHANENSON: Yes.

16 JUDGE CASTILLO: What does that tell you  
17 about what we should be doing on retroactivity, and is  
18 it a situation where Hicks is sort of the tail wagging  
19 the dog?

20 MR. CHANENSON: It tells me that you should  
21 not allow Hicks to be the tail that wags the dog. I  
22 think that Hicks is wrongly decided, but both the  
23 facts, from a practical standpoint, that the 4th  
24 Circuit does not follow that rule and that the  
25 Commission still has the ability to promulgate policy

1 | statements that could even guide 9th Circuit -- the  
2 | overwhelming balance of the equities, in my opinion,  
3 | advocates in favor of retroactivity. And let's not  
4 | forget Rita, Rita versus United States, where of course  
5 | the guidelines are still effectively advisory, but the  
6 | Supreme Court has provided a tremendous incentive to  
7 | district judges to pay attention to what the Commission  
8 | has to say, creating a safe harbor of sorts. And if  
9 | you make that harbor more welcoming for the issue of  
10 | resolving of these kinds of cases, I think certain  
11 | issues of the concerns that the Department has with  
12 | respect to disparity of individuals, where Amendment  
13 | 706 would apply, can be reduced.

14 | JUDGE CASTILLO: Thank you.

15 | CHAIR HINOJOSA: Commissioner Horowitz.

16 | COMMISSIONER HOROWITZ: Yeah. Let me just  
17 | follow up on what Professor Chanenson said. I  
18 | appreciate your testimony. Let me also just clarify.  
19 | The question I asked, or so meant to ask, Judge Walton  
20 | this morning, wasn't that we wait for the decision of  
21 | retroactivity, until the Supreme Court decision in  
22 | Kimbrough, but whether District Courts should then  
23 | wait, if we did decide to make the guideline amendment  
24 | retroactive, before sentencing. And his answer, I  
25 | think obviously was the right answer, which is, for

1 | those individuals who would be released anyway, there's  
2 | no reason to wait. And so let me just ask the question  
3 | to you, then. If a district judge decides to wait, in  
4 | an appropriate circumstance, and the court reverses the  
5 | Kimbrough decision of the 4th Circuit, do you see that  
6 | having any impact on a decision to make the guideline  
7 | retroactive? Does Kimbrough overlay at all with the  
8 | decision we're making?

9 |           MR. CHANENSON: It impacts it, certainly. It  
10 | impacts -- again, if I understand the question, and I  
11 | apologize for misunderstanding it before, but it gave  
12 | me a chance to say something nice about Judge Castillo.

13 |           COMMISSIONER HOROWITZ: That's right. And we  
14 | all try to do that occasionally, on the Commission.

15 |           JUDGE CASTILLO: Occasionally.

16 |           COMMISSIONER HOROWITZ: Occasionally.

17 |           MR. CHANENSON: If I understand the scenario  
18 | correctly, what you're positing is a situation where  
19 | judges are freer than some of the Circuit Courts have  
20 | up to this point allowed to disagree with the 100 to 1,  
21 | or now whatever it is, ratio embedded in the  
22 | guidelines, and that Booker would apply on these 3582-  
23 | type proceedings. It makes the promulgation of policy  
24 | statements all the more important. But again, I think  
25 | that the retroactivity of this issue, to me, still is

1 | the appropriate course to follow on the simple justice  
2 | of it. So yes, this will make life more complicated.  
3 | It raises issues of serious concern as to disparate  
4 | treatment from judge to judge, as we have not seen too  
5 | big of an issue after Booker, but it's the -- you know,  
6 | the monster hiding under the bed of Booker. But I  
7 | think that we can mitigate that or the Commission can  
8 | mitigate that through the promulgation of greater  
9 | policy statements.

10 |           COMMISSIONER HOROWITZ: Thanks.

11 |           CHAIR HINOJOSA: Commissioner Ferry.

12 |           COMMISSIONER FERRY: Let me echo the thanks  
13 | of my colleagues. I found your presentation extremely  
14 | helpful and thank you for the thoughtfulness given to  
15 | the policy statements. On that note, would you --  
16 | what's your reaction or what your recommendation be to  
17 | whether or not the Commission should enact a policy  
18 | statement indicating that the court should not consider  
19 | new factual arguments that may be raised under 3553(a),  
20 | that is essentially arguing that new facts and things  
21 | which aren't relevant to the two-level reduction should  
22 | not be part of the 3582(c) hearing? Would that be  
23 | helpful to the District Courts and do you think that  
24 | would be wise for the Commission to do?

25 |           MR. CHANENSON: I've struggled with this

1 | because 3582(c)(2) proceedings are different, at least  
2 | in my mind. Again, no, I don't think that they are  
3 | resentencings, but they're not exactly Mr. Reilly's  
4 | bailiwick, either. I think it probably would be best  
5 | not to promulgate a policy statement in that regard, in  
6 | part because we don't want to -- within limits and  
7 | guidelines provided by the Commission, I am reluctant  
8 | to tell a District Court judge that an individual's  
9 | misconduct while in an institution is not relevant.

10 |           I'm reluctant to tell a District Court judge  
11 | that something, you know, wonderful that's happened to  
12 | a defendant is not relevant. Again, by providing  
13 | guidelines focusing on specific concerns, if you want  
14 | to identify a population that the judge should look at  
15 | with a particularly jaundiced eye, and by providing the  
16 | hard limit that I think already exists, I think within  
17 | that range of those two levels, I do think that the  
18 | judge can make that determination.

19 |           Otherwise, if I understand what you're saying  
20 | correctly, we're looking purely at historical matters.

21 |       And while there's certainly -- it's certainly a  
22 | plausible position and truthfully, I did struggle with  
23 | it. I think, on balance, I would encourage the judges  
24 | to, within the limit of the two levels, consider  
25 | everything.



1 MS. PIEHL: Can I add to that, because I  
2 would make the same argument. I think it would  
3 mitigate some of the reentry concerns that we heard  
4 earlier, if the conduct while in prison, whether it be  
5 to the inmate's benefit or detriment, would be helpful  
6 and mitigate some of the concerns about shifting the  
7 release date when the Bureau of Prisons hadn't planned  
8 for that particular progression.

9 So it would be nice for the Bureau of Prisons  
10 to be able to contribute the information that they  
11 would otherwise have contributed at a parole hearing,  
12 for example. That would perhaps allow for conditions  
13 of release or some effort to even determine the  
14 particular length of release. For the first group to  
15 be released very soon, you might want to make sure they  
16 had several months left of a sentence that would allow  
17 for halfway house placement before completion of the  
18 sentence.

19 CHAIR HINOJOSA: There being no other  
20 questions, we thank you all very much.  
21 Professor Chanenson, on behalf of all us, we do thank  
22 you for the nice things you said about Judge Castillo.  
23 And his father also thanks you.

24 MR. CHANENSON: Thank you all very much.

25 JUDGE CASTILLO: Thank you very much. Call

1 | this first panel with regards to different member of  
2 | the community expressing their perspectives with  
3 | regards to the issues before the Commission involving  
4 | the decision with regards to the retroactivity of new  
5 | guideline amendments, both in the crack cocaine  
6 | sentencing matters, as well as criminal history.

7 |           We have Mr. Wade Ikard, who currently serves  
8 | as the Weed and Seed Coordinator for the South  
9 | Statesville, North Carolina community, where he has  
10 | been involved in community development and outreach  
11 | through quite a few organizations in the community and  
12 | we certainly appreciate his presence here today. We  
13 | also have Mr. Chuck Canterbury, who is the National  
14 | President of the Fraternal Order of Police, having  
15 | served in quite a few capacities within the  
16 | organization, both at the local level, where he was  
17 | local lodge president for 13 years and state lodge  
18 | president for eight years and we certainly also  
19 | appreciate your presence and your willingness to share  
20 | your thoughts with us today, Mr. Canterbury.  
21 | Mr. Ikard, sir.

22 |           MR. IKARD: Good afternoon. My name is  
23 | Wade Ikard. It's a pleasure to be here today to share  
24 | my testimony before the Sentencing Commission. Again,  
25 | I am a native of Statesville, North Carolina, father of

1 | three and married. I'm a graduate of Statesville High  
2 | School and also attended Mitchell Community College.  
3 | As a community activist, I serve on several boards in  
4 | my community in South Statesville; the Boys and Girls  
5 | Club, I Care, Human Relations Council, the 115 Corridor  
6 | Statesville Redevelopment Community. All these  
7 | programs are involving helping restore our community.  
8 | My job is currently the Weed and Seed Coordinator,  
9 | South Statesville.

10 |           Weed and Seed is a Department of Justice base  
11 | program whose goal is to prevent, control and reduce  
12 | crime, drug abuse and gang activity in target high-  
13 | crime neighborhoods. Weed and Seed strategies follow a  
14 | two-prong process; local law enforcement agencies and  
15 | prosecution weeding out criminals as they engage in  
16 | criminal activities. Weed and Seed, I can say, has  
17 | been the best that has happened in South Statesville.  
18 | We have numerous goals that we have set.

19 |           One of the most important goals was building  
20 | bridges, relationships, with our local law enforcement.  
21 | At one time, community meetings, all of our meetings  
22 | were our police was on one side of the room and our  
23 | community sat on the other side of the room. No  
24 | counter-communication, whatsoever. But now, through  
25 | Weed and Seed, we build great bridges, great

1 | relationship with our local law enforcement. Numerous  
2 | of community events are being held, National Night Out,  
3 | fall festivals, back to school rallies, Community Watch  
4 | and more. Also, with the assistance of Weed and Seed  
5 | initiative, we have a fully functional police  
6 | substation in our Weed and Seed target area also, which  
7 | -- this gives the residents to have police at their  
8 | disposal.

9 |           Also housed in our substation is a full-time  
10 | code enforcement officer who focuses just on our Weed  
11 | and Seed target area. Fifteen to 20 years ago, South  
12 | Statesville was a very vibrant community, but over the  
13 | 15 to 20 years, we have seen crack cocaine devastate  
14 | our community. South Statesville was, at one time, a  
15 | very mid-class community but now, I guess you can call  
16 | it what some would say a ghetto. Crack cocaine has  
17 | broken our neighborhoods.

18 |           The violent crimes that are now being  
19 | committed due to crack cocaine has skyrocketed. Gang  
20 | activity has flooded our communities and terrorized the  
21 | residents, especially the elderly, who are frightened  
22 | for their lives because they have been threatened by  
23 | these gang members, not mentioning the young, from the  
24 | age of 11, that are selling crack, been forced and  
25 | pushed into selling crack because they feel like this

1 | is the way out, this is the only way out. Why?  
2 | Because of the lack of education and not having parents  
3 | in the home. Also allow me to share a few testimonies,  
4 | which are personal, with you today. These are real  
5 | people, but for confidentiality purpose, I'm going to  
6 | pursue another name. I want to speak on Morris.  
7 | Morris and I, believe it or not, were once -- at one  
8 | time, enemies.

9 |           We worked in the same neighborhood, but as I  
10 | separated from my wife, he dated my wife and you can  
11 | understand, when you have someone else dating your  
12 | ex-wife, but Mark (sic) was a very vibrant young man,  
13 | worked very hard, had quite a few things going for  
14 | himself, but over a period of time, a change came in  
15 | Morris's life. Excuse me. I was confronted by Mark  
16 | one evening and Mark asked me could he have a ride and  
17 | I said sure, so I gave him a ride. And we got to a  
18 | certain location, he asked me to borrow some money and  
19 | I declined.

20 |           He said well, can I borrow \$5? And I'm  
21 | thinking, you know, Mark is asking me for money and we  
22 | don't even get along. But then, excuse my language,  
23 | but I'm going to say it the way Mark said it to me,  
24 | Mark said give me \$5 and I'll suck your dick. What  
25 | caused a man, 30 years old, to lower his standards to

1 | say give me \$5 to perform such an act? Now, Kim, Donna  
2 | and Janet, all three of these are close friends and  
3 | classmates of mine. All have been physically quickened  
4 | in age, rotting teeth, body deterioration, loss of  
5 | hair, blotchy skin, constantly in jail for theft,  
6 | prostitution, in and out of courts for neglect and  
7 | child abuse.

8 |           What would make an A-plus student, a talented  
9 | singer, an artist, a possible college graduate, a  
10 | mother, abandon her children and begin to sell her body  
11 | on the streets for just a few dollars? Again, to  
12 | support the habit of crack. Now, this name I'm not  
13 | going to make up because this is personal. Charles, my  
14 | uncle, whom I funeralized (phonetic sp.) due to crack  
15 | cocaine. Our family members knew that Charles was  
16 | addicted to crack and we tried very hard to get Charles  
17 | into some rehab programs. He would go to rehab, get  
18 | out of rehab, go back into a program, go into 12-step  
19 | programs, all to no avail.

20 |           Charles' crack habit got so intense that he  
21 | owed hundreds of dollars to a dealer. He couldn't pay  
22 | it off. What happened to my uncle? Shot, run down,  
23 | bullet lodged into his pelvic. The next day Charles  
24 | died because he wasn't able to pay off his crack  
25 | dealers. These criminals that we are here talking

1 | about today, they know what they do. They know the  
2 | harm that crack does to people, but do they care that  
3 | mothers are taking their money they should feed their  
4 | children to buy crack? No. They don't care at all.  
5 | They just continue to do it. They need to make the  
6 | best of their sentences to help themselves to be  
7 | revitalized while they are incarcerated.

8 |           I feel that very strongly. In April, the  
9 | Commission voted to lower recommended sentencing for  
10 | those caught with distributing crack cocaine, sent to  
11 | Capitol Hill on May the 1st and was passed as of  
12 | November 1st after Congressional review. Today's  
13 | hearing is focusing on 2,000 convicted prior felons.  
14 | In analysis, the Commission has estimated the change to  
15 | lower the prison population to reduce the size of  
16 | federal population within the next 15 years, estimated  
17 | 3800 drug dealers, if not all, from the majority of  
18 | crack cocaine and saving about \$87 million, according  
19 | to the Sentencing Commission.

20 |           I read where a private organization is  
21 | tracking the issue. I have a question to ask. Who's  
22 | tracking the issue of where these individuals will  
23 | reside and a rehabilitation process while they're  
24 | incarcerated? Who's tracking the jobs that would be  
25 | available for them, even the transition back into the

1 | community? Who's tracking the Morris, Leslie, Kim,  
2 | Donna, Jack, Janets and the Charles that may be  
3 | affected in the community that are trying to be  
4 | revitalized? Who is tracking the crack babies and the  
5 | increase of gang violence in our communities? \$87  
6 | million may have saved, but what about the millions  
7 | that will and could be affected by this retroactive  
8 | sentencing, if passed?

9 |           And the millions that would be used to take  
10 | the cases back to court when the U.S. Attorneys already  
11 | got pending cases? Last year, four-fifths of those  
12 | federal courts were African-American, a message to  
13 | African-American women, African-American men, stop  
14 | selling drugs. Stop selling crack. Stop distributing.  
15 | This is not a black issue or a white issue. It's  
16 | reality. You are contributing drugs to what is killing  
17 | your own race. Thank you for having this opportunity  
18 | to speak before you today.

19 |           CHAIR HINOJOSA: Thank you, Mr. Ikard.  
20 | Mr. Canterbury, sir.

21 |           MR. CANTERBURY: Good afternoon,  
22 | Mr. Chairman, Vice Chairman, distinguished  
23 | Commissioners of the U.S. Sentencing Commission. I  
24 | think that you all remember me from my previous  
25 | testimony and I'd like to thank you this opportunity to



1 | be here today to present the rank and file  
2 | practitioner's view of retroactivity. As you know, this  
3 | Commission voted earlier this year to reduce the  
4 | penalties for crack cocaine and at that time, my  
5 | testimony was that even if there was a disparity, we  
6 | believed that maybe powder cocaine should've been  
7 | increased rather than crack cocaine reduced and we  
8 | still feel that way.

9 |           Regrettably, this time Congress failed to act  
10 | and the amendment lowering the penalties for crack  
11 | cocaine were adopted November 1st. With these changes  
12 | already in place, the issue before us today is whether  
13 | these recent changes to the sentencing guidelines  
14 | should be applied retroactively and I'm here this  
15 | afternoon to urge you, in the strongest possible terms,  
16 | on behalf of practitioners, not to do this.

17 |           To begin with, at least 19,500 crack dealers  
18 | will have their sentences reduced and that in addition  
19 | to any other reduction that that offender may have  
20 | already received for cooperating with the government  
21 | for good time credits. It's important to realize that  
22 | these criminals are not low-level dealers or first-time  
23 | offenders. Eighty percent of them have previously been  
24 | convicted of a crime. A majority of them have multiple  
25 | prior convictions and 35 percent of them possess the

1 | firearm in connection with their drug dealing  
2 | operations. Further, more than 15 percent of these  
3 | offenders are in the highest criminal history category.

4 | Projections show that at least 2500 additional crack  
5 | dealers will be released into the community either  
6 | immediately or within the first year of retroactive  
7 | application and another 5,000 could be released into  
8 | the community within two years.

9 |           Some offenders, those who are the most likely  
10 | to be high-level dealers with significant criminal  
11 | histories, could see their sentences reduced in excess  
12 | of 49 months. At a time when law enforcement is seeing  
13 | an increase in crime rates that have fallen for more  
14 | than a decade, it seems at variance with common sense  
15 | and good public policy to release, en masse, crack  
16 | dealers and drug offenders back into our neighborhoods.

17 |           Let me give you some concrete examples as to  
18 | how the retroactive application of these new guidelines  
19 | may affect real communities. I'd like you to consider  
20 | the case of Leonard Brown. Mr. Brown, before his  
21 | arrest, conviction and sentencing, was the main drug  
22 | supplier for Sandersville, Georgia, a rural community  
23 | with approximately 10,000 residents. Mr. Brown, prior  
24 | to being selected by a jury of his peers, to serve a  
25 | sentence that this Commission now deems to be too

1 | lengthy, had an impressive, long criminal history,  
2 | which includes crimes of violence and drug dealing.  
3 | Yet despite this impressive body of work, the best  
4 | efforts of local and state law enforcement authorities  
5 | were not sufficient to remove Mr. Brown from the  
6 | community. The state judicial system had become a  
7 | revolving door that resulted in placing this violent  
8 | drug dealer back into the community after a very brief  
9 | period of incarceration. Obviously, this frustrated  
10 | local and state law enforcement officers, as well as  
11 | the residents of Sandersville, Georgia, whose safety  
12 | was at risk while Mr. Brown's business was in  
13 | operation. However, the federal prosecution and  
14 | sentencing of Mr. Brown had a ripple effect in  
15 | Sandersville.

16 |           Admittedly, the actual amounts of crack  
17 | cocaine possessed by Mr. Brown at the time of his  
18 | arrest, which he's currently incarcerated for, were not  
19 | particularly high, but for a community that size, he  
20 | was a drug kingpin and supplied the community a  
21 | substantial amount of drugs. As befits a person of his  
22 | standing, he employed minors to do the actual legwork,  
23 | exposing them to the risk, while he reaped the rewards.  
24 | It was not until he was prosecuted by federal  
25 | authorities, however, that he was held accountable for

1 | his crimes. His conviction, the significant sentence  
2 | he received and the fact that he would not be eligible  
3 | for parole, sent a clear message that there were  
4 | serious consequences for drug dealers if they were  
5 | prosecuted by federal authorities. It also sent a  
6 | message to the residents and the children of  
7 | Sandersville that the criminal justice system was not  
8 | completely broken and that a long-time drug dealer,  
9 | like Brown, could and would go to jail.

10 |           If the changes in the sentencing guidelines  
11 | were made retroactive, Mr. Brown's sentence will be  
12 | reduced by approximately three years, making him  
13 | eligible for immediate release. This sends a clear  
14 | message that we're not serious about getting and  
15 | keeping drug dealers out of our community. The  
16 | residents of Sandersville, Georgia should be outraged  
17 | because they knew how long it took to put Mr. Brown in  
18 | prison.

19 |           This one example of how the retroactive  
20 | application of the new rules will just be multiplied by  
21 | the number of 10,000 member communities there are in  
22 | our country. It's important to remember that the  
23 | incalculable devastation wrought by our nation by crack  
24 | cocaine and the millions of lives that were damaged and  
25 | families that were wrecked by this drug in many of our

1 | cities have never fully recovered. And as you know,  
2 | the crime rate in the United States is on the rise  
3 | again and I believe it's directly correlated to the  
4 | crack cocaine and the methamphetamine in the country.  
5 | I'd like to thank the Commission for the opportunity to  
6 | give you the rank and file perspective from the people  
7 | on the streets that are dealing with the crack dealers  
8 | and I'll be glad to sit for any of your questions.  
9 | Thank you very much.

10 |           CHAIR HINOJOSA: Thank you, Mr. Canterbury.  
11 | And the panelist, the third panelist, has just walked  
12 | in at a very appropriate moment. Mr. Hilary Shelton,  
13 | who's the director of the Washington bureau of the  
14 | NAACP. Prior to that, of course, he has served as the  
15 | Federal Liaison and Assistant Director of the  
16 | Government Affairs Department of the United Negro  
17 | College Fund and Mr. Shelton, we appreciate your  
18 | presence and you would like to give us your opening  
19 | remarks, sir.

20 |           MR. SHELTON: Thank you, sir. I'd like to  
21 | thank the Commission for inviting me here to today on  
22 | behalf of the NAACP, our nation's oldest and largest  
23 | grass roots based civil rights organization. As you  
24 | mentioned, my name is Hilary Shelton. I'm the Director  
25 | of the NAACP's Washington bureau. The Washington

1 bureau is a federal legislative and national public  
2 policy arm of our nation's oldest and largest grass  
3 roots organization. I'd also like to begin by thanking  
4 the United States Sentencing Commission for your  
5 steadfast efforts to eliminate the racially  
6 discriminatory sentencing laws, mandating that a  
7 conviction for possession for five grams of crack  
8 cocaine is equivalent to 500 grams of powder cocaine,  
9 despite the fact that the two drugs are  
10 pharmacologically indistinguishable.

11           The result of this 100 to 1 ratio has been  
12 the incarceration of a vastly disparate number of  
13 African-Americans and Americans of Hispanic origin. As  
14 such, the NAACP would like to commend the Sentencing  
15 Commission for its May 2007 amendments to sentencing  
16 guidelines for crack cocaine, which will have the  
17 effect of lowering the guideline sentencing range for  
18 certain categories of offenses and offenders.

19           While it is not all that we have been  
20 advocating for, it is an important first step. The  
21 NAACP strongly supports making the amendments  
22 retroactive in those currently incarcerated for crack  
23 cocaine convictions. It has been a year almost to the  
24 day since I last testified before you in opposition to  
25 this injustice. At the time, I told you that despite

1 | the fact that cocaine use is roughly proportionate  
2 | among the different populations of our nation, the vast  
3 | majority of offenders who are tried, convicted and  
4 | sentenced under federal crack cocaine mandatory minimum  
5 | sentences are African-American. Our people in our  
6 | communities continue to be disproportionately  
7 | devastated by the law. Almost 83 percent of those  
8 | convicted of federal cocaine offenses are African-  
9 | American, while according to the 2000 census, only 12.9  
10 | percent of the entire U.S. population is African-  
11 | American. Furthermore, according to the federal  
12 | government's most recent survey, less than 18 percent  
13 | of our nation's crack cocaine users in 2005 were  
14 | African-American.

15 |           Few people today argue that policy makers  
16 | could have foreseen, 20 years ago, the vastly disparate  
17 | impact the 1986 law would have on communities of color,  
18 | yet the fact that African-Americans and especially  
19 | low-income African-Americans continue to be  
20 | disproportionately and severely penalized at much  
21 | greater rates than white Americans for drug use and  
22 | that the policy of the federal government is having a  
23 | devastating effect on our communities and that these  
24 | laws continue to be maintained show, at the very least,  
25 | a callous disregard for our people in our communities.

1 | And it is the disregard for the fate of our people in  
2 | our community that we continue to erode our confidence  
3 | in our nation's criminal justice system. How can  
4 | African-Americans trust or respect policy makers  
5 | perpetuate a law that clearly has such a racially  
6 | discriminatory impact?

7 |           And because it is only human nature to punish  
8 | the messenger, the resulting distrust, disrespect and  
9 | anger that African-American communities feel often  
10 | result in a lack of necessary cooperation with law  
11 | enforcement representatives and the criminal justice  
12 | system, as well. Reform of our nation's cocaine laws  
13 | have been a priority to NAACP since the resulting  
14 | disparities in incarceration became evident and it is  
15 | now a rallying point for our members and the  
16 | communities we represent.

17 |           And so I would like to reiterate the NAACP's  
18 | support and appreciation for the Sentencing  
19 | Commission's continued call for a repeal of the  
20 | mandatory minimum crack cocaine sentences. I would  
21 | also again like to extend our gratitude for the  
22 | Commission's recent amendment which will, on average,  
23 | trim over 15 months from current crack sentences. And  
24 | I would like to strongly repeat the NAACP's strong  
25 | support for making this amendment retroactive. As you



1 know, a decision to make this amendment retroactive  
2 will impact roughly 19,500 men and women currently in  
3 jail, approximately 86 percent of whom are African-  
4 American. It only makes sense that a person who was  
5 sentenced between October 1st, 1991 and June 30th,  
6 2007, should not have to spend more time in prison than  
7 those sentenced after November 1st, 2007, simply  
8 because they had the misfortune of being sentenced at  
9 the wrong time. As I have said earlier, the  
10 continuation of the 100 to 1 sentencing ratio and the  
11 disparate impact it has on our communities exacerbates  
12 our mistrust of the American criminal justice system.

13           It is my hope that the November crack cocaine  
14 amendments will help again in addressing this problem  
15 and failure to apply them retroactively, however, as it  
16 has been done in the past relative to LSD, marijuana  
17 and oxycodone, all which benefit other groups more so  
18 than African-Americans, would perpetuate and perhaps  
19 even intensify the image of injustice. I would like to  
20 thank the Commission again for all of your work on this  
21 issue. Together, we can hopefully persuade members of  
22 the Congress, as well as the American public at large,  
23 for a dire need to reform crack cocaine sentencing. In  
24 the meantime, please note that the NAACP supports and  
25 appreciates your recent amendment to crack cocaine

1 | sentencing guidelines and strongly urge you to apply  
2 | these changes retroactively. This is indeed a matter  
3 | of fairness and simple justice. At this time, I'd be  
4 | delighted to take any questions you have.

5 | CHAIR HINOJOSA: Thank you, Mr. Shelton.

6 | COMMISSIONER FERRY: Mr. Ikard, you've heard  
7 | others indicate, as Mr. Shelton did, that the current  
8 | crack penalty structure has a disproportionate impact  
9 | on African-Americans. Can you speak a little bit to  
10 | what the impact of retroactivity will be upon the  
11 | African-American community in Statesville?

12 | MR. IKARD: To allow -- I don't know the  
13 | number of offenders that would be released back into  
14 | the community if this is passed, but our communities  
15 | would be devastated if this law was to pass. I mean,  
16 | we're currently trying to revitalize, enhance the  
17 | quality of life of families in these areas and to allow  
18 | criminals to come out of prison early, at this  
19 | particular time, our work -- I mean, it's just going to  
20 | be like well, you know, where do we go from here? Do  
21 | we start at ground zero again? My thing is they come  
22 | out, where are they going? They're coming back to the  
23 | same place, the same community, and if not -- if they  
24 | have not yet been revitalized or getting their life  
25 | straightened out while they're in prison, what are they

1 | going to come back and do? Jobs are going to be  
2 | scarce. I can tell you what they're going to do. I  
3 | know for a fact. I have family members, I have a  
4 | brother and I'm going to say this, I have a mother that  
5 | was convicted for it and what did they go back to do  
6 | again? Selling. So to me, what do they do? They go  
7 | right back sometimes to selling drugs again, to home.

8 |           The people that I testified about, those are  
9 | the ones that are hurting and yes, their numbers are  
10 | high. I agree a little with what the gentleman said,  
11 | but it's going to affect the community. So what's  
12 | going to be for the community to allow this to come  
13 | back, that African-American people can continue to have  
14 | to go through this process of not -- being able to  
15 | possess all these drugs, this crack cocaine? Crack,  
16 | you can get it for \$5. What would a woman do for \$5 to  
17 | get it? What will she do? I told you earlier what a  
18 | gentleman would do to get it. These are things that  
19 | need to be taken into consideration. Thank you.

20 |           CHAIR HINOJOSA: Vice Chair Steer.

21 |           COMMISSIONER STEER: I guess I want to wade  
22 | into a little bit of a thorny issue that bothers me. I  
23 | think all of the members of the Commission are aware of  
24 | the disproportionate racial impact of the crack cocaine  
25 | sentencing policies. One of the themes that permeates

1 | the public comment and the testimony, including your  
2 | testimony, Mr. Shelton, is that the Commission should  
3 | make this amendment retroactive because it made several  
4 | other amendments retroactive in the past; not this  
5 | commission, but previous commissions. And those  
6 | amendments that are mentioned are the marijuana plant,  
7 | oxycodone and you know, the -- you know, that list is  
8 | incomplete because there were a few other amendments,  
9 | one involving the definition of what, under the  
10 | guidelines, constitutes crack -- constitutes cocaine  
11 | base where the Commission said it's only crack cocaine  
12 | and that amendment was also made retroactive.

13 |           And then the Commission, as you may know,  
14 | lowered the top level of the drug quantity table, Level  
15 | 42 to 38. I frankly don't know what the ratio of  
16 | impact of those two amendments were, but I suspect it  
17 | was different from those three that are mentioned. I  
18 | guess my basic question is this. Why shouldn't this be  
19 | decided on the merits of the -- what does the impact of  
20 | the race of the offender have to do with whether or not  
21 | a commission that is charged, under the law, to be  
22 | entirely racially neutral in its decision making, what  
23 | does it have to do, what does it add to the decision  
24 | making process?

25 |           MR. SHELTON: If I understand your question,

1 | you're asking what difference it makes that we actually  
2 | introduce the issue of the racial disparities and how  
3 | this particular sentencing guideline has been utilized.  
4 | And very well, crack cocaine is clearly the cheaper of  
5 | the drugs of the two, powder cocaine, crack cocaine.  
6 | It's much easier to get at a lower cost, yet it has a  
7 | much higher price in our criminal justice system.

8 |           So what we're saying is that those people who  
9 | happen to be poor, those people who happen to be  
10 | African-American or Hispanic, which of course, the  
11 | largest demographics prosecuted for the drug and  
12 | incarcerated for possession of the drug are those that  
13 | are going to be most affected, though even the  
14 | Commission -- I shouldn't say even the Commission --  
15 | the Commission had the foresight to see that this will  
16 | be a problem further down. It was the Commission that  
17 | said there should have been no difference between the  
18 | two drugs initially.

19 |           It was the Commission that recommended to the  
20 | Congress that indeed, we do a one-for-one. It was the  
21 | Commission that was right then and it's the Commission  
22 | that's right now. Very clearly, if even the Congress  
23 | would be able to have the foresight to see the  
24 | disparate impact this would have on African-Americans  
25 | and other racial and ethnic minorities in a scenario,

1 | our universe in which race becomes a determinate of  
2 | whether is someone is going to be discriminated and be  
3 | punished more harshly or whether they're going to be  
4 | treated fairly in this country. And indeed, we  
5 | recognize that over the course of years, indeed, those  
6 | who happen to be black and brown are to be more heavily  
7 | penalized for utilizing the same drug, though even the  
8 | Department of Human -- Health and Human Services says  
9 | that we use illegal drugs at about the same rate.

10 |           Now, don't get me wrong. The NAACP's not  
11 | suggesting that anyone should use illegal drugs at all,  
12 | but in these, we talk about equal protection under the  
13 | law and -- very well that if you commit the same crime,  
14 | you should do no more than the same time. And indeed,  
15 | when we have these drugs that are pharmacologically  
16 | indistinguishable, that have no other affect, indeed,  
17 | we should treat them the same way.

18 |           I think it's really problematic, quite  
19 | frankly, when you end up with a scenario where African-  
20 | Americans, the poorest of the poor in our country and  
21 | in this particular case, are those who spend the most  
22 | time in jail. And quite frankly, if you want to find a  
23 | better use that \$25,000 a year plus that it takes for  
24 | someone to spend time in prison over the course of a  
25 | year, then program to provide a road to full

1 participation in our society, like job training, drug  
2 assessment, drug counseling, other programs like that  
3 are a much utilization of that money then keeping  
4 people in prison one year or more longer, which is  
5 exactly what would happen if we don't make this  
6 retroactive.

7 JUDGE SESSIONS: I'm going to expand a little  
8 bit on that question. For others, the real question is  
9 the perception of the criminal justice system within,  
10 well, the entire country, but also within the African-  
11 American community. And to what extent does the  
12 disparity, the 100 to 1 ratio, impact the view, among  
13 the African-American community members, that the system  
14 is unfair and therefore essentially result in bringing  
15 disrespect on the criminal justice system?

16 MR. SHELTON: May I begin by saying that this  
17 is not in a vacuum and that quite frankly, there was a  
18 time when we had different laws on the books for  
19 African-Americans that committed the same crimes as  
20 white Americans in our society. I still look and  
21 almost want to laugh, if it weren't so seriously, about  
22 African-American men being brought up on charges of  
23 rape and the category of rape is malicious ogling and  
24 only African-American men looking at white women would  
25 be sentenced for malicious ogling, that form of rape.

1 | It's almost funny when you think about it, but there  
2 | are men that have spent time in prison for just that  
3 | particular offense in our society. So that being part  
4 | of the context that we're having this conversation, we  
5 | know that there have been many circumstances where  
6 | African-Americans were committing the same crime, ended  
7 | up being punished much more harshly in terms of time  
8 | spent in prison and even the utilization of the death  
9 | penalty. So we're not talking about a discussion  
10 | that's outside the context of a history that we have in  
11 | this country that's been extremely troubling.

12 |                   CHAIR HINOJOSA: Commissioner Howell.

13 |                   COMMISSIONER HOWELL: I just want to talk a  
14 | little bit with Mr. Canterbury and also Mr. Ikard to  
15 | both frame a question, but also just to try and address  
16 | some of what I view as some of the more alarmist  
17 | statistics that you may have heard without the  
18 | appropriate caveats. And sometimes that's difficult in  
19 | the media, but here, I think it's really important to  
20 | make it clear that, for example, Mr. Canterbury, in  
21 | your example of the drug dealer who, after, you know,  
22 | the enormous effort of law enforcement, put away a  
23 | violent drug dealer and put him in jail. I think it's  
24 | worth noting, if you weren't here for the earlier  
25 | morning or I think many of my fellow commissioners



1 brought this out, that the two-level reduction in our  
2 crack amendment, if we do make it retroactive, really  
3 isn't automatic reduction in prison time for anybody  
4 who's currently in prison. It really is an opportunity  
5 for a judge, if the appropriate motions are filed, to  
6 consider whether a reduction in the sentence is  
7 appropriate.

8           So I think the facts relating to that  
9 particular person's offense conduct would probably be  
10 something that a judge -- I'm confident the judge would  
11 look at that. So I just want to allay your concern  
12 that, you know, violent drug offenders are  
13 automatically going to have the key unlocked from the  
14 door of their prison cell. That's not exactly how it's  
15 going to work.

16           Mr. Ikard, also, you also heard and you've  
17 used some of the statistics about the numbers of  
18 defendants who may be released should a judge,  
19 evaluating each of those individual cases, decide the  
20 reduction is necessary, talked about the numbers who  
21 might be released into your community and I commend you  
22 on the time and the effort that you're spending to put  
23 your community and hold your community together and  
24 it's -- I think we're all very impressed by that. I  
25 think, although numbers of 19,500 people have been

1 | discussed, I just want to make sure you understand that  
2 | that's over the course of over 30 years, so it's not  
3 | going to be all at once and in fact, from the district,  
4 | I think, that you're in, in the first year it would  
5 | only be about 42 people who would be released, so it's  
6 | not a huge influx of individuals.

7 |           Nonetheless, you know, the Commission is very  
8 | cognizant of the fact that, you know, people who are --  
9 | who have been incarcerated, this population consist of  
10 | people who may have criminal history scores, and those  
11 | are all things that we have enormous confidence that  
12 | the federal judges in this country will be able to  
13 | evaluate on making the particular decisions and  
14 | particular cases as to whether a reduction in sentences  
15 | is reduced.

16 |           And so I just want to make sure that, to the  
17 | extent that there is public listening to your comments  
18 | and your very legitimate concerns, that those are not  
19 | concerns that the Commission has ignored, we're well  
20 | aware of them, but I also wanted to make sure that you  
21 | understood that in the context of how this is actually  
22 | going to operate, that alarmist concerns are not really  
23 | appropriate.

24 |           MR. CANTERBURY: I don't want 42 more drug  
25 | dealers in my city.

1 MR. IKARD: May I?

2 COMMISSIONER HOWELL: Um-hum.

3 MR. IKARD: Whether it be 42 in the Western  
4 District and 42 in the next city and the next state,  
5 releasing them, having the U.S. attorneys having to go  
6 back to court and try these cases over or whomsoever  
7 and there are already pending cases, it's just going to  
8 delay things and give other people opportunity that are  
9 like well, I've got -- now I got to go court, but now I  
10 have another year and a half on the streets.

11 What are they going to do? I can tell you  
12 what they're going to do because I deal with them every  
13 day. They continue to do what they were doing. And to  
14 allow 42 to come out early, all right, 42. That's an  
15 impact in the South Statesville community, that's an  
16 impact in North Carolina. That's detrimental to us.  
17 That will hurt us. My thing is this and I stand firm  
18 on this, I have a young lady to tell me I don't have  
19 crack, crack has me. To hear someone say it has me,  
20 that's hurting. I want off, I can't get off. And for  
21 one or whether it be two or 42, to come out and  
22 possible enhance that, no.

23 CHAIR HINOJOSA: Well, I guess this question  
24 is both to anybody who wants to answer it, but is there  
25 -- let's leave aside the issue of retroactivity, but is

1 | there no prison sentence that, when someone comes out,  
2 | they're going to go right back to doing the same thing?  
3 | I mean, is it the length of the sentence or what is it  
4 | that you think would, at some point, when someone's  
5 | released, they're not going to back to be --

6 |           MR. IKARD: Well, let's look at the fact that  
7 | you're already reducing the time, so now they know, if  
8 | they come out and have not yet been rehabilitated,  
9 | well, if I get caught again, I'm out early, five or six  
10 | years now, to go back. Sometimes you have to think  
11 | like a criminal, so sometimes you have to think like  
12 | them and that's how a lot of them think. I work with  
13 | them every day. I walk the streets with them. I visit  
14 | the prisons. I do ministry in the prisons. I do  
15 | ministry in the communities.

16 |           I try to minister to these people, but when I  
17 | go to jail and I hear that some of these offenders are  
18 | still running the streets from the prison, from the  
19 | phone, through letters, telling their boys how to still  
20 | do what they were doing before they came in and no  
21 | change, my thing is this, use your time, use it wisely,  
22 | rehabilitate yourself, come out to be a better citizen  
23 | to help us better our communities, because that's what  
24 | we're trying to do. Thank you.

25 |           MR. SHELTON: If I might -- I'm sorry. I

1 | didn't want to interrupt. I feel like I've dominated  
2 | the conversation. But if I might add that all we're  
3 | doing is taking steps to bring crack cocaine sentencing  
4 | ranges a step closer to being in compliance or in line  
5 | with powder cocaine sentencing ranges. It's not giving  
6 | anyone a pass or anyone a buy. They still get  
7 | punished.

8 |           The issue is should they be punished more  
9 | than if they were taking powder cocaine, the more  
10 | expensive, the more luxurious drug? The sure answer  
11 | that most Americans would say is absolutely not. In  
12 | these cases, you still have the opportunity for judges  
13 | to review these particular inmates to find out if,  
14 | indeed, they should be able to take advantage of the  
15 | reprieve they're giving, the 15 month or longer  
16 | reprieve they'll be given and get it a little bit  
17 | sooner than they would for crack cocaine.

18 |           But again, the crack cocaine sentencing  
19 | guidelines are out of alignment with the powder cocaine  
20 | sentencing guidelines. I'd like to again commend the  
21 | Commission for their first decision that said that  
22 | powder cocaine and crack cocaine were indistinguishable  
23 | in many ways and the sentencing range should be much  
24 | the same. You're making the right step in the right  
25 | direction. The problems that are being raised at the

1 | table are not problems of the issue of how long you're  
2 | in prison, they're problems of how we deal with people  
3 | who are reentering our society and our communities.  
4 | That's why organizations like the NAACP is working on  
5 | bills like the Second Chance Act because we know that  
6 | we're not providing enough assistance to our local  
7 | communities to provide what they need to help these  
8 | people come back into society and not commit the same  
9 | crimes that ended them in prison in the first place.  
10 | We all agree.

11 |           We all know that the definition of insanity  
12 | is when you do the same thing over and over again in  
13 | the same way and expect a different result. We need a  
14 | different result here, but we need it in a way that it  
15 | is also under the grounds of fairness and justice for  
16 | all Americans regardless of race, gender, ethnicity or  
17 | other differences and this is the right move in the  
18 | right direction.

19 |           CHAIR HINOJOSA: Mr. Canterbury, you wanted  
20 | to say something? Well, I guess it would also be  
21 | helpful, Mr. Canterbury, with regards to this example  
22 | of -- I think it was Mr. Brown, is that right? What  
23 | was his total sentence, originally?

24 |           MR. CANTERBURY: I don't think I have that  
25 | information, but I can get it.

1 CHAIR HINOJOSA: Did you want to respond or  
2 make comments on --

3 MR. CANTERBURY: Yeah. You know, I agree  
4 with Mr. Shelton on the Second Chance Act. We know,  
5 from practitioner's sake, that when these people are  
6 released, the majority of them have nothing when they  
7 get home and the system, themselves, puts them back  
8 into the only lucrative market they've ever known in  
9 their life and we, as practitioners, would agree with  
10 that. The problem is, we're putting people back into  
11 the same scenario that are convicted criminals, people  
12 that did a criminal -- committed a criminal act and the  
13 difference between -- and we talked about this before.

14 The difference between crack and powder  
15 cocaine may chemically not be different, but I can tell  
16 you the results on the individuals are much different.  
17 The violence associated with crack cocaine is much  
18 higher than with powder cocaine and that's from a  
19 street practitioner. I don't care what the scientists  
20 say, I can tell you, dealing with somebody that snorted  
21 cocaine versus somebody that's been smoking rock, it's  
22 a lot different on the street, a lot different. And  
23 so, you know, we're not talking about people that are  
24 victims, we're talking about people that committed  
25 crimes, got caught, got prosecuted and if my figures

1 | are right, in the federal sector, about 98 percent of  
2 | them pled guilty and -- after a plea -- a one-chance  
3 | plea agreement. So we're not talking about people that  
4 | didn't know the consequences of their actions.

5 | CHAIR HINOJOSA: Does anybody else have any  
6 | questions? Commissioner Reilly.

7 | COMMISSIONER REILLY: I'd kind of like --  
8 | excuse me -- like to go to Mr. Ikard and recognizing  
9 | that you've been engaged in your human relations  
10 | commission, Boys and Girls Club and all of those  
11 | community activities, I suppose -- and I've been on the  
12 | Commission off and on here for 10 or 12 years now, so  
13 | I've heard the arguments. I've supported the fact that  
14 | we do need to do something to remove the disparity,  
15 | whether that was brining powder up to the same level,  
16 | which I just was handed an article a moment ago that  
17 | the state senate of Ohio has done.

18 | It has raised cocaine powder level to the  
19 | same as the crack, in other words, increasing the  
20 | penalties by a minority of leadership in the Ohio  
21 | senate. But my question to you, I guess, as someone  
22 | very involved in the Boys and Girls Clubs and you  
23 | obviously are quite street smart about things, is what  
24 | is the message we do send to our young people and what  
25 | is the message you would carry back if, indeed, we did



1 | make it retroactive, to the young folks and how you  
2 | would approach them and explain to them what we have  
3 | done?

4 |           MR. IKARD: Well, as you say, serving on the  
5 | boards that I do serve on and working with some of the  
6 | children that I work with on a day-to-day basis and --  
7 | and it's just so that you asked me that, just a few  
8 | days ago I had, I guess, a blood -- I guess I can say  
9 | that, to visit my home, currently trying to get him  
10 | into a program and I told him about some of the things  
11 | that I was involved in, trying to do and they tell me  
12 | I'm still swinging, I'm still doing the same thing. I  
13 | know you got this going on and you got this and you got  
14 | this program going on, but you'd rather still do this.

15 |           And then to take the message back to say  
16 | well, one law has already passed and your homies  
17 | (phonetic sp.), as you call them, are going to get out  
18 | early now, possibly one, maybe 42, just give them the  
19 | incentive to say well, I think I'll continue to do what  
20 | I've been doing. It's not as bad anymore. They roll  
21 | for the bling-bling, the \$200 tennis shoes, the high  
22 | lifestyle, the 22's on the escalades, these are what  
23 | the kids see and how do they think they can achieve to  
24 | get it? A lot of them, by selling drugs. By selling  
25 | drugs. To whom? Their friends, their uncles, their

1 aunts, their cousins, anybody that will buy it. And to  
2 go back and have to tell these children, share with  
3 them this or whether it be aired or however they found  
4 out, you know, if -- which way it goes, I think it  
5 would be devastating to some of the efforts that we're  
6 trying to do in our community, very much so.

7 COMMISSIONER REILLY: Thank you.

8 CHAIR HINOJOSA: Thank you all very much.

9 MR. IKARD: My pleasure.

10 CHAIR HINOJOSA: We appreciate your time.

11 MR. CANTERBURY: Thank you.

12 CHAIR HINOJOSA: If the next panel would  
13 please step forward. Our next panel, already seated,  
14 consists of Mr. Marc Mauer, who has been the Executive  
15 Director of Sentencing Project since the year 2005,  
16 having joined that organization in 1987. Prior to  
17 working with the Sentencing Project, Mr. Mauer served  
18 as the National Justice Communications Coordinator for  
19 the American Friends Services Committee. And we also  
20 have Mr. Pat Nolan, who is the President of Justice  
21 Fellowship, the Criminal Justice Reform Division of the  
22 Prison Fellowship Ministries, and Mr. Nolan served for  
23 15 years in the California State Assembly. Mr. Mauer,  
24 sir.

25 MR. MAUER: Well, thank you so much. I'm

1 | delighted to be here and I appreciate all the hard work  
2 | the Commission has done over the years, on this issue.  
3 | We have previously submitted a letter to the  
4 | Commission, on this issue, and I've submitted testimony  
5 | today, too. It seems to me, given the discussion so  
6 | far today and I've heard a good deal of it, it might  
7 | make more sense for me to focus on some of the public  
8 | safety concerns that have been covered here, and to try  
9 | to lend some perspective on what we know about that  
10 | from a sort of criminological perspective and how we  
11 | can sort of put some of that into context.

12 |           And it seems to me, you know, if we look at  
13 | the testimony this morning from the U.S. Attorney from  
14 | the Western District of North Carolina, we have some  
15 | real issues here. So we have potentially 536 offenders  
16 | who might benefit from a retroactivity proposal and get  
17 | out of prison, as she said, unexpectedly early. I  
18 | don't think it'll be unexpected too many people. But  
19 | first, you know, as you all have pointed out, this is  
20 | over a period of 30 years that we're talking about.

21 |           So during the first year, we're looking at  
22 | possibly a hundred people coming out who would not have  
23 | gotten out that year. This drops off rapidly after  
24 | that in that district, so we're looking at, at most, 30  
25 | or 40 people a year. In the tail-end years it declines

1 | much more rapidly than that. Now, to put some  
2 | perspective on that, you know, as we've discussed  
3 | recidivism issues and the potential for some of the  
4 | crack offenders to become involved in crime again, we  
5 | don't want to lose sight of the fact that when we think  
6 | about reentry, obviously the federal court system, the  
7 | federal prison system, are a relative drop in the  
8 | bucket of the criminal justice system.

9 |           As you well know, 90 percent of the people  
10 | housed in prison are in state prisons around the  
11 | country. In North Carolina, for example, there are  
12 | 9,000 people who are released from state prison each  
13 | year, roughly one-third of them, 3,000, released to the  
14 | Western District of North Carolina. So we're looking  
15 | at 3,000 people coming out of state prison and  
16 | generally speaking, about 30 or 40 people getting out  
17 | unexpectedly early on one of these crack retroactivity  
18 | sentence reductions.

19 |           So we do want to monitor these 30 or 40  
20 | people who get out. We want to make sure that there's  
21 | effective supervision of them. We want to do all the  
22 | right things to prepare them for getting out. We are  
23 | talking about a very small drop in the overall bucket.  
24 | Now, we have serious issues of reentry in this country  
25 | and this is being dealt with on Capitol Hill this week

1 | and elsewhere. We want to address that. This is not  
2 | -- you know, as much as we need to supervise these  
3 | people appropriately, this is not going to affect the  
4 | crime rate in Charlotte, or any place else in that  
5 | district, to any significant degree. It doesn't mean  
6 | we're happy if anyone recidivates, but this is not the  
7 | crux of the problem.

8 |           The Department of Justice, in its testimony,  
9 | was concerned. They look at a group of offenders,  
10 | crack offenders, between 1993 and 1995 and they point  
11 | out correctly that these -- this group of people has a  
12 | higher rate of weapons involvement in their crime, a  
13 | higher rate of obstruction of justice, and so they're  
14 | concerned about the release of this group of people.  
15 | At the very least, if these people get whatever  
16 | retroactive benefit that might accrue to them, they  
17 | will have served at least 13 to 15 years, in many  
18 | cases, 20 years or more in federal prison before  
19 | they're released.

20 |           Now whatever reentry services go on in  
21 | federal prison, it would seem there is more than  
22 | sufficient time to do whatever can be done to prepare  
23 | this group of people for release. Another aspect of  
24 | the issue that I think was not addressed very well is  
25 | that, particular for the long-term offenders who the

1 Department is most concerned about, we're looking a  
2 group of people who in many cases will be well into  
3 their 40s and 50s, and criminological research over  
4 many years has demonstrated the best way to reduce  
5 crime is to wait until people reach middle age, and by  
6 the time people reach 40, 45 and 50, they're rates of  
7 re-involvement in crime drop dramatically.

8           This is true both for people who have never  
9 been in crime -- involved, and people who have been  
10 involved in crime. It doesn't mean it gets down to  
11 zero, it doesn't mean there's no concern, but it drops  
12 significantly. In the federal system we know, for  
13 example, recidivism rates for this age group are about  
14 one-third lower than they are for a group of offenders  
15 from their mid-20s to their mid-30s. So we have the  
16 aging process working in our favor, if you think of it  
17 that way. We also have -- this is true both in the  
18 federal system and in state prisons as well.

19           We're dealing with drug offenders and for a  
20 variety of reasons drug offenders typically have lower  
21 recidivism rates than people convicted of other  
22 offenses. In the federal system, drug offender  
23 recidivism rates are about 20 percent lower than those  
24 persons convicted of fraud or larceny; 38 percent lower  
25 than people convicted of a burglary offense. Again, I

1 | don't say this to minimize the scope of the problem, or  
2 | suggest that none of these people recidivate, or that  
3 | there aren't supervision issues, only that the scale of  
4 | the problem, as it's -- I hear it defined by the  
5 | Department of Justice, I think is very much overblown  
6 | in many ways.

7 |           On this issue, of course, too, as you -- many  
8 | of you have pointed out today, of course, you know, any  
9 | given individual has no absolute guarantee of getting  
10 | out early or late or anything like that. And obviously  
11 | this is up to a judge to decide. A somewhat related  
12 | issue that has been raised in some of the testimony  
13 | today and previously to you, has to do with some of the  
14 | cost issues involved, to the federal courts and to the  
15 | Federal Bureau of Prisons. And on the one hand I don't  
16 | think we've seen very much in the way of hard figures  
17 | here.

18 |           There's one figure. The Department of  
19 | Justice estimates something like \$9 million in  
20 | additional District Court costs to process the cases  
21 | that would come through. On the one hand, you know, it  
22 | seems to me that the cost issue should be fairly  
23 | irrelevant. You know, as you've suggested, we want to  
24 | evaluate the issue on the merits and that's clearly the  
25 | most important thing to do. But we're living in a real

1 | world and the cost will enter into it to certain  
2 | extent. \$9 million is nothing to laugh at, but the  
3 | Department makes absolutely no attempt to estimate what  
4 | this would mean for the federal prison system. After  
5 | all, we're talking about potentially releasing more  
6 | than 19,000 people roughly two years sooner than they  
7 | would otherwise. Well, just in very round terms and  
8 | using conservative cost estimates for the cost of  
9 | incarceration, two years early release is going to be a  
10 | little more than \$50,000 per person in the federal  
11 | prison system. If we're looking at 19,500 people, if  
12 | in fact all of them got out, we're literally looking at  
13 | something in the range of \$1 billion over the course of  
14 | 30 years, in terms of reduced prison costs.

15 |           Now, I'm very well aware that when you  
16 | calculate prison costs, you have fixed costs and  
17 | marginal costs and it doesn't mean that you save this  
18 | entire amount if you actually release people from  
19 | prison, but there's no question that there'd be a very  
20 | dramatic cost savings, either in being able to close  
21 | some federal prisons, in fact, or at least not build  
22 | new federal prisons, as a result of a policy like this.  
23 | Now if this was a policy that was going to produce very  
24 | bad results for crime, very bad results for deterrence  
25 | or send a bad message to the public, it seems to me the



1 | cost factor should not be a concern. The taxpayers  
2 | should be willing to pay that cost and do the right  
3 | thing. In this case, the right thing to do is to use  
4 | the policy of retroactivity, and as bonus benefit there  
5 | is also a substantial potential cost saving that the  
6 | Federal Bureau of Prisons will achieve.

7 |           There may be some additional upfront costs at  
8 | first, but the long-run savings would be very  
9 | significant. Finally, let me just close by saying the  
10 | issue of racial justice has come up repeatedly on this  
11 | issue and this goes back 21 years as well as today. I  
12 | would agree that, again, the issue should be addressed  
13 | on the merits. The crack cocaine sentencing policy,  
14 | giving people a mandatory five years in prison for five  
15 | grams of crack, is not a very rationale policy and it  
16 | doesn't matter if every offender is white, black or  
17 | Latino. It doesn't serve the interests of crime  
18 | control very well.

19 |           In addition, though, of course we've had  
20 | these terrible racial disparities that have been sued.  
21 | I think there's certainly an argument to be made that  
22 | when Congress passed these laws initially in the 1980s,  
23 | it was very difficult to separate out the racial  
24 | imagery and racial -- racial ideas about crime from the  
25 | policy itself. Whether this was intentional or

1 | unconscious, we could debate it for quite some time.  
2 | The point is I think there was no question that the  
3 | image of a crack offender was a young black male in the  
4 | minds of the cover of Newsweek Magazine, on the  
5 | television news and things like that. So it's been  
6 | very much a part of this issue ever since day one. It  
7 | seems to me that we could do the right thing, in terms  
8 | of criminal justice goals, by enacting retroactivity.  
9 | And in addition, we would save money and we would take  
10 | some small but significant steps towards reducing  
11 | unwarranted racial disparities in the system. Thank  
12 | you.

13 |                   CHAIR HINOJOSA: Thank you, Mr. Mauer.  
14 | Mr. Nolan.

15 |                   MR. NOLAN: Mr. Chairman and members, my name  
16 | is Pat Nolan and I'm a Vice President of Prison  
17 | Fellowship and lead their criminal justice reform arm,  
18 | Justice Fellowship. And I'm also a member of both the  
19 | Prison Rape Elimination Commission and the Commission  
20 | on Safety and Abuse in America's Prisons. I served 15  
21 | years as a member of the California State Assembly,  
22 | four of those as the assembly Republican leader. I was  
23 | a leader on crime issues, particularly on behalf of  
24 | victims. I was one of the original sponsors of the  
25 | Victims' Bill of Rights and received the Victims

1 Advocate Award from the parents of murdered children.  
2 I also authored several mandatory and minimum bills and  
3 voted for every one that came before me. I was then  
4 prosecuted for a campaign contribution that I accepted,  
5 which turned out to be part of an FBI sting. I pleaded  
6 guilt to one count of racketeering and served 29 months  
7 in federal custody.

8 I sit before you as a conservative  
9 Republican, a former legislature, and former prisoner  
10 who's convinced that this country needs a more  
11 rationale approach to apprehending, prosecuting and  
12 sentencing those who traffic in cocaine. Prison  
13 Fellowship applauds the Commission to move us closer to  
14 a more rationale policy, with the amendments that went  
15 into effect on November 1st. We respectfully now ask  
16 that you take the next important step, to apply those  
17 changes retroactively.

18 I know you've heard from legislatures, both  
19 in support and in opposition to retroactivity, but I'd  
20 particularly like to address the concerns of several  
21 Republican members of the House and Senate who argue  
22 against applying this retroactively. I have a very  
23 high regard for each of those members and worked very  
24 closely with them on criminal justice issues, and I  
25 probably would've signed a similar letter, if it had

1 | come before me when I was in the legislature. However,  
2 | as a result of my experiences in prison, and as a  
3 | member of the two commissions studying violence in our  
4 | prisons, I would not sign it now. I strongly disagree  
5 | with the letter's predictions about the impact that  
6 | retroactivity would have.

7 |           When I was a state legislature I thought that  
8 | locking up people for long sentences made us safer, but  
9 | I know differently now. Long sentences are not an end  
10 | in themselves, but merely a means to make the public  
11 | safer. In the case of crack cocaine sentences,  
12 | Congress specifically sought to give prosecutors the  
13 | tools they needed to get at the large traffickers. The  
14 | theory was that huge sentences would encourage street  
15 | dealers to rat on their suppliers, who would then rat  
16 | on their providers, and so on up the chain until the  
17 | kingpins were nailed. In practice, the opposite has  
18 | occurred.

19 |           Instead of ratting up the chain, offenders  
20 | rat down the chain. They're afraid of those above them  
21 | in the flow of cocaine, but are glad to offer up small  
22 | fish in return for a shorter sentence. In reality,  
23 | those that have the smallest involvement in the  
24 | movement of crack generally serve the longest terms  
25 | because they have no one to rat out. While

1 | incarcerating these small dealers may make prosecutors'  
2 | win/lose percentages look good, it doesn't stop the  
3 | flow of cocaine into our cities. The small dealers are  
4 | easily replaced with other young people gullible enough  
5 | to think that they can rich quick dealing in crack.  
6 | The real life stories related by Mr. Ikard serve as  
7 | reminders of the horrible toll that crack takes on our  
8 | people in our communities daily.

9 |           We must have effective policies to stop the  
10 | flood of that poison into our cities. But those same  
11 | stories he told also demonstrate the utter failure of  
12 | the current crack policies. Every one of those people  
13 | he described became a crack addict while this absurd --  
14 | absurdly long sentences were in place. We had what we  
15 | told would get rid of the crack problem, and yet those  
16 | lives were still being destroyed.

17 |           If these policies had worked, we would see a  
18 | reduction in crack traffic, but we don't and we owe it  
19 | to our people to come up with more effective strategies  
20 | for helping them stop the flow of this poison into our  
21 | cities. I served time with plenty of crack dealers in  
22 | prison for long sentences under the mandatory minimums.  
23 | Typical of these was a small-time dealer. It was the  
24 | kid in the bunk above me. Jody was a 19-year-old and  
25 | doing a 10-year stretch for crack. We were at the

1 federal prison camp at Pleasanton, together. He was no  
2 Mr. Big. He could hardly organize a two-car funeral,  
3 let alone a massive crack conspiracy. Each prison cell  
4 costs about a hundred thousand dollars to build and  
5 each felon costs about \$30,000 a year to house and care  
6 for. Add that to the cost of arresting and prosecuting  
7 Jody and it'll cost the taxpayers about \$500,000 for  
8 this minor player in the crack trade.

9           Are we any safer spending half a million  
10 dollars to lock up Jody for 10 years? In my 29 months  
11 in custody I met plenty of small-time dealers, but I  
12 never met a kingpin. And the numbers confirm my  
13 observation. Only seven percent of federal crack  
14 cocaine cases are directed at the high-level crack  
15 dealers. Only seven percent. Instead, federal  
16 authorities squander huge amounts of resources on small  
17 cogs in the cocaine distribution network.

18           One-third of all federal cocaine cases  
19 involve an average of 52 grams, the weight of a candy  
20 bar. A third of the cases are for that tiny amount.  
21 This is a terrible misuse of the time and talent of  
22 federal law enforcement and prosecutors. Plus, it has  
23 filled our prisons to overflowing. Prisons are for  
24 people who we're afraid of, but we've filled them with  
25 people who we're just mad at. If we're to stop the

1 | flow of cocaine into our cities, federal resources  
2 | should be focused on the high-level traffickers.  
3 | Making the amendment retroactive will help target our  
4 | resources on those who are causing the greatest harm,  
5 | freeing up the resources being spent on these low-  
6 | hanging fruit. I'm not alone as a Republican who feels  
7 | that crack cocaine sentences are horribly out of  
8 | balance.

9 |           You heard earlier from Judge Reggie Walton;  
10 | certainly not a soft-on-crime Republican. Former  
11 | Congressman J.C. Watts recently joined me in an op-ed  
12 | in the Washington Times. In that article, we wrote,  
13 | "If we're to stop the flood of cocaine coming into the  
14 | country, federal resources should be focused on the  
15 | networks that bring in boatloads of cocaine, and on  
16 | people who shoot and kill, the large and violent  
17 | operators that the local and state authorities cannot  
18 | effectively combat.

19 |           This would be good for the taxpayers and more  
20 | effective in stopping the flow of cocaine. After  
21 | almost 21 years, the 100 to 1 crack and powder cocaine  
22 | sentencing disparity has resulted in federal resources  
23 | being misdirected on small-time drug dealers and not  
24 | stopping the flow of drugs into the country." The  
25 | letters from the Republican legislatures warn that

1 retroactivity will significantly shorten the sentence  
2 or result in the release of, in their words, "major  
3 crack dealers with long criminal records, including  
4 firearms offenses." The letters go on to say, "Yet,  
5 these -- those convicted of simple possession will see  
6 little, if any, reduction." These claims are partially  
7 correct.

8           Yes, those convicted of simple possession  
9 will receive shorter reductions than offenders serving  
10 longer sentences, but that's merely a result of the  
11 function of the two-level limitation in the guidelines.

12       And the letters are right that some people sentenced  
13 for simple possession will not see any reduction, but  
14 that's not the result of anything the Commission will  
15 do. That's the result of statutes passed by Congress  
16 and only Congress can change them, the mandatory  
17 minimums.

18           One assertion in the letters is flatly  
19 mistaken: major dealers will not be set free if you  
20 apply this retroactively. In fact, not a single  
21 offender will be set free automatically. Retroactivity  
22 will merely permit certain offenders, who have already  
23 served long sentences, to request a reduction in their  
24 sentence. The decision to grant a sentence reduction  
25 can only be made before -- by a judge, the sentencing



1 judge. If there's reason to believe that the offender  
2 remains a danger to the community, the government can  
3 present that evidence to the judge. In fact, the  
4 statute that allows you to do the amendment  
5 retroactively, directs the courts to take public safety  
6 into account.

7           Prison Fellowship believes that public safety  
8 is a top priority in our justice system, and making the  
9 Commission's policies retroactive would be consistent  
10 with protecting the public. In fact, I would assert  
11 that not making the policy retroactive will endanger  
12 the public. Let me explain why. Our prisons are  
13 bursting at the seams. Overcrowded prisons contribute  
14 to a toxic environment that results in horrible  
15 violence, endangering both correctional officers and  
16 inmates.

17           As I mentioned earlier, I serve on the Prison  
18 Rape Elimination Commission and the Commission on  
19 Safety and Abuse in America's Prisons. In dozens of  
20 hearings around the country, corrections officials  
21 testified to the Commissions that prison crowding makes  
22 it almost impossible to manage their institutions.  
23 Former California Corrections Secretary Rod Hickman  
24 managed a system that confines twice as many people as  
25 his facilities were designed to hold. He listed

1 overcrowding as the first among the significant factors  
2 contributing to prison violence. The report of the  
3 Commission on Safety and Abuse found that "the majority  
4 of prisons and many jails hold more people than they  
5 can deal with safely and effectively, creating a degree  
6 of disorder and tension almost certain to erupt into  
7 violence."

8           Reducing prison crowding was the Commission's  
9 number one recommendation on how to do deal with prison  
10 violence. Retroactivity would help address that goal.

11 By applying your policy retroactively, the Commission  
12 will help reduce prison crowding and violence in a very  
13 intelligent way, by allowing offenders, who have  
14 already served long sentences, to be released unless  
15 the judge finds they pose a risk to security. With an  
16 average sentenced served of over 21 -- 27 months, no  
17 one's getting off easy.

18           By lessening prison crowding, retroactivity  
19 will also increase safety in our communities, by  
20 creating a better environment in which inmates can  
21 prepare to healthy, contributing lives after they're  
22 released. As the Commission stated, "What happens in  
23 prison doesn't stay in prison." The skills inmates  
24 develop to survive inside violent prisons make them  
25 antisocial when they come home. Lessening the crowded,

1 | violent environment in prisons will allow the  
2 | institutions to prepare inmates to be better neighbors  
3 | when they're released. The sheer number of inmates has  
4 | forced corrections officials to turn every available  
5 | areas of prisons into housing for inmates, thereby  
6 | squeezing out space for programs that prepare inmates  
7 | for release.

8 |           I serve on Governor Schwarzenegger's  
9 | Rehabilitation Strike Team. One of the largest hurdles  
10 | we have is that every classroom, chapel, hallway and  
11 | closet has been converted into bed space. This means  
12 | that there's nowhere to hold GED courses, drug  
13 | treatment classes, life skills training, Bible studies  
14 | or other programs. Sending inmates home without  
15 | preparation only increases the risk for all of us. Now  
16 | let me turn to the fairness of your policies.

17 |           The Commission has concluded that the  
18 | sentences for crack offenders are so harsh, that they  
19 | will no longer be imposed on people who commit that  
20 | offense in the future. The Commission's policies are  
21 | correct and they are just as correct for those  
22 | sentenced before November 1st, as they are for those  
23 | after. I thank you so much for this opportunity to  
24 | address you and express our concerns. Our ministry is  
25 | devoted to helping prisoners and their families

1 | successfully return from time in prison, with a changed  
2 | heart and changed habits. The crack disparity has been  
3 | so destructive of the order and discipline in prisons,  
4 | and it's caused such disrespect for the law, it makes  
5 | our ministry significantly more difficult. And I  
6 | commend you for changing the policy looking forward,  
7 | and urge you to make it retroactive. Thank you.

8 | CHAIR HINOJOSA: Thank you, Mr. Nolan. Does  
9 | anybody have any questions? Yes, Judge Sessions.

10 | JUDGE SESSIONS: Could I just follow up on  
11 | that last thing that you said? What do you mean the  
12 | disrespect for the community or the impact --

13 | MR. NOLAN: Disrespect for the law.

14 | JUDGE SESSIONS: -- on discipline within --  
15 | within the prisons?

16 | MR. NOLAN: First overcrowding and secondly,  
17 | the inherent unfairness of it. You know, here I'm a  
18 | fat old white guy coming to the prison and you can't  
19 | but notice the racial disparity. It's overwhelming. I  
20 | don't know anybody that did time in the federal prison  
21 | that isn't smacked in the face by that reality. And  
22 | the you talk to them about their situations. And  
23 | again, I didn't see any kingpins. They were all small  
24 | fries and yet doing long stretches. Jody would lay in  
25 | his bunk every day, staring at the ceiling. Nineteen

1 | years old. He wasn't getting out until he was 29.  
2 | He's not going to have dated anybody. He's not going  
3 | to have a college education. He's not going to work  
4 | for anything in his life. And he'd lay there staring  
5 | at the ceiling, feeling betrayed. Sure he did a stupid  
6 | thing. But you know, one of the things is they  
7 | predicted -- Chuck Cole (phonetic sp.) and I talked  
8 | about this.

9 |           Conservatives say that, well, if we ratchet  
10 | up sentences, prisoners -- offenders will take that  
11 | into account and not commit the crime. That presumes  
12 | that offenders are rational calculators, that they say,  
13 | well, I would do this but gee, the sentence is higher  
14 | and all of that. The fact of that matter is most  
15 | inmates never think they'll get caught. They think  
16 | they're smarter than the system. It doesn't occur to  
17 | them in what they do, what the sentence will be.

18 |           And then they're shocked to find out they've  
19 | got 10 years out of their lives as young people. So it  
20 | creates a disrespect for the law. They see people in  
21 | for violent crimes getting out sooner than they do.  
22 | Across the street from the first prison I was in was a  
23 | lady who had taken phone messages for her boyfriend  
24 | drug dealer. He of course dropped the dime on her. He  
25 | got a short sentence; she got a five-year sentence.

1 She was in prison talking to her mother on the phone  
2 when her mom began to scream. Her mother -- someone  
3 had broken into their home and her mother was being  
4 raped. She got the attention of a correction officer,  
5 who called the local police, who went out and rescued  
6 her mom.

7 This man was arrested, tried and convicted  
8 for rape and walked free, while the young lady, who had  
9 had a boyfriend that was a drug dealer, remained in  
10 prison because of the crack sentences. That shows the  
11 absurdity. A rapist does less time than this  
12 girlfriend of a small-time drug dealer. That's absurd.

13 And situations like that breed a disrespect for the  
14 law. You see it from the folks inside. They see the  
15 system, they feel the system is rigged against them,  
16 that it makes it no sense, and they have no hope,  
17 because nothing's done inside.

18 Less than 20 percent of the inmates receive  
19 any drug treatment while they're in prison. Joe  
20 Califano, Former Secretary of Health, Education and  
21 Welfare under President Johnson, said, to lock up an  
22 addict for a period of years and do nothing about the  
23 underlying addiction and then release them is a fraud  
24 on the public. It is. You know, does just warehousing  
25 somebody help deal with their addictions? Does it make

1 | them a better person? Does it prepare them to be a  
2 | good citizen when they get out? I don't care if it's  
3 | 27 months or 43 months. If nothing's been done to  
4 | change them while they're in, they're not going to be a  
5 | good neighbor.

6 |           JUDGE CASTILLO: Mr. Nolan, I agree with many  
7 | of your statements about our flawed drug policy, in  
8 | particular not focusing in on drug kingpins. In the 13  
9 | 1/2 years of being a federal judge, after prosecuting  
10 | drug cases, I've yet to see the appropriate defendants  
11 | with the control over large amounts of drugs or control  
12 | over large amounts of assets, and from what you're  
13 | telling me, you didn't see them in the federal prisons,  
14 | either.

15 |           MR. NOLAN: Um-hum.

16 |           JUDGE CASTILLO: What I fail to see is  
17 | exactly how do you see the retroactivity decision that  
18 | we're about to make, linking up with sort of waking up  
19 | the Department of Justice in focusing on the right drug  
20 | defendants?

21 |           MR. NOLAN: Um-hum.

22 |           JUDGE CASTILLO: How does that play together?

23 |           MR. NOLAN: I'm not sure that will. I think  
24 | Congress has to.

25 |           JUDGE CASTILLO: Um-hum.

1           MR. NOLAN: I've had to think about what the  
2 proper role of the federal government is in the drug  
3 trade, and the reason you don't see many kingpins is  
4 there aren't crack kingpins, there are only cocaine  
5 kingpins.

6           JUDGE CASTILLO: Um-hum.

7           MR. NOLAN: Crack is an inherently unstable  
8 drug, so it's sold close to where it's cooked and it's  
9 the powdered cocaine that flows across borders, and  
10 across state lines, that's the real problem. That's  
11 what the federal government needs to be concentrating  
12 on. But the guy cooking a small amount of crack, he  
13 can't carry it very far, it's so unstable. It's a  
14 danger to him and everybody else. So it's really a  
15 local boutique drug.

16          JUDGE CASTILLO: Um-hum.

17          MR. NOLAN: And so we need to shift federal  
18 policy. I don't think retroactivity will necessarily  
19 do that, but it will -- for those prosecutors, and  
20 there are some who only look at notches on their belt  
21 and running up the score, it'll take away some of the  
22 incentive for those low fish. I think the biggest  
23 benefit will be the impact on prisons, lessening the  
24 crowding, freeing up space so that -- and federal  
25 prisons are horribly overcrowded and very little is



1 | done. One of the previous witnesses said, well, these  
2 | guys are going to be released with no preparation.  
3 | Preparation doesn't start years before you get out. My  
4 | preparation for release started about three months  
5 | before I was released and it was a very one-sided  
6 | process. It didn't involve my family. It didn't --  
7 | you know, it was going through the motions. We're  
8 | trying to change that, and the BOP is trying to change  
9 | that. To their credit, they really are. But the fact  
10 | of the matter is these people haven't been prepared and  
11 | keeping them another 24 or 46 months probably wouldn't  
12 | anyway, unless we change those policies.

13 |           JUDGE CASTILLO: Thank you.

14 |           CHAIR HINOJOSA: Does anybody else have any  
15 | questions? Well, thank you all very much. The next  
16 | panel. We're ready for our last panel. We've got  
17 | Ocie L. Acoff, who is a minister and currently serves  
18 | in Selma, Alabama, as the Director of the Varner  
19 | Education and Training Facility, which is an  
20 | educational and training center for troubled youths.  
21 | Prior that, he served as a probation -- juvenile  
22 | probation officer for more than 20 years.  
23 | Ms. De-Ann Coffman is a member of Families Against  
24 | Mandatory Minimums. At the age of 21 years,  
25 | Ms. Coffman was convicted of distribution of crack

1 cocaine in '91. She sentenced to life plus five years  
2 for her role in the offense. That sentence was later  
3 reduced to 85 years and in 2001 she was released from  
4 prison, after her sentence was commuted by  
5 President Clinton. And we have Ms. Julie Stewart, who  
6 is the President of Families Against Mandatory  
7 Minimums, which she founded in 1991. And prior to  
8 that, Ms. Stewart worked at the Cato Institute for  
9 three years as the Director for Public Affairs.  
10 Mr. Acoff.

11 MR. ACOFF: First of all, I'd like to say  
12 good afternoon to the Commission and to the Chairman.  
13 My name is Ocie Acoff. I'm from Selma, Alabama, born  
14 and raised there, educated there. I currently serve as  
15 the Executive Director of the Varner Education and  
16 Training Facility. I also served on boards and worked  
17 in affiliation with Habitat for Humanity, the National  
18 Kidney Foundation, ICARE (phonetic sp.), and also  
19 served on the YMCA.

20 I come before you all today to share with you  
21 all some experiences that we have encountered in Selma,  
22 Alabama. Most people know Selma, about the civil  
23 rights, the march from Selma to Montgomery. As a  
24 matter of fact, I was one of the ones that participated  
25 on that Sunday. I marched all the way from Selma to

1 | Montgomery, the original march, and understand the  
2 | plight of people that have felt discriminated against  
3 | and so forth. But I come today to publicly thank the  
4 | fellow agencies that worked together to shut down the  
5 | 1400 block of St. Phillip in Selma, Alabama, which held  
6 | the citizens there in hostage for years. The local law  
7 | enforcement officers were not able to go in on account  
8 | of the situation.

9 |           The drug dealers openly conducted business.  
10 | They did not care and had no regard for law, no respect  
11 | for the people of that community. Elderly people were  
12 | unable to even enjoy the civil liberties of sitting on  
13 | their porch to fellowship with one another. Children  
14 | were not able to play in that community, in the  
15 | streets. I had an elderly citizen, who had served in  
16 | World War II, share with me that he had to sleep on the  
17 | floor at night, for fear of stray bullets coming  
18 | through his house.

19 |           I know of a man, who was elderly, whose son  
20 | beat him to death because of the fact that he would not  
21 | give him his Social Security check anymore, that he can  
22 | go out and purchase crack. I come before you today to  
23 | just share with you those things. I want you to know  
24 | that crack has created so many problems in Selma,  
25 | especially in that community, that I don't know if we

1 | ever will recover. It seems like crack, it's like a  
2 | fungus, like a wildfire. It destroys everything in its  
3 | path. It is something like -- in that community. You  
4 | don't hear laughter, you don't hear the joy. Now even  
5 | after those agencies came in and shut those individuals  
6 | down, their work was still following them by way of the  
7 | addicts who had gone in now, burglarizing homes and  
8 | going in to strip the wire out of houses, the copper  
9 | and so forth.

10 |           They are even bold enough to go into your  
11 | yard and put a chain behind your car and pull it out  
12 | and take it to a recycling company and just destroy  
13 | your car. Our law enforcement situation in Selma is at  
14 | an all-time low, I would say. I talked with our  
15 | district attorney about two weeks ago and shared with  
16 | him some of the concerns about some of the property  
17 | owners, of how their property is being vandalized and  
18 | burglarized, and he sympathized with me.

19 |           He said, well, you got to realize that Selma  
20 | only has 32 police officers now. And I said what? And  
21 | so to release people back into the community -- and I'm  
22 | not trying to infringe upon anybody's civil liberties,  
23 | but I hear argument about someone wants their loved  
24 | ones to come home, and I want to share with you about a  
25 | young man that's in the facility of which I am the

1 | Director. He's about 14 years of age. He has two  
2 | sisters. His mother is avid crack addict. She's  
3 | deserted him. She prostitutes in the streets. And  
4 | this young man is bitter. Her daughters, who happen to  
5 | be a member of the church of which I pastor, they have  
6 | the father there to embrace them and they have a  
7 | chance, but the young man is bitter. He's bitter with  
8 | society, he's bitter with himself, and he's waiting for  
9 | his mother to come home from being addicted to drugs.  
10 | I have a young nephew. Well, he's not young anymore.  
11 | He's started on crack when he was 15 years of age.  
12 | He's 37 now and he still acts like he's 15 years old.  
13 | He's been in and out of prison for the past 22 years.  
14 | Well, the last 20 years.

15 |           I have an occasion when he got of prison and  
16 | he wasn't out six hours before he was back in jail.  
17 | Yes, they say there's a difference in the sentences for  
18 | crack, in comparison to cocaine, but I think crack has  
19 | a more severe effect on our community and our citizens  
20 | than cocaine does. And I'm not saying to lessen the  
21 | penalty for selling cocaine, but I'm just talking about  
22 | what the devastation of crack has done to the black  
23 | communities, since we want to talk about race. It has  
24 | taken, I would say, the essence of life out of our  
25 | communities. The communities are not the same. It's

1 | just like it's been ravaged by a wildfire, just tear up  
2 | the community. You go through there now, it's -- the  
3 | neighborhoods are not the same. You don't have  
4 | laughter. You don't have people playing, the kids,  
5 | like were growing up in my days. All of that's gone  
6 | because of the fear of drug pushers that's placed on  
7 | the citizens there, of Selma, Alabama.

8 |           I would ask that you would do what you're  
9 | doing. I feel that -- I have confidence that you all  
10 | are going to do the right thing, but I just want you to  
11 | take into consideration those people that are not here  
12 | to speak for themselves, those individuals that you  
13 | probably do not have contact with. As the reverend  
14 | from North Carolina shared with you, those things --  
15 | those things are happening and we talked about blacks  
16 | doing it to blacks.

17 |           So it's not a point, if we were talking about  
18 | putting a color on this, I think we just need to deal  
19 | with the drug issue at large, regardless of what type  
20 | of it is. I just found out the other day that they  
21 | have a new drug out and it's going to be cheaper than  
22 | crack. It's killing young people in Texas right now.  
23 | It's going to have a mix of heroin in it. So what's  
24 | that going to do when it's the streets? What's it  
25 | going to do for us? We need to address that. Thank

1 | you.

2 | CHAIR HINOJOSA: Thank you, Mr. Acoff.  
3 | Ms. Coffman. Or did you want to go first, Ms. Stewart?

4 | MS. STEWART: We'll leave the best until  
5 | last. Although I was told that we are the best panel  
6 | and that's we're last. I may have been placated. Good  
7 | afternoon, Commissioners, and thank you for your  
8 | attention this late in the day. And thank you for  
9 | allowing me to testify today on behalf of FAMM's 13,000  
10 | members, many of whom have loved ones serving crack  
11 | cocaine sentences and who are passionate about this  
12 | issue, as I know you know, because you've received  
13 | something like 30,000 letters from a lot of them.

14 | So I'm sure you're aware that we have a very  
15 | interested constituency. First, I just do want to add  
16 | my voice to those that have come before me, to thank  
17 | you for sending the guideline forward on May 1st, to  
18 | make the crack cocaine guideline change, reduced by two  
19 | levels. I have participated in and observed the  
20 | efforts of this Commission, or the Sentencing  
21 | Commission, not you, Commissioners, and in Congress for  
22 | 15 years, around crack cocaine, and until now, nothing  
23 | has been done successfully. So I applaud you for  
24 | accomplishing that feat. It's not small feat. Last  
25 | spring each of you, when you voted on the guideline

1 | amendment, you each voted, saying sort of at the same  
2 | time, that it was a modest step forward. And I  
3 | remember that each of you pretty much repeated the same  
4 | word and it struck me as, yes, it is a modest step  
5 | forward, perhaps, but it's still a very critical one  
6 | and as I just said, the first one that's actually done  
7 | anything, and it's really broken the legislative logjam  
8 | around crack cocaine sentencing bills.

9 |           And we can attest to that by seeing at the  
10 | Senate, there are now three crack cocaine bills. In  
11 | the House there's one and perhaps another one the way.

12 |       So your step really did make a big difference. Now  
13 | you have the opportunity to turn that modest step into  
14 | a really significant one. There is, as you heard  
15 | earlier today, no legitimate argument against making  
16 | the crack cocaine amendment retroactive. In fact,  
17 | there's a moral imperative to do so.

18 |           And as a former chief judge for one of the  
19 | U.S. Courts of Appeals told me, what's right is right.

20 |       And I don't doubt that each of you share that  
21 | sentiment. If a sentence is sufficient to serve the  
22 | purposes of punishment for defendants in the future,  
23 | it's sufficient for those who were sentenced under  
24 | unjust rules in the past. And clearly, I think it's  
25 | been well expressed here, justice should not turn on



1 | the date that an individual was sentenced. I know that  
2 | of greater concern to you is how to apply the guideline  
3 | retroactively, the mechanics of the process, and that's  
4 | what this morning's panels, I think, were able to  
5 | hopefully answer some of those questions and give you  
6 | some guidance. I know that it can be done because I  
7 | was here in 1993 and 1995 with Mr. Steer, when crack --  
8 | when LSD and marijuana guidelines were made  
9 | retroactive.

10 |           So it's certainly been possible and Steve  
11 | Sady did a good job of explaining that to you. The  
12 | commissioners, then, who made those decisions were also  
13 | under pressure not to appear soft on crime, but they  
14 | made the tough but fair decision to remedy the  
15 | injustice and I think that -- I hope that this  
16 | Commission will do the same. And whether or not race  
17 | should be a determining factor in the decision to make  
18 | this retroactive, I do think that making this guideline  
19 | retroactive does help underscore that at least justice  
20 | can be colorblind.

21 |           It is not the only reason that this should be  
22 | done, however. The Commission has determined that  
23 | nearly 20,000 prisoners would potentially be affected  
24 | by retroactivity. I think that often those numbers  
25 | have been abused and I believe some of the questioning

1 | earlier today was getting at the point that 20,000  
2 | prisoners are not going to be released on the streets  
3 | tomorrow, if you make this retroactive. That number is  
4 | over quite a period of time, as I understand, and that  
5 | all of those people are going to be released at some  
6 | point. They just might have the possibility of having  
7 | their sentences come down a couple of year, a year or  
8 | something.

9 |           But also, when we use a figure like 20,000 or  
10 | 19,500, I think it's easy to forget that each of them  
11 | is a human being and that, for their own complicated  
12 | economic and social and personal and psychological  
13 | reasons, they broke a law and as a result they ended up  
14 | in prison. It's easy to paint them as the -- some  
15 | members of the House and Senate Judiciary Committee  
16 | members have, as major crack dealers with long criminal  
17 | records.

18 |           I think that when you hear from  
19 | De-Ann Coffman in a moment, you'll see that that's in  
20 | fact not always true. What members of Congress ignore  
21 | is that even if the Commission makes these crack  
22 | guidelines retroactive, the eligible prisoners will  
23 | still serve a very long time in prison. The people  
24 | deserve to be punished for breaking the law, but their  
25 | punishment needs to not be excessive or gratuitous.

1 | And because sentences have become so inflated in the  
2 | past two decades, a 10-year sentence for a nonviolent  
3 | offender no longer sounds harsh, but 10 years is an  
4 | extraordinarily long period of time. It's a long time  
5 | to be away from society. It's 10 years of missed  
6 | Thanksgiving dinners with your family. It's 10 years  
7 | of missed birthday celebrations, the prisoner's and his  
8 | family; missed marriages and child births and even  
9 | funerals.

10 |           My dad died while my brother was in prison  
11 | and it was -- it was devastating for Jeff, because it's  
12 | time that cannot be recaptured, those last days with  
13 | dad. There are certainly people in this room today who  
14 | know all too well what I'm talking about. Some of them  
15 | have traveled from a great distance to be here today.  
16 | One person flew up from Florida this morning to be at  
17 | this hearing today and is returning later on this  
18 | evening; to be here at this moment because her child is  
19 | serving a crack cocaine sentence.

20 |           We have people from Kansas, Georgia, Texas,  
21 | southern Virginia, here as well. And they're here  
22 | because they are really desperate to find any hope for  
23 | their loved ones. They want to understand how this  
24 | decision is going to be made and this -- today's input  
25 | is part of what will help you make your decision. And

1 | I think they also want to see the seven people who will  
2 | make that decision that will impact their loved ones.  
3 | Unlike members of Congress, where there's 535 faces to  
4 | look at and it's confusing, this is pretty  
5 | straightforward. There are seven of you who will make  
6 | the decision.

7 |           I don't want to take a lot of time, but I  
8 | would ask -- like to ask that everyone who has come  
9 | today, who has a loved one in prison, would stand up  
10 | just so that you can see their faces, please. Thank  
11 | you. And many of them are holding photographs of the  
12 | loved one that they have in prison. Thank you very  
13 | much. I'll close simply by saying that, as you well  
14 | know, the power is in your hands to positively affect  
15 | not only the lives of nearly 20,000 individuals in  
16 | prison, but thousands of lives more, the mothers, the  
17 | fathers, the daughters, the sons, who wait for them to  
18 | return home. I know you will consider this enormous  
19 | responsibility and this opportunity, with care and  
20 | deliberation, and I think you for that.

21 |           CHAIR HINOJOSA: Thank you, Ms. Stewart.  
22 | Ms. Coffman.

23 |           MS. COFFMAN: I am De-Ann Coffman and I want  
24 | to thank you for giving me the opportunity to speak to  
25 | you today. When I was 21 years old, I was sentenced to

1 | life and five years in federal prison for my role in my  
2 | boyfriend's drug operation. After numerous appeals and  
3 | many years in prison, my sentence was lowered to 85  
4 | years. Well, that still sounds like a very long time.

5 | I saw it as I had a release date. Were it not for  
6 | President Clinton's commutation of my sentence, I would  
7 | not have left prison until I was 95, if I were to live  
8 | that long in there.

9 | I was freed in January of 2001, after serving  
10 | nearly 10 years in federal prison. To be clear, the  
11 | crack cocaine amendment would not have helped me. I am  
12 | really here to speak for the many women serving  
13 | sentences for crack cocaine that I know from my time in  
14 | prison. I will try to tell you what I think they would  
15 | say if they were given the opportunity to be here as I  
16 | have today. If they were here, I believe they would  
17 | tell you how much it means to them that you've lowered  
18 | these crack cocaine sentences.

19 | The Commission has provided important  
20 | leadership to challenge this terrible sentencing law  
21 | and take a meaningful step towards reform. I ask you,  
22 | for the sake of the women I served with, to now take  
23 | the next step. The Sentencing Commission has been in  
24 | the forefront of exposing the severity of crack cocaine  
25 | penalties. You have explained how crack sentences do

1 | not fit the crime, how they condemn low-level  
2 | participants such as street dealers, girlfriends and  
3 | couriers to kingpin-sized sentences, and how they  
4 | result in racial disparity. People serving sentences  
5 | for crack cocaine are immensely heartened by your  
6 | efforts. You have helped others raise their voices  
7 | against this injustice.

8 |           You have given judges and lawyers, and  
9 | advocates like FAMM, the information they need to fight  
10 | to change these laws. You know all of this already.  
11 | What I think you don't know is how it feels like to  
12 | serve a sentence that the Commission and all these  
13 | others know is unjust and say is unjust and yet are  
14 | unable to correct. I woke up every day for five years  
15 | with my first thought being I may never leave here. It  
16 | is profoundly frustrating.

17 |           By any assessment, my sentence was too long  
18 | and yet no one in the criminal justice system could do  
19 | anything to shorten it. People convicted of crack  
20 | cocaine offenses serve years longer in prison than they  
21 | would serve if they were sentenced to powdered cocaine.  
22 | They keep hearing how wrong it is and can't understand  
23 | if so many people, even the Sentencing Commission, feel  
24 | this way, why nothing changes. So the years stretch  
25 | one. It is intolerable and times unbearable. As

1 | someone who has spent time in prison, I can testify  
2 | that every day and every month is hard. It puts a  
3 | strain on the person in prison. It puts a strain on  
4 | the people outside of prison, waiting for a loved one  
5 | to come home. To those who are not in prison, reducing  
6 | a sentence by 10, 15, 20 or 25 months may not seem  
7 | worth the trouble of extra court proceedings or  
8 | paperwork.

9 |           But to someone in prison, it means making it  
10 | home before you get that phone call that one of your  
11 | parents is dead, that one of your children has resorted  
12 | to the streets because their mother and father are both  
13 | in prison for what seems like a lifetime. Every day  
14 | counts. Every second counts. Once lost, neither that  
15 | time nor those people can ever be replaced. So you can  
16 | imagine, while you're taking this first step that  
17 | correct that injustice, it means so much to me and  
18 | women I have left behind. I feel their pain each and  
19 | every day.

20 |           Today, you are considering whether to permit  
21 | people serving guideline sentences for crack cocaine,  
22 | the opportunity to apply for a sentence reduction. To  
23 | declare the guideline amendment retroactive would be an  
24 | act of justice. I was the beneficiary of an act of  
25 | justice. When President Clinton commuted my sentence,

1 | I was literally handed my life back. Certainly being  
2 | released from prison was enormous, but the clemency  
3 | meant something else as well. That day, I was  
4 | important. That day, I counted. That day, I was no  
5 | longer just a number. I cannot begin to tell you what  
6 | that means. It meant that someone who had the power to  
7 | correct an unjust sentence cared enough to do so for  
8 | me. I had almost given up believing that such a thing  
9 | could happen. You have that same power. You have the  
10 | power to correct unjust sentences in thousands and  
11 | thousands of cases.

12 |           If you exercise it, you are telling nearly  
13 | 19,500 people, not only that their sentences are  
14 | indefensibly long, but that you will not tolerate this  
15 | injustice. By doing so, you are telling these  
16 | prisoners that what happens to them matters to you,  
17 | that they matter to you. And in the process, you may  
18 | even help restore some of the lost faith in the  
19 | criminal justice system and mankind. I speak for every  
20 | woman I served with. May you hear my voice thousands  
21 | of times today, in my effort to convince you of your  
22 | power to do justice in these cases. I thank you for  
23 | letting me speak in front of you today.

24 |           CHAIR HINOJOSA: Thank you, Ms. Coffman.  
25 | Does anybody have a question? Commissioner Horowitz,



1 | did you have a question?

2 |           MS. STEWART: We persuaded you.

3 |           JUDGE SESSIONS: I have a question for  
4 | Ms. Stewart. I shouldn't let her off entirely. Thank  
5 | you all for your testimony. Very moving. Ms. Stewart,  
6 | your organization is, I think, in an almost unique  
7 | position to be helpful with respect to one of the  
8 | concerns that has been raised about making this  
9 | amendment retroactive, and that is that, although we  
10 | estimate some 19,500 offenders might be eligible for  
11 | release if the amendment is made retroactive, many more  
12 | may apply, hoping that lightning will strike and that  
13 | they will get lucky.

14 |           And that creates a potentially significant  
15 | additional burden on the courts and the Justice  
16 | Department, and everyone, to ferret through those, what  
17 | would be unmeritorious applications. And while we  
18 | can't say exactly what the parameters of the eligible  
19 | would be, because, as you've heard, there's some legal  
20 | uncertainty, we do know that some are not going to be  
21 | eligible and they are the ones that are stuck with the  
22 | mandatory minimums that your organization focuses on,  
23 | in addition to the sentencing guidelines issues. So it  
24 | seems to me that what your organization is in the  
25 | position to do is to communicate to families, and to

1 inmates themselves, that it's not going to be in the  
2 best interest of this process if the Commission makes  
3 it retroactive for this amendment, and it's not going  
4 to be in the best interest of keeping that process in  
5 the future, and I think that the ability of the  
6 Commission to make amendments retroactive is something  
7 that was a very good part of the Sentencing Reform Act,  
8 that regardless of how this issue comes out, ought to  
9 be -- ought to be maintained and I don't want Congress  
10 to take it away. So I just hope that your organization  
11 will, if the Commission does make this decision the way  
12 you want it to, will do everything that you can to help  
13 to communicate the acceptable parameters of the  
14 eligible.

15 MS. STEWART: Yes, we definitely will. We  
16 already have a one-pager, which is maybe two pages, but  
17 of all the, you know, sort of questions and answers  
18 that prisoners and their families have about the  
19 guideline going forward, as well as retroactive --  
20 retroactively. So no, absolutely. When the marijuana  
21 guideline was made retroactive, it only applied to  
22 growers or people that had plants. It did not apply to  
23 people had pounds of marijuana already processed. That  
24 was a good example of saying to those people, I'm  
25 sorry, it doesn't help you. But we are always wanting

1 | to be helpful. I've already had conversations with the  
2 | Bureau of Prisons about how we can help them to even  
3 | diffuse current tensions, because people think that,  
4 | after today, the guideline will be retroactive.  
5 | There's a lot of rumor out there, of course, and so we  
6 | are trying to help people understand that, you know,  
7 | maybe in January the decision will be made. It's not  
8 | going to happen right away. So it's -- we're very  
9 | willing and wanting to be of help.

10 |           CHAIR HINOJOSA: Does anybody else have any?  
11 | Well, we thank you all very, very much. We appreciate  
12 | it. And I want to say, on behalf of the Commission,  
13 | today has been very helpful. We have heard, as we have  
14 | said this morning, from over 30,000 individuals, in  
15 | writing. We have heard from 19 individuals today, in  
16 | person, with different perspectives.

17 |           And I will say, at the end of the day, that I  
18 | judged things in the last several months, based on the  
19 | Anacrecina Baker (phonetic sp.) standard, who is my  
20 | two-and-a-half-year-old godchild who, when recently I  
21 | told her she needed to share something with her younger  
22 | sister, she turned to me and she said, you be quiet.  
23 | And I have to say that every single one of you didn't  
24 | deserve a you be quiet, because all of the individuals  
25 | today, with different perspectives, were very helpful

1 | to what we needed to do and none of you needed to be  
2 | quiet. And at the same time, I have to say that when  
3 | we make decisions -- and crack is a hard decision, but  
4 | I have to say that every single decision that a judge  
5 | makes with regards to sentencing, and every single  
6 | decision that the Commission makes with regards to  
7 | sentencing, is a difficult one.

8 |           We didn't hear much about criminal history  
9 | today, but that's also a difficult decision. They're  
10 | all difficult. But hearing from individuals is  
11 | important and it's also important -- we also have to  
12 | keep in mind, from those we don't hear, that this  
13 | affects the entire public and each one of the  
14 | defendants, whether we ever hear from a defendant or  
15 | not, as well as from the general public. And so we  
16 | make those decisions under the law and we certainly  
17 | take into consideration everything that we hear.

18 |           And we realize many of you have come from far  
19 | and many of you have brought different perspectives and  
20 | they all will be taken into account. And so on behalf  
21 | of the Commission, I thank all of you. I also thank  
22 | the Georgetown University Law Center for letting us use  
23 | their facilities, as well as Larry Center, who has been  
24 | with us today, who is the head of the Continuing Legal  
25 | Education Department here at Georgetown University,

1 | with regards to his help. And certainly to the staff  
2 | of the Commission, every single one of them. Judy  
3 | Shoner (phonetic sp.), our Staff Director, and every  
4 | member of the Commission staff who has worked on this,  
5 | has worked on this tirelessly, and we certainly  
6 | appreciate the help that they gave us in setting this  
7 | hearing up, as well as all the help we get from them on  
8 | every issue before the Commission. And at this point,  
9 | I also would like to give the opportunity to any other  
10 | commissioner who would like to say something before we  
11 | close here today.

12 |           JUDGE CASTILLO: I just wanted to thank you,  
13 | on behalf of my fellow commissioners, for holding this  
14 | hearing. In particular, I thank the family members for  
15 | coming. And even though they didn't all get to  
16 | testify, we certainly will take this matter seriously.

17 |           JUDGE SESSIONS: And I want to say I  
18 | appreciate your courage.

19 |           COMMISSIONER HOROWITZ: And just to the  
20 | people who watched in the audience, who didn't get a  
21 | chance to testify, I think all of us up here certainly  
22 | appreciate your listening to us and communicating your  
23 | views through various speakers today. So we certainly  
24 | appreciate your coming and speaking to us through your  
25 | representatives and directly through your written

1 | submissions.

2 |           CHAIR HINOJOSA: Well, thank you all very  
3 | much, and this hearing is adjourned.

4 |           (Whereupon, at 4:30 p.m., the foregoing  
5 | public hearing was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before

UNITED STATES SENTENCING COMMISSION  
PUBLIC HEARING ON RETROACTIVITY

PLACE: Washington, D.C.

DATE: November 13, 2007

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

\_\_\_\_\_  
SEAN WILLIAMS, Court Reporter

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DAVID MARTINI, Transcriber