

U.S. SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY

Tuesday, November 14, 2006

Georgetown University Law Center
Gerwirz Student Center
Twelfth Floor Conference Room
120 F Street, N.W.
Washington, D.C.

The public hearing on federal cocaine sentencing policy was convened at 9:20 a.m. before the members of the U.S. Sentencing Commission.

CONTENTS

Opening Remarks by the Honorable Ricardo Hinojosa

Panel One: Executive Branch

R. Alexander Acosta
Department of Justice

Joseph T. Rannazzisi
Drug Enforcement Administration

Panel Two: Defense Bar

A. J. Kramer
Federal Public Defenders

David Debold
Practitioners Advisory Group

Stephen Saltzburg
American Bar Association

Carmen Hernandez
National Association of Criminal Defense
Lawyers

Panel Three: Judicial Branch

The Honorable Reggie B. Walton
Criminal Law Committee

Panel Four: State and Local Agencies

Chuck Canterbury
Fraternal Order of Police

Elmore Briggs
District of Columbia Department of Health,
Addiction, Recovery, and Prevention
Administration

Panel Five: Medical and Treatment Communities

Dr. Nora Volkow
National Institute on Drug Abuse

Dr. Harolyn Belcher
Johns Hopkins University

Panel Six: Academics

Dr. Alfred Blumstein
Carnegie-Mellon University

Dr. Bruce Johnson
Institute for Special Populations Research

Dr. Peter Reuter
University of Maryland

Panel Seven: Community Interests

Julie Stewart
Families Against Mandatory Minimums

Jesselyn McCurdy
American Civil Liberties Union

Hilary Shelton
NAACP

Panel Eight: Community Interests

Ryan King
The Sentencing Project

Nkechi Taifa
Open Society Institute

Angela Arboleda
National Council of La Raza

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

2 OPENING REMARKS

3 CHAIRMAN RICARDO HINOJOSA: Good morning.
4 We'll go ahead and call this public hearing on
5 federal cocaine sentencing policy of the United
6 States Sentencing Commission to order. On behalf of
7 the Commission, I would like to welcome everyone who
8 is present and who will be present throughout
9 today's hearings. I also want to especially thank
10 the distinguished group of panelists that we have
11 making presentations throughout the day. We realize
12 that they have busy schedules, and we appreciate
13 very much their taking their time to come and visit
14 with the Commission about federal cocaine sentencing
15 policy.

16 A very special thank you to Dean Alex
17 Aleinikoff and Larry Center with the Georgetown Law
18 School. Larry's back there, and he's the head of
19 the CLE programs here at Georgetown. And they do an
20 excellent job with their CLE programs and certainly
21 with the law school, and we very, very much
22 appreciate their gracious hosting of us during this

1 hearing and every courtesy that has been extended to
2 us, and we look forward to continue working with the
3 Law Center. I especially am very appreciative since
4 I did get an admission letter from Georgetown Law
5 School. As anybody who's been to law school, it's
6 always nice to be admitted to a law school, and so
7 you always hold some special relationship with them.

8 I do want to introduce the Commissioners
9 who are here this morning. We have Vice Chair Judge
10 William Sessions, who is present; Vice Chair John
11 Steer, Vice Chair Judge Ruben Castillo;
12 Commissioners Michael Horowitz and Beryl Howell; as
13 well as our ex officio members Ben Campbell, with
14 the Department of Justice, and Ed Reilly, with the
15 Parole Commission. We are all very interested in
16 hearing from all of our panelists and not only at
17 the public hearing but also any time that we take a
18 break.

19 As well all know, the issue of federal
20 cocaine sentencing policy is one of great importance
21 to the Commission and has been for many, many years.
22 The Commission, through the years, has worked with

1 Congress and others in the federal criminal justice
2 community to address issues with regards to cocaine
3 sentencing. We continue to hear from many that have
4 concerns and suggestions with regards to cocaine
5 sentencing policy, and we hear from many about the
6 need that this continued to be addressed, and the
7 Commission continues to feel the need to address
8 such issues, and, basically, that is the reason for
9 the public hearing today.

10 It is interesting to note that the
11 statistics that have been compiled by the Commission
12 through the years, for example, up through the third
13 quarter of fiscal year 2006, indicate that of
14 approximately 52,000 cases, about 35.9 percent or
15 about 36 percent of the cases are drug cases.
16 Within that drug case 36 percent, about 40 percent
17 of those 36 percent are cocaine cases, with
18 approximately 23.4 being powder cocaine cases and
19 20.9 or about 21 percent of those 40 percent being
20 crack cocaine cases.

21 Today we are fortunate, as I have
22 indicated, to hear from people with different

1 viewpoints and varied viewpoints on the subject.
2 They are all distinguished, and it is a varied group
3 of individuals with interest in federal cocaine
4 sentencing policy. This morning we will hear from
5 the executive branch, the defense bar, the local and
6 state perspectives, as well as from the federal
7 judiciary. This afternoon, we will be hearing from
8 medical experts, people in academics who have an
9 interest in the field, as well as community interest
10 groups, who obviously have interest on the subject
11 also and have been for years.

12 I think I speak on behalf of all of us when
13 we say that the input that we receive today is of
14 paramount importance to the Commission as we
15 continue to address these issues with regards to
16 federal cocaine sentencing policy, and we hope that
17 the Commission's efforts on this area will assist
18 Congress as well as all who are interested on the
19 subject with regards to continued discussion and
20 solutions to federal cocaine sentencing policy
21 issues.

22 In closing, I would like to talk a little

1 bit about the procedure. Each speaker has been
2 asked to please limit themselves to five minutes
3 unless you are part of a panel where you will be the
4 only one speaking. Then, obviously, you would have
5 more than five minutes. But we are going to try to
6 stick to that procedure, and also we will allow
7 everyone on a panel who is speaking to speak, and
8 then afterwards we will open it up to questions from
9 the Commission, and there will be no particular
10 order as to how we ask the questions other than
11 whoever has a question will be allowed to go ahead
12 and proceed with any questions they do have. Please
13 bear in mind that any questions that we do have are
14 not intended to do anything other than to get us as
15 much information as we feel that we need as we
16 address these important issues.

17 Again, I thank each one of you for your
18 presence and certainly welcome anyone who is here
19 who is not on the panels. I know there may be some
20 students here as well as some from Congressional
21 staffs, and we certainly appreciate your interest
22 and your presence. And we also have press as well

1 as, I believe, NPR is taping this, and we appreciate
2 their interest as we know through the years they
3 have shown, the press has shown a lot of interest on
4 this particular subject.

5 PANEL ONE: EXECUTIVE BRANCH

6 CHAIRMAN RICARDO HINOJOSA: This morning we
7 will start with the first panel, which is a panel
8 from the executive branch. We do have Mr. Alex
9 Acosta, who is the United States Attorney for the
10 Southern District of Florida, who has been at that
11 job since June of 2006, and prior to that he was the
12 Assistant Attorney General for the Civil Rights
13 Division of the Department of Justice, having
14 actually the honor of being the first Hispanic to
15 serve as an assistant attorney general. He has
16 served as Principal Deputy Assistant to the Attorney
17 General in the Civil Rights Division, and prior to
18 joining the Department of Justice, he was appointed
19 by the President to serve on the, as a member of the
20 National Labor Relations Board. And he is a native
21 of Miami. He has earned his degrees from Harvard as
22 well as undergraduate as well as law school. In

1 case anybody has seen the new guideline manual, the
2 crimson and white is for Harvard, and it has nothing
3 to do with Texas A&M University [Laughter] which I
4 am sure I'm going to hear some comments about. And
5 he served as a law clerk to Judge Alito on the Third
6 Circuit, and he has previously worked in private
7 practice.

8 Mr. Joseph T. Rannazzisi is here. He is
9 with the Drug Enforcement Administration, where he
10 serves as the Deputy Assistant Administrator for the
11 Office of Diversion Control. He has over 20 years
12 of experience with the DEA. So, we really could
13 have no one better here to answer questions from the
14 DEA perspective, and certainly DEA has a lot of
15 experience with regards to, obviously, drug
16 enforcement policy and the effects of drugs
17 enforcement with regards to drug interdiction as
18 well as the drug situation in the United States with
19 regards to controlled substances. And we appreciate
20 his time and his decision to attend and make himself
21 available for questioning. He holds a B.S. degree
22 in pharmacy as well as a law degree from Detroit

1 College of Law at Michigan State University, and he
2 continues to be a registered pharmacist as well as a
3 lawyer. And so, we especially thank him for making
4 his presence here and willingness to participate
5 here and answer any questions we may have.

6 Mr. Acosta, sir.

7 MR. ALEXANDER ACOSTA: Thank you, Judge
8 Hinojosa. Members of the Commission, good morning.
9 I want to thank you for inviting the executive
10 branch to present views today. I, along with my
11 colleagues at the DEA, are privileged to represent
12 the Administration. With me at the table, as Judge
13 Hinojosa introduced, is Joe Rannazzisi, the Deputy
14 Assistant Administrator of the DEA. Also available
15 to answer questions that you may have are John
16 Casale, a senior research chemist; Tom Duncan, a
17 supervisory chemist; and Tim Wing [phonetic sp.], an
18 assistant deputy chief counsel.

19 The views submitted for the record represent
20 the views of the Administration on federal cocaine
21 sentencing policy. I would ask that those views be
22 admitted into the record. These views, previously

1 set forth in 2002 by then Deputy Attorney General
2 Larry Thompson comport with long-standing Department
3 of Justice positions that current sentencing policy
4 is reasonable and that strong criminal sanctions for
5 trafficking in cocaine base are critical to help
6 shut down the violent drug gangs that terrorize so
7 many neighborhoods.

8 Today's hearing is important, and I want to
9 thank the Commission for holding it. We recognize
10 that this Commission and many others have expressed
11 concern over the cocaine base to powder quantity
12 ratio. The public must have confidence in the
13 federal criminal justice system. It may very well
14 be appropriate to address this issue at this time.
15 That is why the Administration stands ready to work
16 with this Commission and with the Congress to
17 determine whether any changes in federal cocaine
18 sentencing policy are in fact appropriate. This
19 collective work is especially critical now as part
20 of and in light of larger systemic changes taking
21 place in federal sentencing. I recognize that the
22 Commission is familiar with the views of the

1 Administration, however; so, I'd like to use my
2 opening statement to bring the Commission's
3 attention more personal observations based on my
4 South Florida experience regarding today's issue.

5 As United States Attorney for the Southern
6 District of Florida, I'm acutely aware of the
7 importance of the issue before the Commission today.
8 Despite much progress, the trafficking and use of
9 cocaine in all its forms remains a major concern for
10 law enforcement and the wider community in South
11 Florida. When asked to represent the Administration
12 today, I gladly agreed to do so because today's
13 issue has particular resonance in South Florida.

14 I want to share with the Commission a recent
15 experience that confirmed my belief that it is not
16 only appropriate but vital to maintain strong
17 criminal sanctions for trafficking in cocaine base.
18 I attended last week the opening of a new youth
19 computer center at the Liberty Square Housing
20 Complex in Miami. The center is the result of a
21 partnership between us at the Department and the
22 Liberty Square Weed & Seed Program. The Weed & Seed

1 Program, as the Commission knows, focuses on weeding
2 out the violent criminal elements from a community,
3 while at the same time seeding that same community
4 with alternatives to drug gangs and drug violence.
5 Dozens of young kids showed up the first day to get
6 computer training. After-school tutoring and other
7 academic programs are also offered as well. The
8 turnout was much better than expected. It's a great
9 program, but that program will be of less, perhaps
10 little, use if that community continues to be
11 plagued with some of the most violent drug gangs in
12 Miami-Dade County.

13 Initiatives like Weed & Seed along with
14 expanded commitments to drug treatment systems and
15 anti-drug education programs are critical elements
16 to help regenerate America's cities and make them
17 safer. Equally important, however, is a strong and
18 effective law enforcement strategy targeting the
19 violent drug pushers responsible for so much damage
20 to these communities. My point is this: In my
21 experience in South Florida, strong penalties for
22 trafficking in cocaine must be part of any

1 comprehensive attempt to reduce the harm caused by
2 violent drug organizations. The sale of cocaine
3 base is particularly integral to these organizations
4 and a major cause of the violence they inflict on
5 our cities.

6 As in any business, the drug gangs that sell
7 their product worry about competition from rival
8 suppliers and other groups seeking to sell the same
9 product to the same client. These gangs likewise
10 worry about maintaining the loyalty of their
11 members, particularly in light of law enforcement
12 efforts to infiltrate these organizations. Unlike
13 legitimate businesses, however, these drug gangs
14 maintain their positions in particular areas through
15 violence targeted at rival drug gangs or anyone else
16 that threatens their profits or gets in their way.
17 Far too often, and we see this in Miami, far too
18 often, victims of this violence are individuals who
19 had absolutely nothing to do with drug trade or drug
20 gangs. Too often the victims are children, infants,
21 or anyone else who just happens to be in the wrong
22 place at the wrong time.

1 To reclaim our streets from drug dealers, their
2 guns, and their violence, we must dismantle the
3 street-level drug organizations that do business
4 through violence and through fear and through
5 intimidation. Cocaine base is a major product of
6 these organizations. Cocaine base is more closely
7 associated with street-level gang violence than
8 other drugs, including cocaine powder. There's
9 substantial proof that the violent gangs are deeply
10 involved in trafficking in cocaine base especially
11 in metropolitan areas and certain neighborhoods.
12 There's also substantial proof that cocaine base is
13 associated with violence to a greater degree than
14 other controlled substances, including cocaine
15 powder. In short, the violent drug gangs that
16 plague our cities are populated by members who
17 peddle cocaine base and use guns and use violence to
18 promote their drug trafficking activities.

19 This is why the strong federal sentencing
20 guidelines presently available represent one of the
21 best tools for law enforcement's efforts to stop
22 violent crime. Attempt to reduce these sentences

1 create a risk, in my opinion, of increased drug
2 violence. The result would be that kids, like those
3 now attending the Liberty Square Computer Center,
4 will more likely be shot, will more likely be
5 exposed to drug violence, or will more likely become
6 part of a drug gang. And once you're in a gang,
7 you're in it for life. The result could be an
8 increase in the cycle of violence as more drug gangs
9 struggle more violently for control of more
10 neighborhoods.

11 Allow me to close if I could with a final
12 observation. It's been 4 years since this
13 Commission held hearings on this issue. Since then,
14 much has taken place. This commission issued
15 recommendations to Congress. Congress invests
16 substantial time in examining this issue, including
17 consideration of several bills, and now the
18 Commission's once again gathering information on
19 this issue through data collection and data analysis
20 and through today's hearing. I began by stating
21 that, particularly in light of and as part of larger
22 systemic changes taking place in federal sentencing,

1 it may very well be appropriate to address the
2 cocaine base to powder quantity ratio, and that the
3 Administration stands ready to work with this
4 Commission and with the Congress on this issue. I
5 would like to end by emphasizing the importance of a
6 working relationship and a dialogue on this issue.
7 In 1995, the Commission attempted to alter the
8 cocaine sentencing guidelines without the support of
9 the elected branches. As a result, Congress passed
10 and President Clinton signed legislation
11 specifically rejecting Commission efforts. This
12 issue is too important and affects too many lives in
13 my South Florida community and throughout our nation
14 to be addressed without the benefit of that dialogue
15 and that relationship and without the benefit of the
16 counsel of our elected branches. Thank you.

17 CHAIRMAN RICARDO HINOJOSA: Who has the
18 first question? Judge Castillo.

19 VICE CHAIR RUBEN CASTILLO: Mr. Acosta, how
20 do you see this dialogue then playing out in the
21 near term?

22 MR. ALEXANDER ACOSTA: Well, Judge, I think

1 that's a very important question because a part of a
2 dialogue has to be the establishment of a working
3 relationship. My understanding is that the
4 Commission is currently in the process of gathering
5 information and conducting data analysis. We have
6 not yet been privy to that data. The Commission, I
7 believe, has more data than we do with respect to
8 some sentencing issues. As an initial matter, the
9 Department would welcome the opportunity to sit down
10 with the Commission and address that data. Today's
11 hearing I think is also an important part of that
12 dialogue. Today the Commission's hearing not only
13 from the executive branch but from the public at
14 large, and I think it's important to hear that
15 testimony, to hear it with an open mind, to see what
16 suggestions are made, and then, going forward, to
17 sit down with staff from the Commission, staff from
18 Congress. Congress is an integral part of this
19 issue, and to address it as part of a larger
20 systemic issue in larger discussions that I think
21 are ongoing in federal sentencing policy.

22 VICE CHAIR WILLIAM SESSIONS: You've - just

1 reading the written submission that you offered to
2 the Commission, and in part, let me just read - I'm
3 not going to try to hold you to every word that
4 you're, that was written by the Department, but -
5 "The guidelines are tied by law to the applicable
6 mandatory minimum drug trafficking statutes passed
7 by Congress." What you're suggesting there, I
8 think, is that the Commission has no discretion to
9 change guidelines without a delinkage or without
10 basically changing the mandatory minimums. If that
11 is the Department's position, can you tell me where,
12 what's the authority for that?

13 MR. ALEXANDER ACOSTA: Certainly. As an
14 initial matter, let me say that these are the views
15 of the Administration, and I'm glad to address them.
16 The field has changed since 1995. Congress has made
17 clear through statute that the Commission and the
18 Commission's sentencing guidelines should comport
19 with its legislative enactments, and I'm happy to
20 provide citations in more detail, but as a general
21 matter, let me say Congress is our elected branch.
22 Congress passes criminal laws, including the

1 mandatory minima, and Congress by statute has
2 directed the Commission to engage in guidelines that
3 follow as a general matter the laws of this land. I
4 think it would be highly suspect for the Commission
5 to choose to ignore the sentences enacted by
6 Congress as part of the law of this land and to
7 decouple the guidelines from those mandatory minima.
8 In addition to the legal issue, however, I think it
9 opens the door to some policy concerns. So, for
10 example, if an individual with 4.99 grams would be
11 subject to a substantially different sentence than
12 an individual with 5 grams because of the mandatory
13 minima, I would have policy concerns with that, and,
14 you know, certainly the Department did not, you
15 know, certainly the Department's ready to discuss
16 policy issues, but as a legal matter and as a
17 concern of equity across the continua of quantity
18 use, I think it is dangerous and suspect to decouple
19 the guidelines.

20 VICE CHAIR WILLIAM SESSIONS: Well, is
21 there a particular statutory provision that you are
22 thinking about when you say that the Commission

1 would not have the authority to change the
2 guidelines without a corresponding change to
3 mandatory minimums?

4 MR. ALEXANDER ACOSTA: There is. As I
5 said, my understanding is that Congress has passed a
6 statute and by statute has specifically directed the
7 Commission to enact guidelines consistent with its
8 sentencing policy, and I'm happy to provide the
9 Commission after this hearing with a specific
10 citation.

11 CHAIRMAN RICARDO HINOJOSA: Do you think
12 the Commission would - it would be compliance
13 because we do have a section in the guidelines that
14 says, when there is a mandatory minimum that
15 applies, that becomes the guideline. Wouldn't that
16 be in compliance with any such statutory provision
17 if one exists?

18 MR. ALEXANDER ACOSTA: Well, again, when a
19 mandatory minimum applies, obviously it binds the
20 judge at the time. In addition, it's important that
21 the guidelines be in compliance with the laws
22 enacted by Congress. In this case, Congress has set

1 forth a scheme. Congress has directed by law that
2 the Commission adopt guidelines that comport with
3 that scheme, and I think it would be highly suspect
4 to deviate from that.

5 CHAIRMAN RICARDO HINOJOSA: Commissioner
6 Howell, go ahead.

7 COMMISSIONER BERYL HOWELL: Okay. Well, I
8 just wanted to address two different issues. When I
9 skimmed your testimony this morning when I got it, I
10 was looking to see whether there was any specific
11 recommendation for addressing the crack/powder
12 sentencing disparity, and in particular I was
13 looking to see whether the Justice Department was
14 addressing, you know, one issue, that has to do with
15 the mandatory minimum that applies to crack
16 possession. I mean the examples that you gave, you
17 know, were, you know, involving fairly serious
18 narcotics traffickers, perhaps at the wholesale
19 level or in a gang environment, but that's not the
20 crack possession mandatory minimum. And I'm just
21 wondering whether the Justice Department has a
22 position on whether or not there should be a

1 reevaluation and a change in the only mandatory
2 minimum that applies to a narcotics possession
3 offense, which is the crack possession mandatory
4 minimum.

5 MR. ALEXANDER ACOSTA: Commissioner, you
6 raised an important issue, and you are correct in
7 noting that the Department has not predetermined or
8 prejudged particular recommendations. I began by
9 saying it's important to engage in a dialogue on
10 this issue, especially now in light of larger
11 systemic federal sentencing issues, and I want to
12 reiterate that. I think the Department and the
13 Administration, as part of that dialogue, is ready
14 to engage in a discussion that looks at various
15 options. We recognize that there are differences in
16 opinion, that there are differences in views, and
17 that it's important to enter any dialogue with an
18 open mind to hear what individuals have to say, what
19 this Commission believes, what many of the
20 individuals who will be testifying later today have
21 to say. And as a result, my emphasis is that it's
22 important that we continue this discussion beyond

1 simply today, and that we not rush to cut off
2 possibilities or options, especially in light of
3 ongoing discussions in larger sentencing policy at
4 this time.

5 COMMISSIONER BERYL HOWELL: But - so, I
6 take it that you may be open to - even if the - you
7 would be open to suggestions even from the
8 Commission or recommendations from the Commission to
9 Congress, putting aside the crack/powder trafficking
10 offenses for a second, for the Commission perhaps to
11 consider guideline changes that would provide more
12 moderation for offenders convicted just of crack
13 possession. I'm correct? I'm hearing that from
14 what you're saying?

15 MR. ALEXANDER ACOSTA: What I'm saying and
16 what you're saying, Commissioner, are slightly
17 different things. What you're saying is that we
18 would be open to it; what I'm trying to say is that
19 we want to hear what transpires today. We want to
20 sit down, and we want to have conversations with
21 this Commission. We want to hear the Commission's
22 views. We want to sit down and work with Congress

1 to address cocaine sentencing policy, particularly
2 in light of larger systemic conversations that are
3 taking place. As part of that discussion, we
4 believe it would be inappropriate, before we've
5 heard other testimony, before we received the data
6 that this Commission's compiling, to take particular
7 positions that would impede a good working dialogue
8 with this Commission.

9 CHAIRMAN RICARDO HINOJOSA: Judge Castillo,
10 and then Commissioner Horowitz.

11 VICE CHAIR RUBEN CASTILLO: In your written
12 testimony, the part that caught my interest because
13 I will tell you my 20 years' experience of being
14 involved in the drug wars, I think it has been a
15 failure, and that's not to say anything about this
16 Administration or what's going on in Miami because I
17 have a lot of admiration for what you're doing
18 there. But you say in your written testimony the
19 Administration recognizes that disrupting the
20 cocaine market at its highest levels will have
21 benefits in addressing both powder cocaine and crack
22 cocaine trafficking domestically. And that's

1 something that I totally agree with. My question
2 is, have you reflected on the fact that this
3 powder/crack cocaine penalty differential might
4 create incentives for the bringing of prosecutions
5 at lower-level crack cases, and that that is
6 occurring nationally, maybe not necessarily in
7 Miami, but in other federal districts throughout the
8 country and has been a pattern that has continued
9 over the last, let's say, 12 years to take it beyond
10 this Administration? Have you reflected on that?

11 MR. ALEXANDER ACOSTA: Judge, is your
12 question whether the current sentencing policy
13 encourages prosecutions not only at the highest
14 levels but also at the street level?

15 VICE CHAIR RUBEN CASTILLO: My question is,
16 does the current penalty disparity encourage
17 investigations and prosecutions at low-level crack
18 dealer levels without going after the higher cocaine
19 defendants who I'm not seeing anymore?

20 MR. ALEXANDER ACOSTA: Well, Judge, I
21 appreciate the importance of that question because I
22 believe that you're absolutely right in saying that,

1 for the war on drugs to be successful, we have to –
2 and as a matter of fact, it's our position that we
3 focus on the highest level drug offenders, the
4 individuals that we refer to as CPOTs, for example,
5 the Consolidated Priority Organization Target List
6 compiled by the DEA, or the RPOTs, the regional
7 equivalents, not the DEA's fifty most wanted, in
8 essence, but the regional equivalents.

9 In Miami, I can tell you that we have under
10 investigation or prosecution well over twenty of the
11 largest drug dealers in the world. We recently took
12 pleas from the Rodriguez-Orejuela brothers, as an
13 example, who pled guilty to the importation of 200 –
14 I'm sorry – who admitted to the importation and pled
15 guilty to trafficking cocaine. They admitted to the
16 importation of 200,000 kilograms of cocaine, as
17 founders of the Cali drug cartel. We have several
18 other CPOTs and other drug kingpins under
19 investigation, under drug prosecution. One of the
20 things that U.S. Attorney's Office in Miami does is
21 go after the largest of the drug dealers, and that
22 remains our priority.

1 That said, we also focus on local
2 trafficking, and I've said previously that I think
3 it's important that, while our primary focus must
4 remain looking to the south, looking to Colombia and
5 the Caribbean corridors and the avenues for drug
6 importation into this nation - I'm a member of the
7 South Florida community. I live in Miami. I think
8 I'd be negligent in my job if I completely ignored
9 street-level drug trafficking, if I completely
10 ignored the drug gangs - in part, not only because
11 they are harming individuals through the drug trade,
12 but because the result of their activity is gang
13 violence and murders, and many of the areas that we
14 look at as hot spots, many areas of the areas in the
15 city that have the highest incidence of murders and
16 rapes are also the areas where we find the drug
17 gangs. And my experience, speaking with local law
18 enforcement, is that one of the best tools that they
19 have to reduce drug violence are operations that
20 target these drug gangs. As an example, the DEA has
21 what they call a MET team that goes in and focuses
22 on an area where there is high drug gang activity.

1 And I have had conversations with police chiefs that
2 tell me that after a MET team deployment, after we
3 conduct a roundup of these drug gangs, violent crime
4 in that area plummets dramatically, and there's
5 great competition for these MET teams.

6 And to, to some extent, if your question
7 is, is drug sentencing policy a method that we use
8 to reduce violent crime? Yes, it is, and we go both
9 after the high-level dealers and the lower-level
10 dealers.

11 VICE CHAIR RUBEN CASTILLO: Well, my
12 concern is, I tell you, I have great respect for
13 what's going on in Miami. I wish it was going on at
14 the U.S. Attorney's Office in other parts of the
15 country, but, for example, in preparing for this
16 testimony, have you ever seen a paper written by
17 Eric Sterling, the former House Judiciary counsel
18 who was responsible for these very penalties? He's
19 written a paper, a white paper, called "Getting
20 Justice off its Junk Food Diet." Have you ever read
21 that paper?

22 MR. ALEXANDER ACOSTA: No, I have not,

1 Judge.

2 VICE CHAIR RUBEN CASTILLO: I would really
3 commend it to you because he asserts that only 7
4 percent of federal cocaine cases are directed at
5 high-level traffickers. Now, you say that in
6 Southern District of Florida, your primary emphasis
7 is on high-level traffickers. Obviously, if this
8 turns out to be true, that's not the case
9 nationwide, and no one is talking about completely
10 ignoring crack dealing in large urban areas or
11 significantly lowering the penalties, but what I'm
12 concerned about is somehow there's an incentive on
13 the part of investigators to go after these type of
14 cases and not bring the big cases because, other
15 than Miami, I don't think these big cases are being
16 brought in Chicago, New York, and L.A., and I'm
17 concerned about that.

18 MR. ALEXANDER ACOSTA: Well, Judge, as I
19 said, I, you know, the Department's priority are the
20 OCDETF targets. OCDETF is the primary tool that the
21 Department uses to conduct drug policy, and the
22 objective of the OCDETF program is to go after the

1 highest-level targets. I believe that Mr.
2 Rannazzisi could also shed some light on the
3 [indiscernible] and deployments of the OCDETF
4 program.

5 MR. JOSEPH RANNAZZISI: Yes, sir, Judge.
6 The fact is, as we mentioned before with the CPOT
7 targets, those are the highest level of trafficker.
8 Indeed, the - let me throw out a number - 45, 45, 46
9 CPOT targets worldwide, they're mostly
10 international, but we have many cases linked to
11 those CPOT targets. So, he might actually be
12 correct. If his definition is, you know -

13 VICE CHAIR RUBEN CASTILLO: Right.

14 MR. JOSEPH RANNAZZISI: It - just, what the
15 definition of a high-level target is. Our highest-
16 level targets are the CPOT targets, but we can't
17 walk into a CPOT target and make a buy. We have to
18 start at an organizational lever somewhere below
19 that CPOT target. So, yes, there are many, many
20 case, but, again, DEA targets organizations. We
21 target organizations that are linked to those CPOT
22 targets. That's how we do business. So, yes,

1 there's only 44, 45, or 46 major targets worldwide,
2 and there are many cases underneath that that are
3 linked to those targets, that are being supplied by
4 those targets, and those organizations we are
5 working domestically and abroad. So, he might be
6 correct if that's his definition, if his definition
7 falls into that CPOT -

8 VICE CHAIR RUBEN CASTILLO: Well, I don't
9 want to get into a long debate, and I certainly want
10 to give the other Commissioners a chance to answer
11 questions, but the way the drug trade is being
12 conducted in this country, just based on my
13 experience, and I will tell you just last week I had
14 a case in Chicago. A defendant was convicted. He
15 had a million dollars in his car. That's all he was
16 doing. He was just transporting money because all
17 of this has been segmented where by, you know, as
18 well as I do, the person is assigned to do one
19 specific little part of the drug trade. It might be
20 on the drug side or the money side. It might be
21 just moving from one place to another, city to city,
22 but they don't know anything else. And it seems to

1 me that unless we create incentives to go after your
2 higher targets by the way of Title III wiretaps,
3 which is the only way to go after the people that
4 are really moving drugs in Colombia and Mexico,
5 we're never going to work our way from the bottom up
6 because those people with no criminal history who
7 are being constantly prosecuted in federal court
8 have gotten us nowhere in the drug wars.

9 MR. JOSEPH RANNAZZISI: Judge, I could tell
10 you that we do many wiretaps. We use electronic
11 surveillance to identify and dismantle those major
12 targets, and that's how we get - the fact is you're
13 absolutely right. Drug traffickers are smart.
14 They're compartmentalizing, and they're creating
15 cells because they don't want - if one cell is taken
16 down, they don't want the whole domestic
17 organization taken down, and they don't want to be
18 led to the international targets. So, that's
19 correct, but we have to try because a trafficker
20 that's in a cell still knows other cells. They
21 might not do direct business with them, but they
22 know about them, and that leads us to the cells, and

1 it definitely leads us to the organizer of the
2 cells, the cell, the major cell heads in,
3 domestically. So, you're right. If they're
4 compartmentalized and they don't want to cooperate
5 with us, obviously, you know, we're stuck at that
6 point in time.

7 MR. ALEXANDER ACOSTA: If I could just
8 briefly provide two quick examples, and I know that
9 there are some other issues, but I think this an
10 important point. First, we recently, as I said,
11 took pleas from the founders of the Cali drug
12 cartel. That followed the prosecution of 105
13 defendants. The way that we address the Cali cartel
14 matter is to work our way up, and before the heads
15 of the cartel pled guilty, our office had to
16 prosecute 105 individuals to work our way up the
17 chain.

18 VICE CHAIR RUBEN CASTILLO: Those are all
19 powder cases?

20 MR. ALEXANDER ACOSTA: Those are, on the
21 Cali side, powder cases.

22 On a related matter, the office has had some

1 interesting experience recently in how changes in
2 sentencing affect – or – the willingness of
3 individuals to cooperate and help us work our way up
4 organizations. Recently in South Florida, there has
5 been – several individuals have departed upwards,
6 some judges have departed upwards and given some
7 strong sentences on migrant smuggling cases, cases
8 where individuals have died, have been injured.

9 As a result, this office now has several
10 ongoing investigations where we are working our way
11 up the chain. Where before we were only able to
12 prosecute and find the drivers of certain
13 organizations, we are now in a position where we are
14 able to work our way up the chain of the smuggling
15 organizations, and that is in large part due to
16 increased sentences that we are receiving from the
17 judiciary in South Florida that has recognized a
18 need to send clear messages on this issue.

19 And so, I see on an everyday basis how
20 differences in sentencing will affect the
21 willingness of individual drivers or buyers or
22 traffickers to help us and to work our way up a

1 chain of an organization.

2 CHAIRMAN RICARDO HINOJOSA: I have a
3 follow-up question to this, and it's all related to
4 both of your comments about trying to get the upper
5 echelons in the drug trade and some of the examples
6 you've given, Mr. Acosta. My question is, do you
7 have any specific examples with regards to how the
8 100 to 1 ratio with regards to crack and powder has
9 somehow benefited the prosecution of these cases to
10 the point where you're actually getting to the
11 higher echelons in crack versus powder because of
12 the higher penalty based on the ratio, realizing
13 that, as I indicated at the start of the hearing,
14 about 20 percent of the drug cases are crack and
15 about 20 percent are powder? And do you have
16 specific examples of how you have been helped where
17 you've gotten a lot more of the higher echelons in
18 the crack cases than you have in the powder cases
19 based on this kind of a ratio as far as potential
20 sentence? Because your examples are mostly about
21 powder.

22 MR. ALEXANDER ACOSTA: Judge Hinojosa, I am

1 happy to go back and provide that to the Commission.
2 Let me say, as a general matter, as this Commission
3 is looking at this issue, I would, if at all
4 possible, consider the possibility of looking beyond
5 just the federal data, to also look at state data.
6 As an example, in South Florida, one of the reasons
7 that we have the number of cocaine base cases that
8 we do is because in any operation some cases go
9 federal and some cases go to the state. A number of
10 the powder cases go to the state because the state
11 is more readily able to prosecute those cases under
12 the state guidelines to obtain sentences that help
13 us work our way up the chain and that help us put
14 away individuals who are members of violent drug
15 gangs. The federal government takes many of the
16 cocaine base cases because, at least in South
17 Florida, we find that we are better suited to those
18 cases.

19 And so, I say this because I think it's
20 important as the Commission looks at this data to
21 recognize that much of what goes federal versus
22 state is a function of comparative laws in any

1 jurisdiction because, in any large operation, we sit
2 down with our colleagues at the state and we divvy
3 up cases based on who's likely to get the more
4 appropriate or the stronger criminal sanctions.

5 So, I'm happy to take the question back to the
6 Department. I'm happy to provide the Commission
7 with information, but I would ask the Commission
8 also look more broadly at state matters.

9 CHAIRMAN RICARDO HINOJOSA: Commissioner
10 Horowitz, you had a question a while ago, and I -

11 COMMISSIONER MICHAEL HOROWITZ: Let me just
12 pick up a little bit on this as well. I want to try
13 and understand the relationship between powder
14 enforcement efforts and the crack enforcement
15 efforts. We've talked a lot, I think, about powder.
16 From the DEA's perspective, when does the powder
17 trafficking sort of jump and turn into the crack-
18 related issues? And are they the same
19 organizations? Are we talking about two different
20 organizations with different enforcement priorities?
21 How does the crack priority on the law enforcement
22 side compare to the powder side?

1 MR. JOSEPH RANNAZZISI: First of all, we
2 target organizations, not necessarily drugs, but I
3 could give you my experience. I was a supervisor of
4 a housing task force. We did housing – a task force
5 in homicides. And we were in the housing, federal
6 housing facilities quite a bit buying crack and
7 doing search warrants. The fact is the people who
8 are selling crack in those facilities are not buying
9 large quantities. They're buying maybe an ounce or
10 two of powder and then cooking it. They're getting
11 it from a mid-level, you know, retail dealer who's
12 selling multi-ounce quantities –

13 COMMISSIONER MICHAEL HOROWITZ: Of powder?

14 MR. JOSEPH RANNAZZISI: Of powder – who's
15 getting the powder from a wholesaler who's buying
16 kilogram quantities and then breaking it down and so
17 on. You don't really see – the most crack I've ever
18 seen, well, I've heard was on a wiretap. They tried
19 to pick three kilograms of crack up and it failed.
20 They messed up the process, which is unbelievable.
21 Most – [Laughter] – which is unbelievable, but true.
22 For the most part, though, we're seeing, you know,

1 ounces, multiple ounces, being cooked up and then
2 distributed. And it's not being distributed from
3 only one location. You have a one ounce or a one or
4 two ounce crack dealer that has workers, and he
5 divides that crack up to several different workers
6 in a specific area, and it's regionalized. It's a
7 small community. So, he knows where his workers are
8 and he knows where they're stationed. Okay? And
9 he's not going to give them all at once. He's going
10 to give them a few rocks, maybe 10, 15, 20 rocks.
11 "Call me on the cell phone when you're out and I'll
12 re-up you." That's how it works. So, the powder is
13 up the chain. The crack dealer, the - the person
14 supplying the projects is buying multiple ounces,
15 cooking it, and giving to his workers, and there
16 could be anywhere from 10, 20, 30 workers working a
17 specific area.

18 COMMISSIONER MICHAEL HOROWITZ: And so are
19 you, on the crack side, are you targeting crack
20 sellers to try and work up the chain and get back
21 into the powder side? Or are you looking at
22 targeting crack dealers because of the violence;

1 they're in particular neighborhoods, particular
2 regions, gangs? That's what I'm trying to
3 understand. Are looking to go from the crack back
4 to the powder or is there some other -

5 MR. JOSEPH RANNAZZISI: Yes. We are
6 working up the chain, and the housing task force
7 specifically, we were looking at the most violent
8 traffickers in those housing projects, going after
9 them because, yes, we'll get the violent traffickers
10 off the street, but hopefully it will take us all
11 the way up the chain, to the next level and the next
12 level.

13 That task force did a lot good work, and we
14 took several violent people off the street. The
15 fact is a task force will let you feel good because
16 when you arrest somebody, when you do a search
17 warrant, I've had more than one occasion where, you
18 know, a woman or a man has come out and thanked us
19 for taking those people out of the house, taking
20 them out of the facility because, you know, they
21 were doing violence. They were hurting the people.

22 MR. ALEXANDER ACOSTA: If I could add to

1 Mr. Rannazzisi's comments, I understand the
2 Commission's focus and the Administration shares the
3 focus on going after the high-level distributors and
4 importers, but I want to repeat something I said
5 earlier. I think it is a mistake to ignore the
6 violence that we see in local communities. As
7 United States Attorney, I have been in a position
8 where local police have said, "We had X number of
9 murders in this particular community. What can you
10 do to help us reduce the violence?" And they know
11 it's associated with drug gangs. And one of the
12 best tools that we have to do that is to go in and
13 take down those drug gangs, because the drugs are
14 causing the violence. And while I hear and I agree
15 with this, and the Administration agrees with the
16 Commission's focus and concern on the highest level
17 of trafficking, I think it would be unjust to our
18 local communities to say that there is no role for
19 enforcement at the local level or there's a minimal
20 role for enforcement at the local level, because a
21 lot of people are counting on us to help them reduce
22 the immediate violence. Taking down a drug gang,

1 taking down the FARC 3 or 4 years from now by taking
2 their leadership - or actually it takes more than 4
3 years; the Cali cartel prosecutions took a decade -
4 doesn't do anything to reduce violent crime in a
5 particular community today.

6 COMMISSIONER MICAEL HOROWITZ: And just
7 picking up on that, the interesting thing that I
8 find from some of our statistics is that, actually
9 on the crack side, 15 to 20 percent, roughly, per
10 year involve an enhancement for possession of a
11 firearm. That's about double what it is on the
12 powder side. And, basically, most of the other
13 enhancements don't really come into play on the
14 crack side. Are there other proxies that we should
15 be thinking about for the violence for the issues,
16 the problems associated with crack that we might
17 want to consider as potential enhancements? Or, in
18 other words, think about this other than purely
19 quantity based? Because I think that's a big part
20 of the criticism of the 100 to 1 ratio, is that it's
21 just a sort of very rigid 100 to 1 number, as
22 opposed to thinking about some of the issues that

1 you're both talking about in terms of crack and its
2 relationship with the violence in the street. And
3 guns are obviously one proxy; I'm wondering if there
4 are others.

5 MR. ALEXANDER ACOSTA: Well, Commissioner,
6 the views submitted go into a good level of detail
7 regarding the issue of enhancements. I'd like to
8 highlight one concern or one danger with
9 enhancements in particular, and that is that
10 enhancements often fail to capture all the indirect
11 violence that's associated. And so, as an example,
12 if certainly you see a large correlation between
13 guns and drug gangs that traffic in cocaine base,
14 whether or not a particular individual has, at the
15 time of the arrest or at the time of prosecution, a
16 gun in their possession doesn't mean that the gang
17 with which they're associated is not the cause of a
18 lot of violence, and that there is much research
19 that does show that these drug gangs are the cause
20 of violence in a community. And so, one concern -
21 and, again, the views submitted go into greater
22 detail - but one very important concern is that

1 enhancements fail to capture the full impact of the
2 violence that these gangs have on a particular
3 community. It would be very hard both through proof
4 issue and through just capturing the enhancements to
5 fully address that matter.

6 COMMISSIONER MICHAEL HOROWITZ: And I
7 understand and I appreciate that, but I'm wondering
8 if, obviously, a gun being present is an easy,
9 obvious potential enhancement, and I'm wondering if
10 there are others that you see day-to-day on the
11 crack side of the enforcement efforts that have any
12 other indicia we should be thinking about. And
13 maybe there aren't any easy -

14 MR. ALEXANDER ACOSTA: Well, I'm happy to
15 take the question back and, as part of a dialogue,
16 I'm happy and I believe the Department would be
17 happy to discuss that with this Commission.

18 CHAIRMAN RICARDO HINOJOSA: Vice Chair Mr.
19 Steer?

20 VICE CHAIR JOHN STEER: I have a more
21 narrowly focused question, but one that may be
22 important to any recommendations the Commission

1 makes changing the statute. As you know, the
2 statute uses the term "cocaine base," which is a
3 more encompassing definition than "crack." Crack
4 seems to be what the legislative history tells
5 Congress was really focusing on with respect to the
6 penalties. I'm just wondering if you are seeing any
7 significant importation or trafficking of cocaine
8 base in the form that it exists before converted
9 into the powder, the cocaine hydrochloride, or at
10 the end-use level whether you're seeing any
11 trafficking in forms of cocaine base other than
12 crack that we should be concerned about?

13 MR. JOSEPH RANNAZZISI: To the best of my
14 knowledge, the cocaine that's coming into the U.S.
15 is the hydrochloride salt. That's what's being
16 trafficked until it gets down to the street level.
17 There is cocaine base, but that's usually found at
18 the lab sites before it's converted over, the lab
19 sites in, you know, Colombia, Bolivia, and Peru. I
20 don't know of any other type of cocaine base other
21 than crack. Now, obviously, there used to be
22 freebasing, which was something that was done way in

1 the past, but I don't know of any recent instances,
2 within the last few years, of freebasing. Do you?

3 Excuse me one second. That's right. In South
4 America. In South America, there is crack.

5 CHAIRMAN RICARDO HINOJOSA: We have time
6 for one more question.

7 VICE CHAIR WILLIAM SESSIONS: I appreciate
8 your analysis of how prosecutorial decisions are
9 made in Florida, that is, because the state
10 penalties are higher, you oftentimes will let powder
11 cases go to the state, and then crack cases, because
12 the penalties are higher in the federal system, you
13 tend to take those cases on. And that's consistent
14 it seems to me, generally, with our statistics,
15 which indicate that there's almost a grouping right
16 around the mandatory minimum, so that you find that
17 roughly 25 percent of crack cocaine cases are just
18 about at the 5-gram level. I wonder if that in fact
19 does not prove the point that Judge Castillo was
20 mentioning at the very beginning, and that is,
21 because there is this incentive to make sure that
22 the penalties are sufficiently high, that as a

1 result more U.S. Attorneys are focusing in upon the
2 5-gram cases because they can get that kind of quick
3 penalty, than focusing in more upon the much more
4 significant cases, you know, the cartels that you
5 deal with. I must say, in Vermont, we don't deal
6 with the levels, and I would not know what to do -

7 MR. ALEXANDER ACOSTA: The 200,000 -

8 VICE CHAIR WILLIAM SESSIONS: Pardon me?

9 MR. ALEXANDER ACOSTA: The 200,000-kilogram
10 levels?

11 VICE CHAIR WILLIAM SESSIONS: Right. But
12 as a result, viewed from the national perspective,
13 there seems to be a lot of cases focusing in upon 5
14 grams or slightly above that. And is that not an
15 incentive to distract prosecutors from doing all of
16 the hard work that's necessary to put together the
17 big cases that you work on?

18 MR. ALEXANDER ACOSTA: Judge, I understand
19 that concern, and if that were the case, I, too,
20 would be concerned because I think the highest and
21 best way to reduce drugs in this nation is by going
22 after the high-level dealers, the dealers that are

1 responsible for importation in mass quantities.

2 I serve on a committee of United States
3 Attorneys that focuses on narcotics trafficking, and
4 I can tell you, not only in my experience in South
5 Florida, but through that committee, that
6 incentives, for example, the OCDETF programs that
7 provide financial and staffing incentives for U.S.
8 Attorneys to focus on the largest cases ensure that
9 that is exactly what takes place. So, as an
10 example, I have a certain allocation that I receive
11 from the Department to prosecute cases, and this is
12 the case for every U.S. Attorney, to prosecute
13 OCDETF cases. Those are only the highest - those
14 are only the highest-level drug dealers. And so,
15 the Department goes through great pains to ensure
16 that the national drug policy that focuses only on
17 the highest or that focuses primarily on the
18 prosecution of the highest level of traffickers is
19 followed by all the U.S. Attorneys. And I believe
20 that is in fact what is taking place.

21 Now, some of the data may show that
22 prosecutions do tend to focus around mandatory

1 minima. In part that may be a function of the
2 particular cases that United States Attorneys take;
3 in part also that may be a function of what a
4 prosecutor is willing to do. Often it is the case
5 that if you have enough to go after someone for a
6 particular level, rather than push the envelope,
7 rather than spend more time gathering more evidence,
8 rather than make a case more complex, a prosecutor
9 will say this is enough to obtain the result that we
10 believe is warranted. And so, there are cases where
11 individuals may admit to the importation of several
12 kilograms, but may plead to a lesser amount for a
13 number of evidentiary issues. And so, I'll give you
14 – and I can think of very specific examples where,
15 because of international, for example, international
16 restrictions and rules governing what is and is not
17 appropriate for the United States to charge when we
18 bring individuals from other countries, we are
19 willing to charge lesser quantities because they
20 result in sentences that are sufficient, rather than
21 push the envelope on extradition and charge larger
22 quantities.

1 So, it's a very complicated analysis, and
2 the fact that someone is charged in a way that
3 subjects them only to the mandatory minimum does not
4 necessarily mean that they are only a street-level
5 trafficker.

6 CHAIRMAN RICARDO HINOJOSA: Thank you all
7 very much. We appreciate your willingness to come
8 and answer questions as well as your prepared
9 remarks, Mr. Acosta and Mr. Rannazzisi. We
10 appreciated your presence here today, and we look
11 forward, Mr. Acosta, to any further information you
12 may provide with regards to ongoing discussions as
13 well as some of the questions around which you said
14 you would be glad to look at.

15 MR. ALEXANDER ACOSTA: Thank you, Judge
16 Hinojosa.

17 CHAIRMAN RICARDO HINOJOSA: Thank you very
18 much.

19 CHAIRMAN RICARDO HINOJOSA: Mr. Rannazzisi,
20 thank you very much, sir.

21 MR. JOSEPH RANNAZZISI: Thank you, sir.

22 CHAIRMAN RICARDO HINOJOSA: We'll go ahead

1 and get ready for the next panel.

2 PANEL TWO: DEFENSE BAR

3 CHAIRMAN RICARDO HINOJOSA: Our next panel
4 is a perspective from members of the defense bar.
5 We have Mr. A.J. Kramer, who has been a federal
6 public defender for the District of Columbia since
7 1990. Prior to that he has served as an Assistant
8 Federal Public Defender in San Francisco and the
9 Chief Assistant Federal Public Defender in
10 Sacramento. He received his undergraduate degree
11 from Stanford, his law degree from Boalt Hall School
12 of Law at Berkeley, and he has clerked for Judge
13 Peter Hug, Jr., of the Ninth Circuit.

14 We have Mr. David Debold, who is an
15 attorney in the law firm of Gibbson, Dunn &
16 Crutcher, with a practice in the litigation
17 department. He previously has served as the
18 Assistant United States Attorney in Detroit, and in
19 both appellate and trial practice. His is Co-Chair
20 of the Sentencing Commission's Practitioners'
21 Advisory Group, which does provide input to the
22 Commission on a variety of sentencing-related

1 issues, and we appreciate his work on that project.
2 And he is a graduate of the Harvard Law School, and
3 he clerked for the Honorable Cornelia Kennedy in the
4 Sixth Circuit.

5 We also have Mr. Stephen Saltzburg, who is
6 a law professor at George Washington University Law
7 School. Among his many achievements include his
8 prior work as Deputy Assistant Attorney General in
9 the Criminal Division of the Justice Department, and
10 he has served as the Attorney General's ex officio
11 representative on this Commission itself, from 1989
12 to 1990, a position he has clearly survived.

13 [Laughter] And he serves as a member of the
14 American Bar Association's House of Delegates, as
15 Chair of the ABA Justice Kennedy Commissions in 2003
16 and 2004, and he now co-chairs the ABA Commission on
17 Sentencing, Corrections, and Reentry.

18 Making her late appearance shortly will be
19 Ms. Carmen Hernandez, who is the president-elect of
20 the National Association of Criminal Defense
21 Lawyers. She is the past chair of the NACDL's
22 Federal Sentencing Committee and a member of the

1 Sentencing Commission's Practitioners' Advisory
2 Group. She has previously served as an Assistant
3 Federal Defender, as well as having actually worked
4 in the Federal Defender's Office in the
5 Administrative Office of the courts here. And she
6 has law degrees, a law degree with honors from the
7 University of Maryland and her bachelor's degree
8 from NYU, and she has served as an adjunct professor
9 at the University of Maryland School of Law as well
10 as the Columbus School of Law at Catholic
11 University.

12 And, Mr. Kramer, we'll start with your
13 remarks, sir.

14 MR. A.J. KRAMER: Judge Hinojosa and
15 members of the Commission, thank you for this
16 opportunity to again address the Commission about
17 the disparity between the crack and powder
18 sentencing. I do want to say at the beginning,
19 however, that the red you referred to of the
20 guideline books looks more like a Stanford Cardinal
21 color to me [Laughter] than the Stanford of the east
22 color that you referred to. [Laughter]

1 CHAIRMAN RICARDO HINOJOSA: Well, that
2 would definitely offend me less than Texas A&M.

3 [Laughter]

4 MR. A.J. KRAMER: Again, I thank the
5 Commission, and I appreciate your taking this
6 subject up again. I feel a little strange as the
7 Commission has three times issued reports
8 consistently debunking the myths that the 100 to 1
9 ratio - I'm not going to say "based upon" because it
10 seems to have been a figure that was plucked out of
11 thin air, as opposed to based on any empirical
12 evidence or based on any actual facts. But the
13 Commission has issued three reports and, most
14 recently in November of 2004, stated that revising
15 the crack thresholds would better reduce the gap of
16 sentence differences between African American and
17 white offenders, would better reduce the gap than
18 any other single policy change, and it would
19 dramatically improve the fairness of the federal
20 sentencing system, the Commission said in 2004.

21 And this is, of course, a subject, as you
22 can see from my written testimony, that is very

1 important to me because in the District of Columbia
2 the case load of crack cases is approximately three
3 times the national average. So, I see on an
4 everyday basis the effects of the disparity and the
5 unfair effects of the disparity.

6 I actually agree with several things that
7 the gentleman from the Department of Justice said.
8 The public must have confidence in the criminal
9 justice system and in the fairness, and that's
10 absolutely correct. And I think the Commission's
11 studies as well as numerous commentators have shown
12 that the public does not have confidence in the
13 fairness of the disparity between the crack and
14 powder sentencing laws, and that's a serious problem
15 for our criminal justice system.

16 I agree that - I don't think anybody would
17 disagree that violent drug pushers, if they're
18 convicted, deserve long terms of incarceration.
19 That, of course, is not what's happening in the
20 crack area in the crack/powder differential area.
21 As we heard, the powder people, as we heard the
22 person from the DEA say, it starts as powder; it

1 works as powder down to another level, as powder
2 down to another level, as powder down to another
3 level, and then only when it gets to the street
4 dealers is it converted to crack. So, it's the
5 people lowest on the chain who face the highest
6 sentences, and the effects, I believe, are most
7 pernicious at those lower levels as opposed to
8 higher levels. The crack/powder differential is it
9 doesn't make a difference when you get to violent
10 street gangs who are dealing in large quantities of
11 crack and other drugs, in my experience. And there
12 have been a number of those prosecuted in D.C., with
13 murders and bodies, and they have all received life
14 sentences, or the vast majority have received life
15 sentences.

16 Not one of those gangs, that I recall, has
17 ever exclusively dealt in crack. They deal in
18 powder; they deal in crack; they deal in heroin;
19 they deal in PCP; they deal in marijuana; they deal
20 in LSD. They deal with whatever drug they can get
21 their hands on. In fact, I recall testimony in one
22 of those cases where the supply of cocaine, both

1 powder and crack, had dried up; they went to heroin,
2 and it seemed to depend on what the supply chain was
3 bringing in. But I don't know of a gang, a violent
4 gang, of drug dealers that deal exclusively in
5 crack. I've never heard of one of those and never
6 seen one of those.

7 And I agree that we should – that resources
8 are better spent getting at the kingpins and the
9 higher echelons. That's not, again, what happens in
10 the crack/powder area, and as you heard, there seems
11 to be some incentive for the federal government to
12 go after the crack cases and at very small levels
13 sometimes because of the penalties, I assume, and
14 they can get the higher penalties. Again, we're –
15 and expanded drug treatment, the Department of
16 Justice said, and I agree with that; the problem is
17 the money hasn't been provided for that. That would
18 prevent a lot of these cases.

19 But what I see on an everyday basis is the
20 direct effect, and what – at the Sentencing
21 Commission's recent national symposium, held in
22 Washington, D.C., the counsel for the House

1 Judiciary Committee stood up and was asked about the
2 crack/powder disparity and said it was
3 unconscionable. He said it was unconscionable. He
4 said something should be done about it. He said
5 politics – Michael Volkov was his name, the chair,
6 the counsel to Representative Sensenbrenner, and I
7 couldn't agree more with that. He said politics
8 sometimes got in the way of trying to do something
9 about it, but I think that absolutely sums up the
10 problem with the crack/powder disparity, that it's
11 unconscionable. And given – we've had 20 years now
12 of this disparity, and we hear that programs are in
13 danger of somehow [indiscernible]. Well, it has
14 worked for 20 years at this level of disparity, and
15 I couldn't agree more that it's unconscionable, and
16 I would ask the Commission to take appropriate
17 action. We have a new Congress coming in now, and
18 the Commission has suggested a number of – from 1 to
19 1, to 5 to 1, to 20 to 1. The only one that's ever
20 sent to Congress was the 1 to 1. Congress
21 disapproved that, but didn't say we have to keep it
22 at 100 to 1; in fact, Congress recognized, when they

1 sent it back, that a different ratio might be
2 appropriate.

3 I understand the Commission has been right
4 out front and in the forefront of trying to
5 eliminate to some extent this disparity by sending
6 other suggestions, and Congress hasn't acted. But I
7 would implore the Commission to act again and
8 actually send something concrete to Congress, and
9 let Congress try to deal with this.

10 CHAIRMAN RICARDO HINOJOSA: Mr. Debold?

11 MR. A.J. KRAMER: Thank you very much.

12 CHAIRMAN RICARDO HINOJOSA: Thank you, sir.

13 MR. DAVID DEBOLD: Thank you, Judge
14 Hinojosa, and members of the Commission. On behalf
15 of the Practitioners' Advisory Group to the
16 Sentencing Commission, it is always a pleasure to be
17 invited to share our views from the field on how the
18 guidelines are operating. Of course, we serve
19 primarily to provide the Commission with the defense
20 bar's perspective, but I must add that most of my
21 experience with sentencing and the federal
22 sentencing guidelines, especially as it relates to

1 today's issue, comes as an Assistant U.S. Attorney,
2 a position I held for approximately 17 years, and I
3 hope this experience will help bring an additional
4 perspective to the Commission.

5 The relative treatment of offenses
6 involving crack and powder has been the subject of
7 great debate over the years. I remember quite
8 clearly, when I was as AUSA, Congress's enactment of
9 the 1 to 100 ratio for crack and powder, and I also
10 recall defending the position that the ratio was
11 constitutional and that downward departures based on
12 the alleged unfairness and irrationality of the
13 ratio were forbidden. Many of the judges before
14 whom I appeared in the Eastern District of Michigan
15 struggled mightily with how to impose sentences in
16 crack cases that they believed were consistent with
17 the purposes of sentencing, yet would not be subject
18 to reversal.

19 My comments will focus on what is listed
20 under question number 5 of those that were submitted
21 to the panelists, which generally addresses possible
22 differences and harm associated with crack versus

1 powder cocaine, and asks more particularly whether
2 trafficking in one form of the drug should be
3 punished more severely than trafficking in the other
4 form.

5 There is a broader issue that I will touch
6 on briefly to put my comments in context. Sentences
7 for drug defendants have always been driven
8 primarily by drug quantity. The assumption, which I
9 do accept at a general level, is that, all other
10 things being equal, a defendant whose offense
11 involves a large quantity of a particular drug is
12 more culpable and more deserving of punishment than
13 a person whose offense involves a smaller quantity
14 of the same drug. Of course, all things are rarely
15 equal as between any two defendants, and part of the
16 challenge in creating a rational system that
17 generates appropriate offense levels in drug cases,
18 as is true in all other cases, is to figure out
19 which factors other than drug quantity should be
20 considered, what weight they should receive in
21 relation to drug quantity and each other, and what
22 to do about factors that are less susceptible to

1 ready measurement or categorization.

2 For example, how should the drug guidelines
3 deal with differences between these three
4 defendants?

5 Defendant A comes from a privileged
6 background and decides to start importing large
7 shipments of drugs to make money more easily than he
8 could in a legitimate and readily available
9 profession.

10 Defendant B comes from a broken and
11 impoverished family and gets involved in the drug
12 business as a youth because his brother, whom he
13 idolized, encouraged him to do so.

14 Defendant C starts dating a drug dealer
15 knowing that generally he is engaged in illegal
16 conduct and ends up agreeing to answer various phone
17 calls for him when he is unavailable, dealing with
18 the drug trade.

19 Now, to some extent, I recognize that the
20 role-in-the-offense provisions in Chapter 3 and the
21 specific offense characteristic provisions in
22 Section 2D 1.1 will try to differentiate between

1 these defendants and others, but in the end the
2 quantity of drugs that can be attributed to each of
3 these defendants will play a large part in their
4 offense levels.

5 That's the context in which I'd like to
6 make a few observations about how the ratio
7 operates. As you know, crack is made from powder
8 and the process is really quite simple. It involves
9 baking powder, water, and a heat source, which, in
10 my experience in handling cases in Detroit, was
11 usually a microwave oven at a crack house. The
12 mixture is cooked, and a hard substance is produced.
13 It's broken into rocks of various sizes. This
14 simple conversion of cocaine from powder to rock has
15 an enormous impact on the sentence for the person
16 who is left, often quite literally, holding the bag.

17 Now, should the guidelines recommend such
18 disparate treatment of two defendants, one who
19 handles the drug in powder form and the one who
20 handles it later when it's in rock form?

21 I ask you to consider the lifeline for a
22 kilogram for cocaine, and you've heard a little bit

1 about this from the previous testimony. The plants
2 are harvested usually in a South American country,
3 and some individual or group in that country
4 oversees the production of cocaine powder. It's
5 then packaged for shipment to the United States. A
6 hypothetical kilogram could enter the U.S. as part
7 of a multi-kilo package or all by itself, maybe in a
8 courier's car or a boat or a plane. Someone or some
9 group in the U.S. purchases the cocaine. It could
10 be my Defendant A, the privileged person who had
11 every opportunity to make an honest living. This
12 person might be buying in large quantities from a
13 foreign source, or he could be part of an
14 international conspiracy, working for someone in the
15 source country.

16 In any event, at some point, that kilogram
17 is broken down into amounts that a user will want to
18 buy. It will also probably be cut at one or more
19 points in the process. It could remain as powder
20 and end up being snorted or injected by the user.
21 Or the user could convert it to crack him- or
22 herself and smoke it. Or the person selling to the

1 user could convert to crack or have someone else do
2 it, perhaps my Defendant B, whose brother got him
3 into the drug business. Or an organized group of
4 varying possible sizes within a particular community
5 could have a system by which large quantities of
6 powder are converted to crack, and then the crack is
7 distributed to various locations where it is sold to
8 the users. In my experience, this happened on some
9 occasions. Large organizations would in fact run
10 several crack houses and oversee the distribution of
11 kilograms of powder and have it converted to crack.

12 Under the guidelines, the person who
13 handles the kilogram of cocaine in powder form is a
14 base offense level 26. Without any other
15 adjustments, that's a 63- to 78-month range under
16 criminal history category I. A person handling some
17 or all of that kilogram after it has been converted
18 to crack will be treated much more harshly. Let's
19 assume conservatively that a kilogram of powder
20 converts to 750 grams of crack. If a defendant
21 handles the entire 750 grams, he is at offense level
22 36. That is 188 to 235 months. That is three times

1 longer than the range for the powder defendant. To
2 end up in that same range as the person caught with
3 a kilogram of powder, again all other things being
4 equal, the defendant caught after conversion to
5 crack would have to be accountable for 20 grams or
6 less. In fact, a person possessing just 5 grams of
7 crack would fall in the same range as the person
8 possessing a kilogram of powder – in effect a 1 to
9 200 ratio.

10 Now, this does not promote proportionality
11 in sentencing. In fact, it runs counter to the goal
12 of calibrating punishment to levels of culpability.
13 As a general matter, those persons who are selling
14 or handling the crack at a retail level are no more
15 responsible for the harms resulting from that form
16 of drug than the persons who handled it when it was
17 still in powder form. Indeed, again as a general
18 matter, we would want to reserve the greater penalty
19 for the person or persons higher in the chain of
20 distribution, at the wholesale level rather than the
21 retail level, who are responsible for more harm
22 because of the higher quantity of drug.

1 Of course, the crack defendant may be more
2 likely to engage in violence or possess a firearm.
3 And we've heard testimony about that. If these are
4 features of that particular defendant's conduct or
5 conduct with which he was, associated himself, there
6 are ways in the guidelines currently to
7 differentiate him from other crack defendants. But
8 if we're saying that crack defendants should receive
9 higher sentences simply because crack tends to do
10 worse things to the community, something that itself
11 appears not to be true, there is no good reason to
12 single them out for harsher punishment than those
13 who handle the cocaine before it's converted to
14 crack.

15 To return to my examples, Defendant A might
16 be caught with a single shipment of a kilogram of
17 powder, and with a plea to a single count in the
18 absence of other drug involvement, he would be
19 looking at a guideline range with acceptance of
20 responsibility of 46 to 57 months. Defendant B,
21 whose brother asked him to convert a smaller amount
22 of powder into 60 grams of crack, and is caught with

1 that crack, would be facing 87 to 108 months if he
2 pled guilty and accepted responsibility. That's
3 more than twice the sentence for possessing one-
4 tenth the amount. Defendant C, who relayed messages
5 between her boyfriend and the co-conspirators, would
6 face vastly different sentences depending on whether
7 the co-conspirators were in the part of the
8 distribution chain where the cocaine was still in
9 powder form or whether it had already been converted
10 into crack.

11 We submit the solution here is to return
12 the crack cocaine penalties to those applicable to
13 the same quantity of powder cocaine, a 1 to 1 ratio.
14 The penalties would still be quite stiff, but the
15 anomalies that I mentioned above would be
16 eliminated.

17 CHAIRMAN RICARDO HINOJOSA: Thank you, Mr.
18 Debold. Professor Saltzburg?

19 MR. STEPHEN SALTZBURG: Mr. Hinojosa and
20 members of the Commission, thank you for having me
21 today. The American Bar Association was invited to
22 send a witness to testify, and President Karen

1 Mathis asked me if I would do it. And so, I am here
2 representing the American Bar Association, and while
3 I am thrilled to be a part of this panel and I have
4 great admiration for each member of this panel, I
5 just want to say that the American Bar Association
6 is not a defense group. Indeed, I'm the chair-elect
7 of the Criminal Justice Section, and as you probably
8 know, we rotate from a prosecutor, a defense lawyer,
9 and then a judge or an academic so that we try to
10 keep a balance. And when we develop American Bar
11 Association policies, it's generally a consensus,
12 and in the area of sentencing, we have a consensus,
13 a pretty large consensus, among the Criminal Justice
14 Section and throughout the American Bar Association.
15 Ben Campbell sat in on our last meeting and has been
16 there on several meetings and knows that what we've
17 seen is that, throughout the states, there's a
18 different attitude toward the right approach to
19 sentencing generally and to drug sentencing in
20 particular than we see in the federal sentencing
21 system.

22 And the two points that I emphasized in my

1 testimony for the ABA are these: The American Bar
2 Association has supported this Commission since 1995
3 when the Commission said that the ratio should be 1
4 to 1, as David said. We emphasize, however, that
5 there's a real danger in simply viewing that as the
6 fix that will solve the sentencing system and will
7 make things fair because, depending on how you
8 sentence, we might be very sorry that we asked for a
9 1 to 1 ratio. If in fact you change the penalties
10 for powder and didn't do anything with respect to
11 the crack penalties, things would be a lot worse
12 rather than better.

13 And so, American Bar Association has been
14 on record for a long time as opposing mandatory
15 minimum sentences. Now, this Commission, of course,
16 doesn't adopt them. This Commission actually has to
17 deal with them. And I think that something that
18 A.J. Kramer said is worth reminding ourselves about,
19 and that is, from the birth of the guidelines, we
20 know that the 1986 statute that imposed the
21 mandatory minimum sentences not only drove the
22 original guidelines with respect to drug sentencing,

1 but it drove a lot of the guidelines.

2 And so, as we look at sentencing in the
3 year 2006 and we look back after almost 20 years,
4 what we know is that we had a system that was not
5 developed originally by the Commission on its own.
6 The Commission didn't do drug sentences the way it
7 went about trying to do certain other sentences. It
8 basically started with the mandatory minimums, and
9 that's changed everything and driven everything for
10 almost 20 years. The Kennedy Commission, which I
11 chair, recommended very specifically that Congress
12 remove the 25 percent rule, get out of the business
13 of telling the Sentencing Commission what it -
14 giving directives to the Commission, ordering the
15 Commission to do things - and letting the Commission
16 use the expertise it so obviously has to take to
17 look a how a sentencing system ought to run if the
18 Commission actually could do it without the heavy
19 hand of Congress bearing down on it in ways that it
20 has generally and specifically with respect to drug
21 sentencing.

22 I commend you - I won't take your time to

1 do it now - the portions of the Kennedy Commission
2 report where we looked at what state prosecutors are
3 doing with respect to drug sentencing, the ways
4 they've gone about adopting treatment as an
5 alternative to sentencing, we recommend. Just look
6 at Brooklyn. Look at Charles J. Hynes in Brooklyn
7 and what he's done with a group of defendants who
8 are 90 percent minority, who have all the problems
9 that you've heard about in Florida and other places,
10 and how he's gone about reducing crime, reducing
11 victims, and reducing the actual number of people
12 who have to go to prison for drug offenses, by
13 getting them into real treatment.

14 The basic bottom line for the American Bar
15 Association is we do favor the 1 to 1 ratio. We
16 don't believe that there is any longer a strong
17 argument that crack cocaine is so much more
18 dangerous than powder that there should be a
19 sentencing differential. We continue to oppose
20 mandatory minimums because of the impact they have
21 on the guidelines, including the drug guidelines,
22 and we agree with the United States that, in fact,

1 it is time for the federal government to look to the
2 states and see what they've been doing with respect
3 to alternatives to incarceration, because it can
4 work; it can save money; it can reduce crime and
5 therefore reduce the number of victims. And that's
6 really what everybody is for.

7 CHAIRMAN RICARDO HINOJOSA: Thank you,
8 Professor Saltzburg. Ms. Hernandez?

9 MS. CARMEN HERNANDEZ: Good morning, Your
10 Honor, and members of the Commission. I'm here
11 representing the National Association of Criminal
12 Defense Lawyers. I guess I should move a little bit
13 away from Professor Saltzburg. We are - only
14 represent criminal defense lawyers. I will not
15 attempt to be balanced. You'll hear enough from the
16 government and others in that regard.

17 It was difficult trying to respond to your
18 questions, and it was difficult trying to determine
19 what I would say today because I think everything's
20 been said, and it's been said probably best by the
21 Commission itself in the many reports it has
22 published in which it, in many ways, debunked all

1 the supposed reasons for the 100 to 1 ratio.

2 There is I think no scientific basis,
3 absolutely none, to say that crack and powder are -
4 the one is a hundred times worse than the other.
5 There may be a difference - and I'm not going to
6 argue; the Commission will have to decide that -
7 there may be a difference for saying there should be
8 a little difference, but there is absolutely none,
9 no evidence, of any scientific value that says 100
10 to 1 is an appropriate measure.

11 So, having said that, I'm going to try for
12 a change, in the many times that I've appeared
13 before you, to try to answer some of your questions
14 instead of address what I really want to say here.

15 One of the questions the Commission asked
16 is, what is the effect of crack cocaine distribution
17 in the community, and in that regard, I want to
18 respond in two ways. One is by paraphrasing what I
19 heard a Congressman from California say on the floor
20 of the House in 1995, when they were debating
21 whether to accept the Commission's proposal to
22 equalize crack, and when he stood up, he stood up -

1 and he was from a wealthy country – and he said,
2 guess what, folks? Drug addiction devastates
3 families regardless of what the drug is. Someone
4 who's addicted to alcohol or cocaine or meth or
5 anything else, and ends up losing his job and
6 getting divorced and, you know, losing the house and
7 committing crimes, whatever, is devastated
8 regardless of the substance that that person uses.
9 So, if that's the reason why you're making a
10 distinction, I don't think it warrants the huge
11 difference you get in crack versus some of the other
12 substances. In fact, you know, fewer people – there
13 are fewer deaths either as a result of violent
14 conduct by the user or as a result of an overdose
15 than result from crack cocaine, than result from
16 alcohol, which is a legal drug, or from nicotine,
17 for that matter, or any of the other substances,
18 heroin or meth or anything else.

19 So, I would say that as far as that's
20 concerned, I don't think that's a meritorious reason
21 for the distinction. What is different, however, is
22 that crack cocaine is quite often – or the way it is

1 prosecuted, in any event, quite often ends up
2 impacting lower socioeconomic classes, and either
3 black or Latino neighborhoods in terms of the
4 defendants who are prosecuted.

5 And that I think is a terrible symbol in
6 our criminal justice system of the racial and
7 socioeconomic inequalities that are present in our
8 criminal justice system at all levels, you know,
9 from the ability to put someone in rehabilitation
10 when they start to experience drug addiction to
11 educational opportunities to job opportunities. And
12 that is only one of the factors that the Commission
13 has to take into account, but I think it is a
14 significant factor that the Commission should
15 consider.

16 I want to say what we don't want the
17 Commission to do. We don't want the Commission, as
18 I understood the government's statements to you
19 earlier today, to sort of say, well, if there are
20 inequities and there are inequalities, allow us
21 prosecutors to take care of that through our
22 charging practices. I think that creates - first of

1 all, that's not how our system of justice ought to
2 be devised. It ought not to depend on whether the
3 particular prosecutor is a reasonable person or a
4 just person or, you know, an even-handed person. It
5 ought to be based on more principled sort of reasons
6 than that. And we know from experience, in the
7 money-laundering area, for example, I think the
8 Commission and the Department of Justice stood
9 before you and said, you know, "We'll only prosecute
10 real money laundering cases. We won't prosecute the
11 others." And when the Congress directed the
12 Commission to do a report on that, what it found was
13 that was in fact not what was happening. And I
14 think if the Commission were to actually analyze the
15 practices of the Department of Justice in this
16 regard, you would find that that is in fact - that
17 you ought not to rely - and I am not trying to
18 indict or cast aspersions on any particular
19 prosecutor. I just think that ought not to be the
20 way to go forward, that is by saying, if there's an
21 inequity, let the prosecutor at the charging level
22 take care of it. That really ought not to be what

1 the Sentencing Commission is about.

2 So, we also don't want – we certainly do
3 not want for the Commission to add enhancements on
4 top of sort of the unsupported ratio that you have
5 now. If you change it to 10 to 1, 20 to 1 – and I
6 really would like to get away from a ratio-based
7 issue – but if you change it to 10 to 1 or 20 to 1,
8 theoretically the reasons you have it at 10 to 1 or
9 20 to 1 is because of the added – which I challenge
10 – you know, the added violence or the added
11 addictive qualities or all of those things, but if
12 you change it to that and then add enhancements on
13 top of that, you really have not solved the problem.
14 You've just double-counted or exacerbated the
15 current problem, and you have created enhanced
16 penalties for other drug offense where no one is
17 clamoring for that.

18 And you're going to end up, if the
19 Commission is interested in how to view courts and
20 judges, particularly after *Booker*, really follow the
21 guidelines, I think that response from the
22 Commission would not – would invite again reductions

1 or deviations from the guidelines because judges –
2 and that's another one of the questions you asked –
3 what has changed since 2002?

4 Well, one of the primary things that has
5 changed since the *Booker* opinion, the guidelines are
6 no longer mandatory, and judges are required –
7 Congress has directed the Congress to take a look at
8 unwarranted disparity, to take a look at the nature
9 and circumstances of the offense, to take a look at
10 the personal characteristics of the defendant.

11 Well, you know, frankly, I think the average judge
12 who looks at a crack sentencing and really follows
13 the directions in 3553(a) would be wrong in
14 sentencing under the current scheme because the
15 Commission's reporting itself has called into
16 question the ratio and because the person standing
17 before the, the average crack defendant standing
18 before a federal judge in the average case is a
19 street-level dealer who is nowhere near, either in
20 terms of sophistication, in terms of harm, in terms
21 of the total quantity of drugs, in terms of the
22 amount of money that they made from the offense,

1 nowhere near as culpable or as deserving of a harsh,
2 of the severe sentence that is called for under the
3 crack guideline as someone, as a drug importer even.
4 And yet the sentences are about the same in many
5 instances.

6 It's a crazy system. I mean, everyone down
7 the line has talked about the inversion of
8 penalties. The "inversion of penalties" is a term
9 that the Commission itself identified in the 1995
10 report. There's a chart in the 1995 report that
11 identifies the amount of profit for a 5-year
12 mandatory minimum crack defendant as about \$575; for
13 powder it's about \$50,000; for heroin, it's
14 \$100,000. And for the 10-year mandatory minimums,
15 it was something like crack, \$5700 profit; for
16 powder, \$535,000 profit; and for heroin, a \$1
17 million profit. That's the Commission's data. It
18 makes no sense, absolutely no sense. I mean I don't
19 know how else to say that.

20 What do we want? I suppose. I guess what
21 we ask the Commission is to step away from quantity
22 to culpability, to step away from the mandatory

1 minimums, to once again tell the Congress what it
2 has done in the past, that the evidence before you
3 doesn't support the current ratio, to promote a
4 crack guideline that is more cost-effective and that
5 is more likely to reduce drug offense, crack
6 offenders. In that regard, I would say that that
7 would call for more drug rehabilitation, more
8 educational opportunities, more job training. And I
9 don't know whether all of that is within the
10 Commission's sort of power, but certainly the amount
11 of money we spend in prosecuting crack defendants
12 just is not money well spent, is what I would say to
13 the Commission.

14 I guess one of the last items - I want to
15 make two more points. One is, in terms of why the
16 100 to 1 ratio is so wrong, is that, as everybody
17 else has said, crack and powder are in the same
18 chain of supply. It makes no sense to punish the
19 guy at the end of the line - and it's not done in
20 any other drug cases - punish the guy at the end of
21 the line more harshly than the guy who's either
22 importing or who's managing a number of people.

1 And, as a part, a corollary to that, I
2 mean, the Commission's report, I think it was the
3 2002 report, that reflected that not only are crack
4 defendants getting more harsh treatment, unwarranted
5 harsh treatment, I would argue, because of the
6 ratio, but also you'll see fewer mitigating
7 adjustments for role in the offense for crack
8 defendants, even though, in fact, they probably are
9 low level and ought to be receiving mitigating role
10 adjustments, but because of the way they work and
11 because the way courts have interpreted the
12 mitigated role adjustment, quite often you may have
13 a crack defendant appearing alone, and therefore he
14 won't get a mitigating role adjustment. So, the
15 crack guideline really is wrong in the way it's been
16 formulated and the way it's been applied, for many
17 reasons.

18 So, the last thing I want to leave you with
19 is that I think the Commission ought to be commended
20 for time and again telling the Congress sort of the
21 unvarnished truth on crack cocaine. I understand
22 that the Congress has chosen not to take up the

1 Commission's recommendations, but I think maybe it's
2 time for the Commission to send up and actually -
3 the last time, since 1995, you have not sent up a
4 guideline amendment. You've just sent
5 recommendations that, for whatever reason, inertia
6 or politics, Congress did not take it up.

7 So, I would recommend to the Commission
8 that it once again send an amendment to Congress,
9 along with all the reasons why you're amendment is
10 correct. And you will therefore be complying with
11 your statutory mandate in 991. If Congress wants to
12 make a policy decision that, in my opinion, would be
13 the wrong policy decision, that's up to them, but I
14 think the Commission has to stay true to its mandate
15 and true to the evidence that appears before it and
16 actually correct the inequities. Thank you.

17 CHAIRMAN RICARDO HINOJOSA: We have time
18 for a few questions. Commissioner Howell?

19 COMMISSIONER BERYL HOWELL: I want to
20 follow up on one of the comments that Ms. Hernandez
21 made, and I appreciate all of your comments, but,
22 you know, we've heard from the Department of Justice

1 that we really ought to talk a lot and, in some
2 ways, I interpret the Justice Department's testimony
3 to be we should wait and see what Congress does and
4 not suffer the same consequences that occurred in
5 1995. Ms. Hernandez, I'm appreciative of your
6 request that we take more - more aggressively take a
7 position and send up recommendations.

8 Could the other three panelists give us
9 your, you know, best recommendation about how the
10 process should unfold? That's question number 1, on
11 process. And then on substance, if you could also
12 address not enhancements, but downward adjustments
13 that would be, that might be considered by the
14 Commission within our power to address some of the
15 disparity, since we, of course, can't address the
16 statutory mandatory minimums.

17 You know, it's interesting from the 15-year
18 report that the Commission itself concluded that 25
19 percent of the average prison term for drug
20 offenders, across the board, can be attributed to
21 the guidelines, beyond the mandatory minimum
22 statutory levels. So, the Commission itself does

1 have some power to address some of the disparity,
2 certainly not all of it. So, I'd really appreciate
3 hearing from all of you comments not about
4 enhancements, but about downward adjustments that
5 might focus in on some of the specific
6 characteristics for crack offenders that strike
7 people as the most unfair.

8 MR. A.J. KRAMER: Commissioner Howell, in
9 response to both your questions, I think I've said
10 in my written testimony, but if not, let me make it
11 clear that I also believe the Commission should act.
12 There's been, obviously, a change in Congress, and I
13 don't know what the status of the, what I think has
14 been referred to as the Sessions Bill, not for
15 Commissioner Sessions, but for another, for Senator
16 Sessions. And I think that if the Commission -
17 after we've had 20 years of this policy not working
18 and it's time to put an end to it I think or try, at
19 least the Commission try to put an end to it, and
20 say to Congress, okay, you told us to study it
21 again; we've studied it again and again; we've sent
22 things to you; now it's your turn: either act

1 again, either turn us down again, and we'll know
2 exactly where you stand or do something about it. I
3 think that it's time to present that.

4 I think, as Ms. Hernandez said, in answer
5 to your second question, the biggest thing would
6 come in some clarification of the mitigating role
7 adjustments as to exactly when they can be applied.
8 They've been quite sparingly applied for various
9 reasons, as she said, to crack offenders, and I
10 think that's because they are often, as she said,
11 caught alone. There's no body else around, and they
12 won't get a mitigating role adjustment, even though
13 you've heard the DEA say it goes through five higher
14 levels before it gets filtered down to the street
15 dealer, and yet courts are looking and saying
16 they've only been held responsible for their 7
17 grams, and they're not entitled to any mitigating
18 role adjustment. I think that would probably be the
19 single, biggest factor that could help, short of the
20 mandatory - putting aside the mandatory minimums;
21 there's just nothing you can do about - short of the
22 disparate ration, the unwarranted disparate ratio,

1 changes in mitigating role adjustments.

2 MR. DAVID DEBOLD: I have the same answer
3 as A.J. on the first question. It certainly doesn't
4 hurt for the Commission to try to work with members
5 of the incoming Congress on having this combined
6 with a statutory change. I agree, and on behalf of
7 the Practitioners' Advisory Group, I agree with Mr.
8 Saltzburg, with Steve here, that getting rid of
9 mandatory minimums is also a key step here, but even
10 if that can't be achieved in the near term, we
11 recommend that the Commission send a proposal to
12 Congress with a change in the ratio, and we do favor
13 the 1 to 1 ratio.

14 On the second question, it's really hard to
15 think of any downward adjustments that will deal
16 with a systemic problem of treating with crack and
17 powder so differently from one another, other than
18 something that would just inherently put less
19 emphasis on quantity in crack cases. Maybe that's
20 the same way as saying that you get rid of the ratio
21 or you minimize the ratio, but problem is you have,
22 even with role adjustments, you have individuals

1 who, with respect to the quantity that they're
2 caught with, they played an average role. They
3 cooked it, they sold it, but because of the small
4 quantity, in combination with the 100 to 1 ratio,
5 they're going to get hit with a higher sentence.
6 So, unless you find some way to put less emphasis on
7 quantity as a whole in crack cases, I'm not sure
8 what downward adjustments will really solve the
9 problem.

10 MR. STEPHEN SALTZBURG: I have a slightly
11 different view on the first question that you asked,
12 on process. I think you have to be careful about
13 shoving something in Congress's face because we've
14 seen how Congress responds to that. You've got a
15 new Congress coming in, as A.J. Kramer said. It
16 seems to me there's a real opportunity for the
17 Commission to identify the two or three things or
18 four things that it really would want to get from
19 Congress and to have a conversation before it sends
20 anything. These are things that could make us the
21 kind of effective Commission that Congress
22 originally anticipated when it enacted the statute.

1 I mean, the - what makes this very complicated is
2 the Supreme Court has the two cases that just ran,
3 where it's going to examine the appellate review
4 standard. Everybody's going to be waiting. The
5 Department's waiting. Everybody's waiting to see
6 what's going to happen there because, depending on
7 what the Court says, there could be a Congressional
8 backlash with respect to sentencing generally, and I
9 think - so one has to recognize the realities that
10 there truly are three branches here, and there's
11 something in play right now in all three branches.

12 I think, though, there is an opportunity.
13 I mean I was very encouraged that the Department of
14 Justice representatives said they want to talk about
15 these things. Well, maybe the place to talk is with
16 the Judiciary Committees in the Congress with the
17 Commission being present, with the Department being
18 present, and some of these same people, who are
19 saying we need change, present, and - but I think
20 the, one of the most important think is to identify
21 the priorities, the things you want most and you
22 think are most important. I think the crack/powder

1 differential is at the top of a lot of people's
2 list.

3 With respect to how you deal with or
4 minimize the effects, there are only two ways that I
5 can think of, and you've heard them both, which is,
6 one is you can try to redefine the role so that the
7 crack distributor can get, you know, a role
8 adjustment. I don't know if you can do that,
9 actually, in ways that won't spill over and have
10 effects that you won't be happy with in other areas.
11 The other way is to try and basically, as the
12 amounts go up, is make the increases in amount less
13 significant. So, basically, you have the same
14 penalties for larger quantities of drugs, and that
15 may, as you get above the mandatory minimums, may
16 reduce the effects somewhat. But other than that, I
17 don't have a very good answer.

18 CHAIRMAN RICARDO HINOJOSA: We have time
19 for one more question. Vice Chair Sessions?

20 VICE CHAIR WILLIAM SESSIONS: Well, I
21 wanted to bring up a little bit more the complicated
22 question -

1 CHAIRMAN RICARDO HINOJOSA: Carmen, you
2 were going to say something?

3 MS. CARMEN HERNANDEZ: I was just -

4 CHAIRMAN RICARDO HINOJOSA: At the behest
5 of Commissioner Howell, [Laughter] I'm going to go
6 ahead and let you say something.

7 MS. CARMEN HERNANDEZ: I don't disagree
8 with what Mr. Saltzburg said about, you know, the
9 process before you actually send something to
10 Congress. I'll be brief. Another reason,
11 Commissioner Howell, that you mentioned about why
12 sentences are above the statute, the mandatory
13 minimum, that you have pegged the mandatory minimum
14 at the low end of the guideline range for offense
15 level 26, which is a 5-year mandatory minimum, is
16 just above the mandatory minimum. So, you could
17 reduce - and you've considered this in the past -
18 you could reduce the whole drug guideline by two
19 levels and still have the mandatory minimum fall
20 within the range. I know you've considered this in
21 the past. That's in response to your question.

22 COMMISSIONER BERYL HOWELL: Thank you.

1 VICE CHAIR WILLIAM SESSIONS: Well, let me
2 come back to something that you said directly and
3 actually A.J. said as well: Take the appropriate
4 action. You talked replacing quantity with
5 culpability. Should we go back to 2002? That's
6 exactly what we tried to do - essentially, make a
7 suggestion to Congress that there be a balanced
8 approach, not necessarily just a dramatic reduction,
9 but a balanced approach by reducing the significance
10 of quantity and replacing it with factors that
11 should be significant and should replace the concern
12 about crack cocaine. That's what we did. Now, do
13 we do that at this particular juncture? In other
14 words, if we were to take Mr. Kramer's suggestion,
15 Mr. Debold suggestion, that we actually pass
16 guideline changes, do we in a sense try to refocus
17 people's concern about crack and redirect those
18 toward enhancements, in which case you could
19 ultimately be faced with a situation in which the
20 mandatory minimums stay in place and then on top of
21 that you have a significant number of enhancements?
22 Or do we sit back and just do nothing? Or do we

1 then say just 1 to 1, or 10 to 1, and leave it at
2 that, knowing full well that we have not proposed a
3 balanced approach?

4 That's the first thing I want to say, and
5 since I only had one question, there's another one.
6 [Laughter] We talk about downward adjustments -
7 it's all one question. [Laughter]

8 CHAIRMAN RICARDO HINOJOSA: If this was a
9 courtroom, it'd be more than one question [Laughter]
10 but it's not.

11 VICE CHAIR WILLIAM SESSIONS: That's right.
12 If this was a courtroom, I'd be in charge, right?
13 [Laughter]

14 You talk about downward adjustments. Well,
15 one of the most logical downward adjustments is in
16 crediting treatment, drug treatment. We now see
17 statistics here that we have read in preparation of
18 the hearing, which suggest that every dollar spent
19 on treatment saves \$7.50 on ultimate prison costs.
20 And is there not a way that, at least coming from
21 the defense community or from other communities
22 concerned about these issues, that there'd be some

1 adjustment in drug-related offenses for persons
2 who've been involved in treatment, and that,
3 thereby, reducing penalties for those people who've
4 been through treatment because they pose less of a
5 risk of recidivism based upon the fact that they've
6 gone through treatment? Is that a question or a
7 statement? [Laughter]

8 MS. CARMEN HERNANDEZ: Only if you fund the
9 treatment for poor defendants.

10 MR. A.J. KRAMER: Can I give one answer to
11 that?

12 CHAIRMAN RICARDO HINOJOSA: Mr. Kramer,
13 please try. [Laughter]

14 MR. A.J. KRAMER: First of all, I think
15 that basing it on culpability as you did, back at
16 the last time you proposed possible changes to the
17 guidelines, is still the way to go, factoring in a
18 quantity level in there, obviously, that's more
19 realistic to what the harms are, and the more you
20 factor in culpability and the harms involved, the
21 less, the closer the ratio gets to 1 to 1 because
22 you've then accounted for all the effects, the

1 outside effects, in it. So, I would suggest that,
2 yes, that's the way to go.

3 It occurs to me, of course, with the
4 benefit of a little more time, in answer to
5 Commissioner Howell's question and the second
6 subpart of your one question, that there's also -
7 that drug rehabilitation has been a recognized
8 ground for departure under the guidelines by a
9 number of circuits. So, I think that -
10 extraordinary rehabilitation - so, I think that
11 building that into an adjustment would not be coming
12 from nowhere; it's already something that some
13 courts have considered and would certainly be
14 appropriate.

15 It also occurs to me that there could be
16 further adjustments made to the safety valve
17 provision that's now just two levels off, that
18 there, that it could be incorporated in the safety
19 valve where someone has zero, is in category 1 and
20 has told the government truthfully everything about
21 the offense, and seems to me to be, as determined by
22 Congress, one of the most minor, so to speak,

1 offenders, and you could make adjustments in the
2 [indiscernible]. All that Congress said, in the
3 safety valve, was it has to be at least 2 years.
4 The vast majority of safety valve guidelines
5 adjustments end up way above 2 years. They end up
6 very – just two levels below what the offense would
7 be, so they end up near the mandatory minimum
8 because they're key to the mandatory minimum. Maybe
9 a graduated range of adjustments under the safety
10 valve, because as I said, all Congress said was you
11 have to have – it has to end in a sentence of at
12 least 2 years. So, there could be further
13 adjustments made under safety valve, too, for some
14 if its provisions.

15 MS. CARMEN HERNANDEZ: Commissioner
16 Sessions, if I understood your question, the first
17 question, I am really concerned because I think
18 that's what the proposal you sent up in 2002 did,
19 that if you're going to add enhancements to get to
20 culpability or to do, or to measure culpability,
21 that the ratio come down, because otherwise what you
22 have is added enhancements on top of a bad ratio –

1 on top of a ratio that purportedly takes into
2 account the things you're adding on with the
3 enhancements.

4 In other words, the theory behind the
5 crack/powder ratio differential is that crack
6 involves more guns or there's more violence
7 associated with it, or, you know, there's more
8 violence in the drug dealing. If you add an
9 enhancement for violence or if you add an
10 enhancement for gun, a multi-range enhancement for
11 guns, but leave the ratio at the same level as it is
12 today, or just change it a little bit, you're really
13 double- or triple-counting without - as A.J. said, I
14 mean that would be okay if you come back to almost a
15 1 to 1 ratio, but if you're not at a 1 to 1 ratio
16 and you're just adding on top, I think it's a very
17 difficult thing.

18 The other problem I think with crack
19 defendants quite often is that you get a lot of
20 inner city type defendants who may have prior
21 convictions, even if they're not very, you know,
22 severe, even if it's just a single prior. Sometimes

1 it's traffic, you know, traffic tickets that weren't
2 paid and they had their license suspended twice, and
3 therefore they're no longer eligible for the safety
4 valve because they have two criminal history points.
5 So, it's such a - I mean the problems are so
6 intertwined, sort of the economic problems of the
7 class of people who sometimes are, who are quite
8 often prosecuted for crack cocaine, including drug
9 rehabilitation. It would be great. I think that's
10 a great proposal, but if the government isn't going
11 to fund that rehabilitation - I mean I have a client
12 right now pre-trial who may be facing jail because
13 he has no place to live because his wife is in a
14 Section 8 apartment, and if you have, you know, drug
15 use, you cannot live in a Section 8, in an apartment
16 funded, you know, subsidized by the government. You
17 lose federal benefits. So, here's a guy who's doing
18 fine, but the struggle now is to find him a place to
19 live pre-trial outside of the prison system because
20 he has no place to live. So, I mean the financial
21 aspects of criminal justice are really difficult,
22 particularly when it comes to crack defendants.

1 COMMISSIONER EDWARD REILLY, JR.: Could I
2 just one thing? Judge Sessions, I'd really like the
3 idea of credit for drug treatment, but I agree with
4 Carmen Hernandez, it's very, we don't have time to
5 go into it, but it's very complicated because the
6 drug treatment programs that work are intense and
7 they're long-term, and the way in which the system
8 operates is people are going to be sentenced before
9 they actually can demonstrate the success that they
10 would need and that you'd want and, therefore, at
11 some other time, it would be interesting to present
12 to the Commission some of the things the states are
13 doing as alternatives, but I don't know of any that
14 operates where you could find a short-time success
15 that would justify the kind of reduction I think
16 that you'd be looking for.

17 MS. CARMEN HERNANDEZ: So, Judge Weinstein,
18 who deferred sentencing in a case for year – Judge
19 Weinstein in the Eastern District of New York, he
20 deferred sentencing for a year in order to get proof
21 that, in fact, the rehabilitation was working.

22 CHAIRMAN RICARDO HINOJOSA: I thank this

1 panel. I would indicate that certainly it seemed
2 that the Department was indicating that there might
3 be some statutory situations with regards to whether
4 the Commission can delink the base offense level for
5 mandatory minimums. If any of you, Professor
6 Saltzburg and the defense attorneys, have any
7 suggestions or thoughts on that, since the
8 Department may be following that up, you certainly
9 would be free to so and it certainly would be
10 appreciated if you had any comments on that
11 particular issue.

12 Again, Professor Saltzburg and the three
13 defense attorneys, thank you all very much.

14 [Laughter] And we appreciate your patience with us
15 and your willingness to take your time to be here.

16 We will take a very short 5-minute
17 unannounced break here.

18 [Recess]

19 PANEL THREE: JUDICIAL BRANCH

20 CHAIRMAN RICARDO HINOJOSA: We'll go ahead
21 and get started, and we'll rearrange the schedule
22 here slightly. We want to thank the members of the

1 panel that have agreed to go next as to not go next,
2 but Judge Reggie Walton is representing the judicial
3 branch, and he does have a schedule with regards to
4 court that we need to get him to.

5 Judge Walton was appointed as U.S. District
6 Judge for the District of Columbia in 2001 and
7 serves on the Criminal Law Committee of the Judicial
8 Conference of the United States. He was appointed
9 by President Bush as Chairperson of the National
10 Prison Rape Elimination Commission in June of 2004.
11 And prior to his appointment to the federal bench,
12 Judge Walton was an associate judge with the
13 Superior Court of the District of Columbia, and he
14 was also an Executive Assistant U.S. Attorney in the
15 District of Columbia, and he was a staff attorney in
16 the Defender Association of Philadelphia. He
17 received his bachelor's degree from West Virginia
18 State University and his law degree from American
19 University. And actually Judge Walton has received
20 numerous awards and honors, and I would take all of
21 his time if I went through those, but they've all be
22 very well deserved. Judge Walton, we appreciate

1 your presence and any thoughts you would like to
2 share with the Commission would greatly be
3 appreciated, sir.

4 JUDGE REGGIE WALTON: Thank you. I
5 appreciate you calling me out of turn. I actually
6 received a call asking that I be here at 11:15. So,
7 I left chambers and came over a little early, and
8 that created somewhat of a problem because I'm
9 working on an opinion that can only be worked on in
10 chambers because of classified information. So, I
11 need to get back and try and finish that opinion
12 before the end of the day, but I thank you for
13 giving me the opportunity to appear before you. I
14 have submitted my written testimony, which I'm sure
15 you'll make a part of the record.

16 I do appear here on behalf of the Criminal
17 Law Committee of the Judicial Conference for U.S.
18 Courts, and the Committee had made a recommendation
19 to the Conference that it take a position regarding
20 the disparity between crack and cocaine sentencing,
21 and earlier this year the Judicial Conference did
22 express its determination to oppose the existing

1 sentencing differences between crack and powder
2 cocaine and agreed to support the reduction of that
3 difference.

4 I wholeheartedly agree with that position,
5 and I want to preface what I'm going to say, and
6 I'll keep my remarks short so if you have any
7 questions, you can ask me those questions. I don't
8 appear here as a bleeding heart liberal. Anybody
9 who knows me knows that I was a hard-charging
10 prosecutor in the United States Attorney's Office
11 for years. When I was on Superior Court, I think
12 they called me "Attila the Hun." [Laughter] So, I
13 do believe in punishment, and I do believe in
14 appropriate punishment when it's necessary. And I
15 know the problem that crack cocaine has created for
16 our society. I was just with my sister last
17 weekend, who's a school teacher in a depressed
18 community in Ohio, and she was telling me about the
19 difficulty she has trying to educate her second
20 graders because so many of them were crack babies
21 and, as a result of that, have severe learning
22 disabilities and other problems that make it very

1 difficult for them to be educated. So, I understand
2 the impact that crack is having on communities and
3 it's devastating, but nonetheless I do believe that
4 something needs to be done to address this problem.
5 I think there are pragmatic reasons why it needs to
6 be addressed. I frequently will go over to my old
7 court, the local court here in Washington, and have
8 lunch with my former colleagues, and they express
9 concerns about the disparity that exists in the
10 federal system, that's having a spill-over effect in
11 the local system even though they don't have a
12 disparity, because people in the community are
13 astute enough to know about the disparity, and they
14 bring concerns into the courtroom as potential
15 jurors and, as a result of that, many times will say
16 they can't serve as jurors in these cases and many
17 times will serve with the intent of not convicting
18 despite the amount of evidence that the government
19 may have. And I think that has a perverted impact
20 on the process. I know, from the many occasions
21 when I go into the community and have a chance to
22 talk to people, that there are people in the

1 community who feel that the system of justice in
2 America is racist, and much of their view about that
3 is predicated on their feeling that we've got all of
4 these young black men who are being locked up
5 because they've been involved in crack cocaine. And
6 they know of the disparity, and as a result of that,
7 they have an attitude about the system that I don't
8 think is healthful for America to have a significant
9 segment of our society have that perspective about
10 the criminal justice system.

11 I just left the courtroom before I came
12 over here. I had a young man before me, 24 years
13 old, no prior juvenile or adult record, caught up in
14 a conspiracy. If he had not been caught up in a
15 conspiracy based upon his activity - he was not a
16 leader or organizer or anything of that nature - he
17 inevitably would have been prosecuted in the
18 Superior Court because the U.S. Attorney's Office
19 here has the discretion of either prosecuting in
20 Superior Court, where they prosecute, or prosecuting
21 in the federal system. And because he was a part of
22 this vast conspiracy, he was brought into the

1 federal system. Had he not and had gone to the
2 local system as a result of the amount of drugs that
3 he had, inevitably he would have, as a first
4 offender, walked out of the courtroom on probation,
5 but because he was in the federal system, the
6 guideline sentence that he was facing was 46 to 57
7 months. There was a mandatory 5-year sentence, but
8 because he qualified under the safety valve
9 provision, he was able to escape that. And I asked
10 the probation officer, "Well, if he was a cocaine,
11 powder cocaine, dealer with the same amount of
12 cocaine, what would his sentence have been?" And
13 the guideline sentence would have been 10 to 16
14 months as compared to 46 to 57 months and, as I say,
15 probation, had he been prosecuted in the local
16 system.

17 It seems to me that that vast disparity has
18 to be problematic for anybody who's concerned about
19 fairness, and I think fairness has to be foremost a
20 part of the criminal justice system and that we
21 should continue to strive to make sure that fairness
22 is a hallmark of what we do. But, like I say, I

1 think while fairness, fundamental fairness, is
2 important, the perception of fairness, I think, is
3 just as important, and I think we should be able to
4 go to all parts of our citizenry and represent to
5 them that we have a system that's treating everybody
6 fairly.

7 When you go into - one of the things I'm
8 doing now is running this commission that's looking
9 at the problem of prison rape, which is a pervasive
10 problem in many of our prisons throughout the
11 country, and I have the opportunity to go into
12 prisons on a fairly regular basis as a result of
13 that, and all you see, in many of these prisons, are
14 young black men, and most of them are there because
15 of their involvement with crack cocaine. The impact
16 that that is having on communities is devastating.
17 Most of our kids in many of our poorer black
18 communities don't have fathers, and they don't have
19 fathers because of some of the things that
20 admittedly they're engaged in, but there are, I
21 believe, a lot of these young men who we lock up for
22 extended periods of time who, we should lock up for

1 some period of time, who can come back into the
2 community and be positive, contributing members of
3 our society, but because they're locked away for so
4 long, that opportunity is not available. I have a
5 nephew, a young man who scored over 1300 on the SAT,
6 my brother's son, very bright, got involved in drugs
7 and, as a result, ended up in prison. He also has a
8 child. Fortunately, he didn't get one of these
9 lengthy sentences. So, he just came back out, and
10 our hope, obviously, is that he'll get his life back
11 on track, become a father to his son, and make sure
12 his son doesn't end up in the same position where he
13 was.

14 And as a society, at some point, it's a
15 problem that we're going to have to address, and I
16 think it starts here because as long as we continue
17 to lock up the number of young black men that we
18 continue to lock up, we're going to leave many of
19 our boys and girls without fathers, and without
20 fathers, I think, children end up having significant
21 problems.

22 So, you have my written testimony, so I'll

1 open myself up for any questions you may have.

2 CHAIRMAN RICARDO HINOJOSA: Who has the
3 first question? Judge Castillo?

4 VICE CHAIR RUBEN CASTILLO: First of all,
5 thank you for taking time out of your difficult
6 schedule to be here, Judge Walton. Aside from all
7 your criminal justice experience, you also have had
8 the experience of being the Associate Director of
9 the National Drug Control Policy. So, I'm going to
10 ask you a question that is more generalized, and you
11 can answer it based on any of your multiple
12 experiences. I'm concerned that somehow that this
13 cocaine powder versus crack penalty disparity, aside
14 from being unfair and wrong and unjustified, has
15 created a perverse incentive on the part of our
16 federal drug agencies to bring small crack cases as
17 opposed to go after large drug organizations. Has
18 that been your experience or has it not?

19 JUDGE REGGIE WALTON: It has not. Most of
20 the cases that I have brought before me do involve
21 sizeable amounts of cocaine. That's not to say that
22 there aren't some where you have smaller amounts,

1 but that has not been my experience. That may be a
2 different circumstance in other jurisdictions. In
3 this jurisdiction, since the United States
4 Attorney's Office prosecutes both in the local court
5 and the federal court, there is, I think, some
6 uniformity of when cases are brought in those two
7 courts, and to a large degree, it's based upon the
8 amount involved and also based upon whether the
9 individual was involved in a conspiratorial, you
10 know, set of activities.

11 VICE CHAIR RUBEN CASTILLO: So, in the case
12 you reference, because of the conspiracy, a smaller
13 drug case was brought into federal court.

14 JUDGE REGGIE WALTON: That's correct.

15 VICE CHAIR RUBEN CASTILLO: And the idea
16 being to obtain the cooperation?

17 JUDGE REGGIE WALTON: Correct, and he ended
18 up not actually providing cooperation because he was
19 at the lower end of the totem pole and really didn't
20 have anything to offer, but he did get the credit
21 for having admitted his guilt and having pled
22 guilty, and then he did qualify under the safety

1 valve provision.

2 VICE CHAIR RUBEN CASTILLO: In the post-
3 *Booker* era that we're in, it seems to me that every
4 single court of appeals has said that judges are not
5 free to reject the 100 to 1 ratio and replace it
6 with whatever they think is fair, but it seems to me
7 also that courts of appeals have indicated that
8 judges can look at individualized factors and try
9 and do through the backdoor what they're not
10 allowing through the front door, that is, use
11 individualized factors to bring about sentences that
12 they think are fair and reasonable. Has that been
13 your experience?

14 JUDGE REGGIE WALTON: I struggle with this
15 issue because I am not one of those judges who
16 dislikes the guidelines. Having worked for many
17 years in the Superior Court where there were no
18 guidelines, I appreciate the need to place, in my
19 view, some level of constraints on the discretion
20 that judges have because when you don't do that,
21 then you have judges all over the map and you've got
22 people being sentenced based upon the individual

1 predilection of judges, and I don't think that's a
2 good system either. So, I don't come - I did not
3 come to the federal court with the feeling that the
4 guidelines were a bad thing. If anything, the
5 guidelines tempered my sentences as compared to
6 maybe some, but I think they do have a proper role.
7 I don't know. It's a very difficult problem, I
8 think, for me because I have seen so many
9 communities devastated by crack, but I just - I
10 think at bottom it's a problem that has to be taken
11 on.

12 VICE CHAIR RUBEN CASTILLO: Finally, if
13 people do perceive, among different minority
14 communities, that there is a racist system of
15 justice, do you think it affects the level of which
16 people are willing to cooperate with police officers
17 and prosecutors?

18 JUDGE REGGIE WALTON: I can't definitively
19 say that would be the case because I'm not involved
20 in that aspect of the process. So, I can't say that
21 people are not willing to come forward, but one
22 would have to believe that, if people are not

1 willing to serve on juries and if people are not
2 willing to convict despite the quality of evidence
3 that the government may have and despite the impact
4 that they know crack has on their community, one
5 would think that they would also have a level of
6 apprehension about providing cooperation, because
7 I've had jurors candidly come up and, in this
8 community, I mean the demographics are changing, but
9 still the majority, vast majority, of jurors are in
10 fact black jurors. And I've had jurors come up
11 during the voir dire process and say that they just
12 will not be a part of sending another black man to
13 jail in a system that they believe is racist because
14 of the disparity regarding crack as compared to
15 powder cocaine sentencing. So, one has to believe,
16 if you have people who are willing to express that
17 in a court of law, that there are probably people
18 who are not willing to come forward and cooperate.

19 CHAIRMAN RICARDO HINOJOSA: Vice Chair
20 Steer?

21 VICE CHAIR JOHN STEER: Judge Walton, you
22 bring a very valuable perspective to this

1 discussion, and we appreciate it. You seem to
2 suggest in your testimony an openness to considering
3 that there may be some basis for somewhat harsher
4 penalties for crack than powder. What do you – what
5 factors about crack trafficking and use and its
6 impact on the community do you think might make for
7 a sentencing policy that would have harsher
8 penalties for crack?

9 JUDGE REGGIE WALTON: I mean that's
10 obviously a policy decision that policy makers have
11 to make, but at least in my experience, I have seen
12 crack cocaine have a greater impact on the community
13 than powder cocaine. Clearly, it seems to me that –
14 I don't think the quality of crack cocaine makes it
15 more addictive. I think that's clear. But the
16 manner in which it's used, I think, does cause
17 individuals to become addicted to a greater extent
18 than powder cocaine, and I know there was a sea
19 change in what we saw happening, for example, in the
20 Family Division, when I served on the Superior
21 Court, when crack came into the community because,
22 for whatever reasons, it seemed to have the capacity

1 to destroy the maternal instincts that even heroin
2 didn't seem to have because mothers, even though
3 they may have been addicted to heroin, still seemed
4 to remain an active part of their children's lives;
5 whereas, with crack cocaine, we saw the number of
6 kids coming into the system as neglected and abused
7 children skyrocket. My last job, when I was on the
8 Superior Court, was the presiding judge of the
9 Family Division, and we had over 5,000 children
10 under the supervision of the court, and most of
11 those children were there because their mothers were
12 involved in crack and they're father wasn't
13 involved.

14 So, I think that, because of the impact
15 that crack is having, I could see how a policy maker
16 could take the position that there should be some
17 level of distinction between how we punish for crack
18 as compared to powder, but I think the 100 to 1
19 distinction is just far greater than what it should
20 be and that serious consideration has to be, you
21 know, undertaken to reduce that.

22 VICE CHAIR JOHN STEER: If I could ask a

1 sort of unrelated follow-up, if this effort is
2 successful to convince Congress to change and lower
3 the penalties and the Commission lowers the
4 guideline penalties, that's going to generate a big
5 and controversial issue about what you do about the
6 previously sentenced. Have any thoughts on
7 retroactivity?

8 JUDGE REGGIE WALTON: Well, I mean,
9 obviously, that would wreak havoc with our criminal
10 justice system if the change was made retroactive,
11 and I, obviously, shouldn't, I don't think, as a
12 judge opine on whether that would be appropriate,
13 but I can tell you it would wreak havoc with our
14 criminal justice system if we did that.

15 CHAIRMAN RICARDO HINOJOSA: Commissioner
16 Howell?

17 COMMISSIONER BERYL HOWELL: Judge, I just
18 wanted to tell you how much I appreciated your
19 comments, too. When I was on the staff of the
20 Senate Judiciary Committee, you know, I think it was
21 one of those things that I've - this whole issue was
22 one that I found most disturbing in terms of the

1 perception of fairness, not just of the criminal
2 justice system, but as a consequence of the
3 functioning of our government as a whole and whether
4 it was serving, you know, all the people of America
5 in a fair way.

6 One thing we haven't touched on yet this
7 morning and, given your multiple roles both as a
8 judge and as a policy maker in the narcotics and as
9 an enforcer of narcotics law, one of the, you know,
10 one of the problems that I think Congress is facing
11 in addressing this issue has been the debate over
12 whether or not the narrowing of the disparity should
13 be done by increasing powder penalties. And I just
14 wondered whether you had an opinion about whether or
15 not there was a need to increase powder penalties by
16 lowering the threshold for powder, since that is in
17 part of where - part of what this debate is going to
18 engage.

19 JUDGE REGGIE WALTON: Well, again, that's a
20 policy decision that I don't know as a sitting judge
21 I should give an opinion on, but let me just say
22 this: I believe firmly that certainty of punishment

1 is a greater deterrent than giving lengthy
2 sentences. That's not to say at some point, if
3 somebody is a habitual criminal and they continue to
4 put poison into the community and destroy people's
5 lives and communities, that at some point harsh
6 punishment is not appropriate, but I think at the
7 beginning level, I think if individuals know that
8 they're going to pay a consequence for their
9 behavior, in my view, that has a greater deterrent
10 impact than these significant sentences.

11 So, you know, we have a lot of people in
12 our prisons, and like I say, I don't have any
13 apprehension about locking people up when it's
14 appropriate, but as a society, you know, I think we
15 have to make an assessment as to how many people can
16 we continue to lock up and not only just drain our
17 resources, which I think should be a major concern,
18 but to remove from some of our communities the vast
19 majority of men that we've removed and not have the
20 devastating impact on communities that we see taking
21 place now. I just don't think - I mean, as a
22 father, I think fathers are important, and I think

1 that, as we continue to remove from communities the
2 number of fathers that we do, we destroy
3 communities.

4 So, increasing sentences for the sake of
5 increasing sentences, I guess, you know, is
6 problematic, and like I say, I think that if we
7 aggressively enforce our laws and we make sure that,
8 you know, people are going to get slapped when they
9 get caught, I think that has a greater impact. I
10 know a lot of inmates or people I've sentenced
11 who've come into the federal system from the local
12 system, and they have told me candidly, "Judge, if
13 somebody had let me know before that you all were
14 serious down here, I would have changed my conduct,
15 but I thought, you know, I could do what I wanted to
16 do and there weren't going to be any consequences
17 because the two or three times I came down before,
18 you didn't do anything to me." And I'm not saying
19 that means necessarily put them in jail for a long
20 period of time, but I think people expect, when they
21 do wrong, to be punished, and if they're not
22 punished, then it causes them to feel that crime

1 does pay, but I don't think that has to be harsh,
2 throw-away-the-key punishment either.

3 CHAIRMAN RICARDO HINOJOSA: I, again, join
4 all the Commissioners in expressing our appreciation
5 for your coming. You said that you were very
6 supportive of the guidelines, as obviously we are,
7 and obviously the guidelines have been controversial
8 with judges over the past 20 years, and now they're
9 advisory in nature, and to some extent their
10 application depends upon the discretion of judges.
11 My question is, do you think the crack/powder
12 disparity has any impact, from the judge's
13 perspective, on the credibility of the guideline
14 system as a whole?

15 JUDGE REGGIE WALTON: I think it does. I
16 mean I think the statistics, which you know better
17 than I, bear out the fact that judges, by and large,
18 are still sentencing within the guidelines and
19 that's been my experience, and my experience with
20 the colleagues in the District of Columbia. And I
21 think the area where you do see judges going off the
22 reservation and giving non-guideline sentences is in

1 this arena, and I think it does have a negative
2 impact on the credibility that the guidelines have
3 when you have, in one particular area of the
4 guidelines, a significantly greater number of judges
5 going off the reservation and giving non-guideline
6 sentences.

7 So, I think it would lend credibility to
8 the guidelines if the disparity was addressed
9 because I know - I mean there are judges who are
10 doing some novel things in this area, and I've been
11 asked about some of those, and while I struggle with
12 these sentences, I still, for the reasons I
13 indicated before, have great concern about me as an
14 individual judge making the decision that I know
15 better than everybody else and therefore I'm going
16 impose these set of sentences in my cases as
17 compared to what other judges are doing in other
18 cases. I think it does hurt the credibility of the
19 system to the same degree as what we have as far as
20 disparity is concerned because, as I say, if you
21 have someone with basically the same background
22 having committed the same offense going into one

1 courtroom and getting 10 years and then go into
2 another courtroom and get 2 years, I think it does
3 create a perverse perspective about the system, and
4 I think it does hurt the credibility of the process.

5 CHAIRMAN RICARDO HINOJOSA: Does anybody
6 else have any other questions?

7 If not, Judge Walton, thank you so much.
8 We realize you have a busy schedule, and we
9 appreciate your willingness to come and speak on
10 behalf of the Judicial Conference as well as give us
11 your personal viewpoint, which has been extremely
12 helpful. And I will say your written comments are
13 also extremely helpful.

14 JUDGE REGGIE WALTON: Thank you for having
15 me, and I hope the powers that be will have the will
16 to do the right thing and rectify this problem.

17 CHAIRMAN RICARDO HINOJOSA: Thank you, sir.

18 PANEL FOUR: STATE AND LOCAL AGENCIES

19 CHAIRMAN RICARDO HINOJOSA: This panel
20 represents some state and local perspectives. We've
21 got Mr. Chuck Canterbury, who is the current
22 national president of the Fraternal Order of Police,

1 having joined the organization in 1984. He did
2 retire in January of 2004 from the South Carolina,
3 Horry County, South Carolina Police Department, and
4 he basically has had a 25-year career as a law
5 enforcement official, and he is a graduate of the
6 Coastal Carolina University. And we certainly
7 appreciate his presence. And he was appointed by
8 President Bush to serve on the Medal of Valor Board
9 and also serves on the country's Homeland Security
10 Council.

11 We have Mr. Elmore Briggs, who is the
12 Director of Clinical Services of the Addiction,
13 Recovery, and Prevention Administration of the
14 District of Columbia Department of Health.

15 Mr. Briggs, we appreciate your taking your
16 time from your busy schedule to be here.

17 He has previously served as a consultant,
18 trainer, and a vice president for clinic services
19 for Vanguard Services Unlimited, which is a
20 community-based non-profit agency, and he was a
21 counselor at Kolmac Clinic in Silver Spring,
22 Maryland, and he has been the Director of Program

1 Services at the Northern Virginia Juvenile Detention
2 Home. So, he has a history of working in this
3 particular field. He has a master's degree in
4 clinical community counseling from Johns Hopkins,
5 and his bachelor's from Mercer.

6 And so, at this point, Mr. Canterbury, if
7 you would like to start with your remarks, sir.

8 MR. CHUCK CANTERBURY: Thank you, Mr.
9 Chairman. As previously stated, my name is Chuck
10 Canterbury. I'm the National President of the
11 Fraternal Order of Police, the single largest police
12 organization in the United States, representing over
13 324,000 of our nation's police officers. And as you
14 know, we previously addressed this Commission on the
15 issue of the disparate penalties associated with
16 crack and powder cocaine offenses, and this morning
17 I'm here to provide our views to the current
18 sentencing guidelines for cocaine offenses. And I
19 appreciate this opportunity to be here.

20 The drug abuse and narcotics trafficking in
21 the United States has always been one of our top
22 concerns, and in 1980s our nation experienced an

1 explosion in the violence that was fueled almost
2 entirely by the emergence of crack cocaine, a
3 cheaper, more dangerous form of the drug, which was
4 revealed to have more devastating psychological and
5 physiological effects on its users.

6 The Commission has asked what the impact of
7 crack trafficking has been on our local/state
8 communities and whether it permeated our nation in a
9 different manner than powder cocaine. Well, as a
10 first responder and a practitioner in the field for
11 almost 26 years, I can tell you the answer was
12 definitively yes. Families were ripped apart.
13 Murders skyrocketed. Drug abuse led to neglect,
14 broken homes, and in many cases, violence. In fact,
15 while only 22 percent of all users of cocaine use
16 crack, 72 percent of primary admissions to hospital
17 for cocaine usage were crack-related. Furthermore,
18 during the eighties, during the height of the
19 epidemic, New York City Police Department reported
20 32 percent of their nearly 2,000 murders were crack-
21 related. That's more than the total number of
22 homicides committed in New York in the year 2005.

1 Congress moved quickly to confront this
2 violence and the ongoing threat of crime and
3 addiction by giving law enforcement the tools they
4 needed to combat drug trafficking and dealers.
5 Congress recognized the great dangers of crack
6 cocaine, and under current law, a person convicted
7 of distributing 500 grams of powder cocaine or 5
8 grams of crack cocaine receives a mandatory 5-year
9 sentence, and 10-year sentence for those convicted
10 of distributing 5,000 grams of powder or 50 grams of
11 crack.

12 In the experience of the FOP, these tougher
13 penalties worked and were a very significant factor
14 in the ability of law enforcement to counter the
15 crack explosion. There are, however, other factors
16 which should go into the sentencing of those
17 convicted of crack/powder cocaine offenses, and
18 these are the additional aggravating factors that we
19 seem to see much more with crack: The presence of
20 firearms or children; the use or attempted use of
21 violence should be also considered in the final
22 sentencing. However, these and other enhancements

1 should continue to be in addition to the reasonable
2 mandatory minimum sentence, based first and foremost
3 on the quantity of the controlled substance as
4 provided under the current law.

5 Now, as an organization, we've heard and
6 appreciate the concerns about the 100 to 1
7 sentencing disparity between crack cocaine and
8 powder cocaine, and we've testified previously on
9 this issue, but we continue to reject strongly any
10 proposal which would fix this disparity by
11 decreasing the penalties, which have proven to be
12 effective in law enforcement's fight against crack
13 cocaine. We hold this approach to be at variance
14 with common sense and strongly disagree with the
15 assumption that 5- and 10-year mandatory sentences
16 should be targeted only at the most serious drug
17 offenders. The so-called low-level dealer who
18 traffics in small amounts of either powder or crack
19 cocaine is no less a danger to a community than the
20 individual at the manufacturing or wholesale level.
21 In fact, the Commission noted in its 2002 report
22 that the aggravating factors occurred more often in

1 crack cocaine uses than in powder cocaine.

2 We believe and the ADAM Program indicates
3 that in four major metropolitan areas the number of
4 transactions in the crack market was much larger
5 than in the powder cocaine market and the marijuana
6 market. In these sites, the estimate size, measured
7 in dollars, of the crack cocaine market in a 30-day
8 period was two to ten times larger than the size of
9 the powder cocaine and marijuana markets.

10 The violence, the addiction, and the
11 relative size of the crack cocaine trade make
12 reducing penalties for crack cocaine dealers exactly
13 the wrong strategy. If the disparity is that great
14 of a concern, and we believe it is, the Fraternal
15 Order of Police would support increasing the
16 penalties for offenses involving powder cocaine
17 through a reduction in the quantity of powder
18 necessary to trigger the 5- and 10-year mandatory
19 minimums, thereby decreasing the gap between the two
20 offenses and addressing the concerns of those who
21 question the current ratio, without depriving law
22 enforcement with the tools they need to control the

1 possession, use, and sale of cocaine.

2 We appreciate the opportunity to be here
3 today, and we have submitted our written testimony.
4 I'll be glad to stand for any questions.

5 CHAIRMAN RICARDO HINOJOSA: Thank you, Mr.
6 Canterbury, and, again, thanks to you and Mr. Briggs
7 for your patience and your willingness to be
8 rearranged with regards to the schedule here. We
9 appreciate it very much.

10 Mr. Briggs?

11 MR. ELMORE BRIGGS: Thank you, Your Honor,
12 and thank you to the Commission for allowing me to
13 submit written testimony and sit here before you and
14 give my perspective on this issue.

15 I am a licensed substance abuse treatment
16 practitioner, and I believe treatment works. So, my
17 perspective will be a bit different from some of
18 what you heard. I'm also a husband, a father, and a
19 grandfather. I have five grandchildren. And I
20 realize that the use of crack cocaine and other
21 drugs of abuse and dependence are tearing our
22 communities apart.

1 Although I live in Montgomery County now,
2 as you mentioned, I work in the District of
3 Columbia. APRA is - serves under the Department of
4 Health as a safety net agency in that we provide
5 treatment to folks who couldn't afford to go to a
6 private paid clinic or who did not meet the criteria
7 to be referred to one of the treatment providers
8 that APRA licenses under Chapter 23 of the District
9 of Columbia.

10 As a third-generation Washingtonian, at 60
11 plus years, I've seen this city go through some
12 major explosions. The first was the heroin
13 epidemic, which tore this city apart. Next came the
14 powder cocaine. Well, back in those days, it was
15 called "the rich man's drug" because most of the
16 people that used it came from suburbia. They
17 weren't inner city folks. Then we had the era I
18 called the Richard Pryor era, where we had the
19 freebasing, and that became prominent after his
20 incident of catching on fire. Part of the evil
21 genius of addiction is to practice better living
22 through chemistry and cheaper. That's how crack

1 cocaine came on the scene. It was a cheaper form,
2 and it moved to the inner city.

3 I agree with Judge Walton. I agree with
4 Mr. Canterbury. It's a devastating drug, but on the
5 other side as a treatment provider, I work with
6 mothers who were crack cocaine addicts, who had
7 their children taken away by Child and Family
8 Services for neglect, who were able to enter
9 treatment, embrace recovery, and get their children
10 back, and join the community as productive members
11 of it. I have watched people who you would think
12 are just totally lost, become found and mostly
13 through the efforts of treatment and recovery.

14 I don't like to see people get away with
15 things. I believe that if we have a law that has -
16 a land, rather, that has no laws, we're all lost,
17 but like Judge Walton, I am definitely concerned
18 that most of the people I see in treatment look like
19 me, and somewhere that disparity seems to be, I
20 won't say intentional, but certainly it has serious
21 cultural implications.

22 If we look at treatment, there are four

1 goals we want to accomplish: We want to educate the
2 patient. We want to help them self-diagnose, that
3 is, to see the problem the within them. We want to
4 help them develop recovery resources. And the most
5 important, accept personal responsibility for their
6 actions. A lot of people that are arrested, say,
7 the average crack cocaine user, their homes or
8 apartments might be used by drug dealers who take
9 advantage of their dependence and say, "Let us use
10 your place to cook drugs." Well, if a warrant is
11 served and they're arrested, those people get a lot
12 of time, when what they were doing was actually
13 practicing their addiction.

14 So, it comes to point, are we talking about
15 criminals or are we talking about patients? From my
16 perspective, I'm looking at this from a public
17 health issue. We're talking about a disease, a
18 virulent disease that destroys the soul, the mind,
19 the body; and it destroys communities. Treatment
20 can change that.

21 Another thing that happens: Some addicts
22 do some kind of thinking, feel that, "Well, I'll

1 maximize my gain and minimize my loss, and become a
2 dealer." So, they'll amass some quantity of money.
3 They'll buy some powder cocaine. They will change
4 it, convert it to crack cocaine, and they'll go out
5 and say, "I'm going to sell it and make a lot of
6 money." Well, anybody in the treatment community
7 will tell you they often become their own best
8 customer. Now, they might be caught on a sweep with
9 a pocket full of crack. Had they not been caught,
10 they would have smoked it up. And you could
11 probably poll some of the major treatment systems in
12 the United States of America, and they would share
13 that with you. Addicts generally do not make good
14 dealers. At all.

15 On the other side of that, yes, they are
16 violent people, and a lot of folks here on this
17 table today have mentioned that. And I'm not
18 advocating that those people don't be punished, but
19 what I am advocating is, if we find a way to
20 separate out those who suffer from addiction, which
21 we understand as a brain disease; it's typified by
22 obsession, compulsion, loss of control over use and

1 continued use despite adverse consequences. These
2 people aren't in their right mind. Treatment can
3 help move them toward their right mind. Treatment
4 can put that disease in remission, and what you have
5 left oftentimes is a productive member of society,
6 not a criminal.

7 And because they commit a criminal act does
8 not a criminal make, because many of these people
9 get jobs, get their families back. They pay taxes.
10 Those that are eligible, if their sentencing is not
11 so severe, can vote again. They can get their
12 voting rights restored. These are people you see
13 every day, and you probably walk right by them and
14 don't know them. And this is the process of
15 recovery, and that's what we work on in the
16 treatment community.

17 I think that's it.

18 CHAIRMAN RICARDO HINOJOSA: Thank you, Mr.
19 Briggs. Who has the first question? Commissioner
20 Riley and then Commissioner Howell.

21 COMMISSIONER EDWARD REILLY, JR.: I wanted
22 to ask Mr. Canterbury that one thing I missed in

1 your statement, we hear an awful lot and read an
2 awful lot about the exposure that our law
3 enforcement officials have when they're making
4 arrests and so on as regards the violence associated
5 with, say, crack versus marijuana versus heroin
6 versus cocaine, methamphetamine, whatever. What is
7 the history on that in terms of your street
8 experience with arresting people who are, say, on
9 meth or on crack, what have you?

10 MR. CHUCK CANTERBURY: From a practical
11 standpoint, the violence against law enforcement
12 went up substantially in the crack era versus powder
13 cocaine. Methamphetamine is the same way.
14 Tremendous violence in communities, territorial
15 fights. The addiction to crack just appeared to me,
16 as a street practitioner, to be, to cause much more
17 violence in the community: Domestic violence rose
18 tremendously in every neighborhood that had a crack
19 problem. Assaults on police officers, larcenies,
20 burglaries, and the act of aggressively seeking out
21 sources. The marijuana users and the heroin users
22 that did most of the petty theft early in my career

1 became the strong-arm robbers and the armed robbers
2 during the crack era.

3 CHAIRMAN RICARDO HINOJOSA: Commissioner
4 Howell?

5 COMMISSIONER BERYL HOWELL: Yes. Mr.
6 Canterbury, thank you so much for coming, and you
7 also, Mr. Briggs. My question is for Mr.
8 Canterbury. You know, I appreciate your point that,
9 in your words, it's a wrong strategy, you know, to
10 reduce the penalties for low- and high-level drug
11 dealers, but putting that aside, I wondered what
12 your opinion was about the anomaly that applies to
13 crack in that there is a mandatory minimum for
14 possession of crack, which is not applicable to
15 other drugs. Do you have an opinion about that or
16 not so much?

17 MR. CHUCK CANTERBURY: Well, I do, but it's
18 probably from a different perspective than you're
19 going to expect. I would say 98 percent of crack
20 cocaine users are sentenced in state and local
21 courts, and those that the federal officers adopt,
22 such as my good friend Alex Acosta from South Miami,

1 he would never see 99.9 percent of the crack users
2 that my officers and my members would arrest,
3 because they're not involved in the criminal
4 conspiracy of providing crack to other people. And
5 so, I think the disparity looks to be much worse on
6 the federal level than it really is, because of the
7 fact that the mitigating factors – most of the time,
8 if a federal prosecutor, outside of maybe the
9 District of Columbia, which has that dual system,
10 most of the time the federal prosecutors involved in
11 a crack possession case, there's also a criminal
12 conspiracy involved or other mitigating factors; or,
13 if not, they would have never come in and adopted
14 our case.

15 CHAIRMAN RICARDO HINOJOSA: Mr. Briggs, you
16 obviously have a lot of experience with regards to
17 addiction recovery, and in your many years of
18 experience with regards to – have you seen or have
19 you noticed a difference with regards to the
20 recovery aspects of someone who's a powder cocaine
21 addict as opposed to someone who's a crack cocaine
22 addict?

1 MR. ELMORE BRIGGS: Well, as I stated in
2 the written testimony, there's - we do what's called
3 "relapse prevention." There are certain things that
4 can trigger a thought or a behavior in a person in
5 recovery at different stages, whether it be early-,
6 middle-, or late-stage recovery. A lot of crack
7 cocaine users, because of certain changes in the
8 brain, tend to relapse at different rates. Some of
9 that's environmental. Some of it's not putting what
10 we call enough protection on their sobriety. Some
11 of the people we treat, they can't move. They have
12 to come out of their homes where people are dealing
13 crack. They see people smoking crack. They walk
14 through their hallways, and so, it creates a
15 trigger. On the other side of that, I don't look at
16 cocaine use as being a light-weight offender, so to
17 speak, because if you look at the process, a lot of
18 people that start out snorting cocaine might move to
19 injecting cocaine and figure, "Let me get more bang
20 for the buck," and they start buying crack.

21 So, I don't always see the difference.
22 Addiction is addiction. But a lot of people that

1 start out with powder wind up smoking it. It's just
2 sort of the crazy kind of logic addicted persons
3 have, that they could spend a lot less money, so
4 they think, in the beginning, buying smaller
5 quantities of crack cocaine. The problem is the
6 high is so dramatic, and the comedown is equally as
7 dramatic. They're out chasing, and I think that's
8 what Mr. Canterbury alluded to, that you see a lot
9 of bizarre behavior because the brain is demanding
10 that reward pathway to be activated again.

11 But I don't see - I see differences in the
12 way people come into treatment on crack cocaine. As
13 I also mentioned in the testimony, that people come
14 in - you're on a crack binge, you're not eating.
15 So, I might get somebody that we admit to our
16 detoxification program that might not have eaten for
17 3 days. They're feeling depressed, and their brain
18 is saying, "Feed me. Get me back. Get me back."
19 And it makes it hard to work with, but there are
20 strategies and interventions that help us accomplish
21 that.

22 CHAIRMAN RICARDO HINOJOSA: Commissioner

1 Horowitz and then Vice Chair Steer.

2 COMMISSIONER MICHAEL HOROWITZ: Mr. Briggs,
3 to follow up on that, in terms of dealing with
4 addicts, one of the things that we talked about
5 already this morning and there's been a lot of
6 dialogue about is, both for crack and powder
7 dependence, whether to give reductions or some other
8 differences in sentences for first-time offenders or
9 individuals who have essentially no criminal
10 history, is there any - from your standpoint in
11 treating individuals - is there any correlation or
12 any differences between people who are essentially
13 the first time through the system and those who have
14 recycled through many times and might have longer
15 criminal histories? Is there any - do you see any
16 differences?

17 MR. ELMORE BRIGGS: Well, there's a belief
18 that if you can get to a person early, before
19 extensive damage is done, you do have a better
20 chance of getting them to embrace recovery. Being
21 able to treat them, more specifically being able to
22 get them to accept the need for treatment.

1 Sometimes the wall of denial is not as thick for
2 first-time offenders that might, say, go through a
3 drug court and be diverted to treatment, as it is
4 from somebody who's sort of been recycled and
5 recycled.

6 And we also must remember that a lot of
7 people that smoke crack cocaine or use powder
8 cocaine suffer from trauma as well as PTSD. So, you
9 start to see a lot of mental health issues, you
10 know, with these folks, and it makes it a little
11 more difficult. But in response, the first-time
12 offenders is where I like to get them because
13 sometimes there's a shock. I think Dr. Walton -
14 Judge Walton mentioned that maybe that shock on that
15 first time and saying like, "Oh, my God. This can
16 happen to me," then I can come in and we can provide
17 treatment and get them on the road to recovery.

18 COMMISSIONER MICHAEL HOROWITZ: I wonder,
19 Mr. Canterbury, if you had any thoughts on -

20 MR. CHUCK CANTERBURY: I agree
21 wholeheartedly. I mean the first-time crack
22 offender that we catch early, many times during the

1 process will ask for the assistance -

2 MR. ELMORE BRIGGS: Yeah.

3 MR. CHUCH CANTERBURY: - of somebody in the
4 detoxification arena. A long-term user, absolutely
5 not. They just want out of jail to go smoke more
6 crack.

7 CHAIRMAN RICARDO HINOJOSA: Vice Chair
8 Steer and then Vice Chair Castillo.

9 VICE CHAIR JOHN STEER: Actually, you had
10 asked and Mr. Briggs had answered the question I had
11 about the difference in treatment success between
12 crack and powder. So, I'll yield to Judge Castillo.

13 VICE CHAIR RUBEN CASTILLO: Well, my
14 question would be for Mr. Canterbury. I think we
15 can all agree that crack cocaine is a bad drug. The
16 question is how bad in 2006? And in that sense,
17 would you agree that the level of violence has gone
18 down in crack trafficking from the 1980s to this
19 year?

20 MR. CHUCK CANTERBURY: I would think the
21 statistics show that, and I think that, of course,
22 as Mr. Briggs has alluded to, the new designer drug

1 on the street for us meth.

2 VICE CHAIR RUBEN CASTILLO: Right.

3 MR. CHUCK CANTERBURY: So, we're kind of in
4 that cycle. I personally believe that crack will be
5 back because of the cost of crack to the individual
6 user, the street end user, and once the price of
7 meth is driven up, I think you'll see crack, same
8 that we did with heroin. We saw the increase in
9 heroin when the price was reduced because of demand.
10 But I think there has been somewhat of a reduction,
11 but I also attribute that to much longer sentences
12 for long-term offenders. We don't see them as much.

13 VICE CHAIR RUBEN CASTILLO: So, you agree
14 that crack violence is down; crack usage is down,
15 too?

16 MR. CHUCK CANTERBURY: It appears to be.

17 VICE CHAIR RUBEN CASTILLO: Okay. You
18 think crack will be back. As you said, you think
19 crack violence will back with that.

20 MR. CHUCH CANTERBURY: Absolutely.

21 VICE CHAIR RUBEN CASTILLO: And when you
22 say that one way to get rid of the differential

1 between powder and crack is to increase the crack
2 penalties - or the powder penalties, is there any
3 objective reason for doing that, that your members
4 have, other than just reducing the differential?

5 MR. CHUCH CANTERBURY: If the disparity is
6 the issue of being fair, then it's absolutely
7 essential that we keep - and when you're talking
8 about the guidelines of this Sentencing Commission
9 and the perpetrators this Sentencing Commission will
10 be dealing with versus state and local -

11 VICE CHAIR RUBEN CASTILLO: Hmm-mm.

12 MR. CHUCH CANTERBURY: - on average, I
13 believe that those sentences are appropriate for the
14 offense, and I think it's helped to reduce crack
15 violence on a national scope, and the importation of
16 crack and the development of crack as a more
17 widespread drug, but saying that, reducing the
18 sentences for crack will only proliferate the use.
19 And as Mr. Briggs said, I've never met somebody that
20 smoked crack that didn't use some other form of
21 cocaine intermittently or prior to crack.

22 So, I just don't see that much of a

1 difference between them. And, obviously, the price
2 of powder cocaine has been driven down by the lack
3 of users. I mean they want to use crack cocaine
4 because of the price, and that drove the price of
5 cocaine down.

6 MR. ELMORE BRIGGS: Can I just add
7 something to that? Additionally, it is rare now
8 that you see just a crack cocaine user. The very
9 nature of going on that binge that I mentioned
10 earlier, they might shoot or snort heroin, drink
11 alcohol, because it diminishes the effect or that
12 shakiness from having your brain jacked up for 2 or
13 3 days and not eating. So, for example, in our
14 detox facility, we'll get people and we put them in
15 acute care because they're withdrawing from alcohol.
16 But they are primarily crack users, but they drink
17 alcohol because it sort of lets them down gently.

18 VICE CHAIR WILLIAM SESSIONS: I'd like to
19 ask you, Mr. Briggs, about the addictive nature of
20 crack versus powder.

21 MR. ELMORE BRIGGS: Yes.

22 VICE CHAIR WILLIAM SESSIONS: I know 20

1 years ago, the argument was that crack was more
2 addictive. You've described this fast up -

3 MR. ELMORE BRIGGS: Yes.

4 VICE CHAIR WILLIAM SESSIONS: - and this
5 fast down, and I wonder if it is because of the
6 nature of the drug or is it the manner of ingestion?

7 MR. ELMORE BRIGGS: Well -

8 VICE CHAIR WILLIAM SESSIONS: In other
9 words, smoking versus, let's say, snorting. What is
10 it, if you know, about -

11 MR. ELMORE BRIGGS: I'm sure -

12 VICE CHAIR WILLIAM SESSIONS: - why there's
13 a difference?

14 MR. ELMORE BRIGGS: I'm sure this afternoon
15 Dr. Volkow will give you a lot of that in more
16 scientific detail, but I can you you're going to
17 have someone that injects - which is rapid; it gets
18 to the brain fast - or you'll have somebody that
19 snorts, or you have somebody that smokes. When they
20 smoke, it goes to the brain quickly. If someone is
21 snorting cocaine, there's some dilution effects
22 because of the mucus, not that they don't get it,

1 but they might not get all of it. When you're
2 smoking it in the form that it is, I mean it's a
3 freight train through what we call the "reward
4 pathway," and they get the instant up. The problem
5 is, and this is the addictive nature, is that it
6 rapidly cycles down, almost as fast.

7 So, I think what Mr. Canterbury describes
8 as that frantic type behavior, well, these people
9 are drug seeking because they want to get back to
10 that peak, and it's always a cycle of sort of
11 chasing a rabbit that you can never catch, because
12 your brain keeps saying, "I want to be back where I
13 was. I want to be back where I was," and they keep
14 using.

15 VICE CHAIR WILLIAM SESSIONS: Do people who
16 use powder cocaine, inject powder cocaine - that's
17 also a fast -

18 MR. ELMORE BRIGGS: Yes.

19 VICE CHAIR WILLIAM SESSIONS: That's a fast
20 -

21 MR. ELMORE BRIGGS: And it's a -

22 VICE CHAIR WILLIAM SESSIONS: Do they go

1 through the same -

2 MR. ELMORE BRIGGS: It's fast.

3 VICE CHAIR WILLIAM SESSIONS: Do they go
4 through the same rapid decline with this frenzied
5 activity?

6 MR. ELMORE BRIGGS: It's not as fast, but
7 it is a rapid decline, more so, say, than heroin.

8 VICE CHAIR WILLIAM SESSIONS: Okay. So,
9 there is something about the nature of crack cocaine
10 which impacts the down -

11 MR. ELMORE BRIGGS: Yes.

12 VICE CHAIR WILLIAM SESSIONS: Is that what
13 you're saying?

14 MR. ELMORE BRIGGS: Because it's such a
15 dramatic up that's different from snorting. It's
16 different from injecting. And you have to remember,
17 once that process that was talked about in an
18 earlier panel of converting it from powder to crack,
19 a lot of impurities are gone. So, I mean you're
20 getting a substance that is very close to pure in
21 that sense, and because it hits the brain really
22 fast, like a freight train and then it leaves, that

1 magnifies the addictive nature and the drug-seeking
2 behavior.

3 CHAIRMAN RICARDO HINOJOSA: Mr. Campbell?

4 COMMISSIONER BENTON CAMPBELL: I have
5 question for Mr. Briggs which follows up on Judge
6 Sessions' - or Commissioner Sessions', Commissioner
7 Judge Sessions' [Laughter] point, which is, in your
8 written testimony, you made a point that the end-
9 point of crack cocaine users continued addiction
10 appears to be pronounced. And I was curious if you
11 could elaborate on that a little bit, what you
12 meant.

13 MR. ELMORE BRIGGS: It's pronounced in
14 terms of - there is a deprivation that I've seen
15 with crack cocaine users, that I've not seen with
16 heroin addicts. There's a ruination that just comes
17 on so fast.

18 For example, Judge Walton talked about the
19 heroin epidemic, and I, you know, I saw that in the
20 District. You wouldn't see mothers as neglectful
21 with their children as when crack cocaine came.
22 Now, I run two program, two separate programs, for

1 Vanguard Services that was for mothers with
2 children, and generally the mothers with children,
3 that were addicted, that were in this residential
4 program for treatment, that were heroin addicts,
5 generally still had their kids. They had the
6 presence of mind maybe to get their kids to a
7 relative that was stable. But a lot of the mothers
8 that use crack cocaine didn't do that. And I don't
9 have any scientific evidence, but it's just
10 experience that crack cocaine does something to
11 people in terms of that frantic drug seeking that
12 doesn't happen with other drugs. And I'm sure, some
13 of the readings I have, methamphetamine is very
14 similar, and I think it's the result of any brain
15 that's hijacked and highly stimulated. There's some
16 basic things - Judge Walton mentioned that maternal
17 instinct - that leave. Now, on the other had, I've
18 seen it come back. As I mentioned earlier, there
19 are [indiscernible] get their children back. But
20 there's a level of destruction from crack cocaine
21 use that you really don't see.

22 The only thing that's even close is the

1 potential for death brought on by an alcohol addict.
2 You know, we have to medically detox them. But when
3 you see people come in that have not eaten, very
4 depressed, maybe with suicidal ideation, and all the
5 while wanting to run back out the door with nothing,
6 to buy - I mean, they want to buy something but they
7 can't - and they're very frantic. They're nervous,
8 sensitive to loud noises - the whole range. It's
9 just a destructive drug.

10 COMMISSIONER BENTON CAMPBELL: And, Mr.
11 Canterbury, is your experience similar or different?

12 MR. CHUCK CANTERBURY: Exactly the same.
13 Exactly the same. It's a - go to a crack house.
14 Six, seven, eight children in the crack house that
15 haven't been cared for in 2 and 3 days. They're
16 just there. And it's very similar to that.

17 COMMISSIONER BENTON CAMPBELL: And has that
18 changed since the eighties, or is that something
19 that's still constant today?

20 MR. CHUCK CANTERBURY: With crack addicts,
21 it's still constant; we just haven't seen quite as
22 much.

1 MR. ELMORE BRIGGS: Yeah.

2 MR. CHUCK CANTERBURY: I think there's more
3 divergence in the types of drugs, and I think law
4 enforcement's doing a -- and the communities have
5 done a better job, with community-oriented policing,
6 with initiatives where we go in and tear crack
7 houses down and try to revitalize neighborhoods,
8 working with treatment centers, which is something
9 we didn't do in the seventies and eighties --

10 MR. ELMORE BRIGGS: Hmm-mm.

11 MR. CHUCK CANTERBURY: -- which we started
12 doing in the nineties, which is something we very
13 much favor. You know, I don't want anybody to
14 mistake the fact that we believe strict penalties
15 have helped us; we also believe treatment programs
16 have helped us as well, and I would love to see
17 funding in those areas as well.

18 MR. ELMORE BRIGGS: And that's the
19 diversion part that I really, really, really would
20 like to see happen. In the early eighties, I think
21 you might agree, it was pretty much impossible if
22 you talked about law enforcement and treatment

1 working together. You've got drug courts now, law
2 enforcement, treatment, and I think together we make
3 a very potent force. You know, I agree with Judge
4 Walton that, yeah, there are people that need
5 penalties imposed for breaking the law, but also
6 there are people that simply need treatment, and
7 they might have committed criminal acts, but they're
8 not criminals; they're addicts, and they're seeking
9 a drug to change their brain, and recovery is
10 possible.

11 CHAIRMAN RICARDO HINOJOSA: Commissioner
12 Horowitz, you had a question?

13 COMMISSIONER MICHAEL HOROWITZ: Mr.
14 Canterbury, there's been, I think, several states
15 that have made efforts in the last few years to
16 reduce drug penalties for a variety of reasons, some
17 budgetary and some other reasons. Has your
18 organization or any other studies that you're aware
19 of analyzed how that's impacted both enforcement
20 efforts at the state and local level or perhaps use
21 of some of the drugs? Has there been any up-tick as
22 a result of that? Any studies on that?

1 MR. CHUCK CANTERBURY: I really don't have
2 much information about that. I can have our staff
3 look and see what we have, but I really couldn't
4 answer right now.

5 COMMISSIONER MICHAEL HOROWITZ: Okay.

6 CHAIRMAN RICARDO HINOJOSA: Mr. Briggs,
7 this may be something you haven't looked into or
8 haven't had reason to look at, but if you have any
9 familiarity with state and federal prison programs
10 with regards to drug addiction, if you do have any
11 such experience, what are your thoughts with regards
12 to the types of programs available and whether
13 they're effective or not, and ways to improve them
14 if they need to be improved?

15 MR. ELMORE BRIGGS: Generally, in a prison
16 or jail-based programs, some of have established
17 what's called a therapeutic community, where it's
18 considered milieu treatment. From the time they get
19 up until the time they go to bed, they're doing
20 treatment. They generally work well. The problem
21 occurs when they leave because, in prison, for
22 whatever time they're there, you've created a safe

1 environment, and an inmate learns to function pretty
2 well in that safe environment. The problem is when
3 they come home, what do they do? They live in the
4 same communities. If their skill level's not up,
5 they can't get a job. If there's no what we call
6 "continuing care plan" - I mean to me it's insane
7 to have someone complete a program in a prison or a
8 jail-based community program and come out without
9 after-care. I mean that's a recipe for disaster
10 because they still need to learn how to do freedom.
11 Most people doing long-term sentences lose the
12 ability to do freedom. And so, if they can get that
13 knowledge through those goals I mentioned earlier in
14 a prison or jail-based program, come out to an
15 after-care setting that provides case management,
16 because now we're not only talking about dealing
17 with your early recovery issues, we're talking about
18 employment; we may be talking about mental health
19 issues. A lot of addicted offenders have co-
20 occurring disorders. How you manage your life - how
21 do you practice refusal skills when you're living in
22 a community that some of those places Mr. Canterbury

1 mentioned, they're still selling drugs in, and
2 they're selling the drug that you used. How do you
3 link them with the recovery community that lives
4 right around there and they're not using drugs?
5 That's what I think could be enhanced.

6 I appreciate those programs because it
7 gives the inmate or offender a running start. The
8 problem is it's a false reality because they're not
9 living in jail forever in this program. What do you
10 when they come home?

11 CHAIRMAN RICARDO HINOJOSA: We have time
12 for one more question, if we field one more
13 question.

14 If not, thank you all very much again.

15 MR. ELMORE BRIGGS: Thank you.

16 CHAIRMAN RICARDO HINOJOSA: Thank you so
17 much for agreeing to have us change your schedule,
18 and we appreciate your taking your time and the
19 perspectives that you have given us today. Thank
20 you very much.

21 MR. CHUCH CANTERBURY: Thank you.

22 MR. ELMORE BRIGGS: Thank you.

1 CHAIRMAN RICARDO HINOJOSA: And we will be
2 adjourned until 1:45 for lunch.

3 [Recess]

4 PANEL FIVE: MEDICAL AND TREATMENT COMMUNITIES

5 CHAIRMAN RICARDO HINOJOSA: We'll go ahead
6 and get started with our next panel. We are very
7 fortunate to have two distinguished panelists with
8 expertise on the medical field.

9 We have Dr. Nora Volkow, who is the
10 Director of the National Institute on Drug Abuse,
11 and she has served there since May of 2003 and is
12 recognized as one of the world's leading experts on
13 drug addiction and brain imaging. She has earned
14 her medical degree from the National University of
15 Mexico in Mexico City, and did her psychiatric
16 residency at NYU. And she has more than 330 peer-
17 reviewed articles and has also edited three books on
18 the use of neuro-imaging in studying mental and
19 addictive disorders.

20 We're also very fortunate to have someone
21 equally as qualified as Dr. Volkow to also be a part
22 of this panel, Dr. Harolyn Belcher. She's a neuro-

1 developmental pediatrician and research scientist at
2 the Kennedy Krieger Institute and is currently the
3 Director of Research at the institute's Family
4 Center. She is an associate professor at Johns
5 Hopkins School of Medicine, where she also jointly
6 serves in the Department of Pediatrics and the
7 Department of Mental Health. She earned her
8 bachelor's degree in zoology from Howard University
9 as well as her medical degree from the Howard
10 University College of Law and a master's degree in
11 health science from Johns Hopkins Bloomberg School
12 of Public Health. For the past 10 years, she has
13 worked in the area of substance abuse prevention,
14 treatment, and outcome, and is well known in her
15 particular field.

16 And I would, at this point, call on Dr.
17 Volkow, if you would like to start off with a
18 statement. And then we'll proceed with Dr. Belcher,
19 and then we'll open it up for questions.

20 DR. NORA VOLKOW: Mr. Chairman, members of
21 the committee, I want to thank you for the
22 opportunity you are giving me to come to testify to

1 you about what research has shown you on the effects
2 of cocaine, with special emphasis on the differences
3 between cocaine hydrochloride and cocaine base.

4 What's the nature of the problem of
5 cocaine? Even though it's not as high as it was in
6 the eighties when we hit the epidemic of cocaine,
7 it's still at unacceptably high levels. In 2005,
8 the estimates of people that have abused cocaine in
9 the past year in the United States was 5.5 million,
10 and the estimate of people that had taken cocaine
11 over the past 12 months - over the past month, was
12 1.9 million.

13 Now, why do people take cocaine? They take
14 it because they want to get high, and the reason why
15 they can get high when they take cocaine is because
16 cocaine increases the concentration of dopamine in
17 the brain reward centers, and this is the mechanism
18 by which all of the drugs of abuse produce pleasure.
19 The mechanism why they do it differs, and in the
20 case of cocaine this is done by the fact that
21 cocaine can block the dopamine transporters, and
22 these are the molecules that normally remove

1 dopamine back into the cells, terminating its
2 actions, and when cocaine blocks them, dopamine just
3 accumulates in concentrations that are much larger
4 than the ones that occur naturally, and that is
5 associated with a very intense pleasure.

6 Now, cocaine, whether it is the freebase or
7 cocaine hydrochloride, regardless of its chemical
8 form, blocks the dopamine transporters, and when you
9 control for differences in plasma concentration,
10 that is for the same levels in plasma, the efficacy
11 of cocaine to block the transporters is the same,
12 whether it is hydrochloride or freebase, whether you
13 inject the drug or you snort it by hydrochloride or
14 you smoke it by freebase. However, when you – the
15 rewarding effects differ, and when you inject the
16 drug intravenously, like some abusers do with
17 hydrochloride, or you smoke the drug, like people do
18 with cocaine freebase or crack, the rewarding
19 effects are much more intense than when you take
20 that drug, hydrochloride, snorted. Why is that so?
21 That is because the rewarding effects of cocaine are
22 directly related to the speed at which they're

1 getting to the brain. The faster the drug gets into
2 the brain, the more intense the pleasure associated
3 with it. And the route of administration is -
4 ultimately, it's the route of administration that
5 determines the rate at which the drug gets into the
6 brain, not its chemical form, whether it's
7 hydrochloride or freebase.

8 So, that two routes of administration that
9 lead to the fastest uptake into the brain, fastest
10 delivery, are injection, intravenous, which is the
11 hydrochloride, or smoke, which is the freebase
12 crack. And this is why these two forms and routes
13 of administration are the ones that are the most
14 rewarding and are also the ones that are most
15 addictive.

16 Now, why do people become addicted? They
17 become addicted because cocaine produces such large
18 changes in dopamine that this initiates plastic
19 changes in the brain that lead to the compulsive use
20 of the drug without the - and the loss of ability to
21 control for it. Not everybody that takes cocaine
22 becomes addicted to cocaine, and it is estimated

1 that approximately 5 to 6 percent of people that
2 have initiated taking cocaine will in 2 years become
3 addicted. If you look at those numbers, then you
4 come to recognize that those that smoke and inject
5 are much more likely and at much greater risk to
6 become addicted than those that snort the drug.
7 However, many of those individuals that become
8 addicted by smoking or injecting started taking the
9 cocaine hydrochloride by the snorting route and then
10 shifted to these more dangerous forms of
11 administration.

12 Now, we should be concerned about cocaine
13 not just because it is addictive, but because it can
14 have catastrophic medical consequences. And,
15 indeed, cocaine accounts currently for approximately
16 20 percent of all emergency room admissions related
17 to drug use. Why is it - why can it be medically
18 harmful? Many mechanisms, but one of the most
19 important is that cocaine decreases the blood flow
20 to the organs in your body. So, if it happens in
21 the heart, that's going to translate into myocardial
22 infarction. If it happens in your brain, it's going

1 to translate into a stroke that can leave you, for
2 example, paralyzed or blind.

3 Not everybody is as sensitive to the toxic
4 effects of cocaine, and there are people, for
5 example, who can take cocaine for years with no
6 physical adverse consequence. And there are others
7 that can actually die from the first administration,
8 and the case of Len Bias is a very good reminder.
9 Why can you die? You can die from a myocardial
10 infarct. You can die from cardiac arrhythmia. You
11 can die from seizures, or you can die from a stroke.

12 Another very serious complication from the
13 use of cocaine is that it increases the risk for
14 getting infectious diseases such as HIV and
15 hepatitis C. When people inject cocaine, like the
16 hydrochloride, they are increasing the risk because
17 of the possibility of using contaminated material or
18 paraphernalia. However, when they smoke cocaine or
19 they inject it, they are also increasing their risk
20 because the intoxication from cocaine produces
21 changes that increase risky sexual behaviors. That
22 puts them at higher risk of diseases such as HIV.

1 Now, the good news about cocaine is that it
2 can be both prevented and treated. And, indeed,
3 studies have shown that therapeutic interventions
4 are effective, whether are sought out voluntarily or
5 mandated by the criminal system. Does this provide
6 an extraordinary opportunity to intervene to treat
7 those addicted to cocaine? And, indeed, studies
8 done in the criminal justice setup have shown that
9 individuals that are treated in the prison system,
10 cocaine abusers, not only significantly reduce their
11 consumption of cocaine, but they also dramatically
12 reduce the rate of incarceration.

13 So, in summary, what research has shown is
14 that the pharmacological effects of cocaine are the
15 same, whether it is in the form of cocaine
16 hydrochloride or crack cocaine, the base. What
17 determines the difference in its rewarding effects
18 and its addictiveness is the route of
19 administration.

20 So, what I would like to say is that, as
21 decisions are made on how to best handle the problem
22 of cocaine abuse in this country, we should not

1 forget that strategies to prevent and treat cocaine
2 abuse and addiction are critical for success.

3 Thank you for inviting me to participate in
4 this important hearing, and I will be happy to
5 answer any questions you may have.

6 CHAIRMAN RICARDO HINOJOSA: Thank you very
7 much, Dr. Volkow. Dr. Belcher?

8 DR. HAROLYN BELCHER: Thank you also for
9 the opportunity to participate in the U.S.
10 Sentencing Commission's public hearing on cocaine
11 and federal sentencing policy.

12 I've been asked to update the Commission on
13 the scope of illicit drug use and child outcomes
14 following fetal exposure to alcohol, tobacco, and
15 cocaine. I'll organize my talk to review the
16 percentages of alcohol and illicit drug use in
17 pregnancy, and then follow with effects of these
18 drugs on the developing fetus and child, beginning
19 with the most known harm, which is alcohol, and
20 concluding with cocaine.

21 The 2005 National Survey on Drug Use and
22 Health estimates that about 3.9 percent of pregnant

1 women use illicit drugs, which included marijuana,
2 hashish, cocaine, including crack, heroin,
3 hallucinogens, and unauthorized use of prescription
4 drugs, such as tranquilizers or painkillers.
5 Marijuana is by far the most commonly used illicit
6 drug, accounting for approximately 73 percent of
7 illicit drug use during pregnancy, followed by
8 unauthorized use of prescription medications at 34
9 percent, powdered cocaine at 7 percent, and crack
10 cocaine at 2 percent. Twelve percent of pregnant
11 women reported current use of alcohol during
12 pregnancy, and about 17 percent of pregnant women
13 reported cigarette use. So, this results in about
14 159,000 with illicit drug use, about a half a
15 million children with alcohol exposure, and about
16 680,000 infants with tobacco exposure.

17 So, fetal alcohol syndrome, or FAS, is the
18 leading identifiable and preventable cause of mental
19 retardation and birth defects. FAS, as it's often
20 called, occurs in about 30 to 40 percent of
21 pregnancies in which women drink heavily. FAS is
22 associated with characteristic physical features and

1 also psychological and neuro-psychological
2 disorders, including attention deficit, mental
3 retardation, learning disabilities, depression, and
4 other mental health disorders. In fact, in one
5 study, over 90 percent of children and young adults
6 with fetal alcohol exposure, the whole syndrome, had
7 mental health disorders.

8 If you look at the data on children with
9 intrauterine tobacco cigarette exposure, they have
10 an increased risk of low birth weight and asthma.
11 In addition to that, tobacco-exposed infants have a
12 higher incidence of neuro-psychological
13 abnormalities, including difficulties with learning,
14 problem-solving, memory; and there are some studies
15 that associate tobacco exposure with a higher
16 incidence of attention deficit disorder and conduct
17 disorder.

18 The majority of individuals who acknowledge
19 cocaine use, about 1 percent of U.S. citizens, use
20 powder cocaine. About 0.3 percent of the United
21 States' citizens admit to crack use. These data
22 suggest that the rate of powder cocaine use is about

1 three times that of crack use. In Baltimore City,
2 for instance, less than 5 percent of cocaine-related
3 emergency department visits were attributable to
4 crack.

5 Both forms of cocaine, as you've mentioned,
6 are metabolized to the same chemical compounds,
7 which are virtually indistinguishable by the
8 traditional drug detection methods, and there are no
9 studies noted in PubMed that documented the long-
10 term and immediate effects of crack cocaine versus
11 powder cocaine exposure in the fetus and the child.
12 As the studies have begun to be more sophisticated,
13 what is apparent is that cocaine exposure is less
14 harmful developmentally than alcohol and cigarette
15 exposure is.

16 Children with intrauterine cocaine exposure
17 have similar intellectual and cognitive potential
18 compared with their socioeconomic peers. The subtle
19 effects of cocaine exposure include language
20 deficits that were noted at 6 and 7 years of age,
21 and those effects were not noted at 9 and a half
22 years of age in the studies. There are some

1 researchers that have found increased incidence of
2 externalizing behaviors, that's attention deficit
3 and aggressive behaviors, mostly in boys. Other
4 studies have not found that to be the case. Many
5 studies, though, have found difficulties with the
6 children as far as their visual attention skills,
7 which may leave them at risk to have attention-
8 deficit hyperactivity disorder as they follow along
9 and get into school age.

10 Importantly, I think, children with
11 intrauterine drug exposure may suffer more or as
12 much from the lack of a stable, nurturing home
13 environment as they do from the actual drug of
14 exposure, and also there are studies that document
15 that children with intrauterine drug exposure do
16 benefit from interventions that provide support,
17 education, medical surveillance. So, these children
18 really can learn, and they do do well in a
19 structured environment where the family, the whole
20 family unit, is provided with structure and
21 intervention.

22 So, to reiterate, there's no scientific

1 evidence of differential effects on the fetus and
2 child up to 9 and a half years of age from
3 intrauterine crack exposure versus powder cocaine
4 exposure. There's no evidence that one form of
5 cocaine is biologically more harmful than the other
6 in the developing fetus and child. And the current
7 sentencing seems to invite disparities in the
8 implementation of justice.

9 CHAIRMAN RICARDO HINOJOSA: Thank you, Dr.
10 Belcher. And we'll start with the first question.

11 VICE CHAIR JOHN STEER: Dr. Belcher, this
12 morning, one of the witnesses reported anecdotally
13 that his sister who teaches - well, you heard -

14 DR. HAROLYN BELCHER: Right.

15 VICE CHAIR JOHN STEER: Okay.

16 DR. HAROLYN BELCHER: I heard that. I was
17 cringing. [Laughter]

18 VICE CHAIR JOHN STEER: Well, I would just
19 like for you to comment on that further. You know,
20 I think that you do have this anecdotal reaction
21 that, you know, the "crack baby" phenomenon is real
22 and has real manifestations, and yet research that

1 we've all, I think, been familiar with shows
2 differently.

3 DR. HAROLYN BELCHER: Right. I think that
4 early on in the eighties, when the very significant
5 social-political impact of that drug was apparent in
6 the communities, that there was a lot premature
7 information in the medical literature as well as in
8 the lay literature about how the children were going
9 to be severely disabled and they wouldn't be able to
10 learn. And I believe a lot of that was premature,
11 and as the studies have gotten more sophisticated
12 and more prospective, say, the maternal life style
13 study, which has followed individuals from pregnancy
14 or late pregnancy/early delivery, all the way
15 through 6, 7, 8 years of age, we are finding that
16 that was premature to say that these children would
17 be at significant risk for learning disabilities.
18 We're just not finding that to be the case. I think
19 that if you have a parent who still has drug-seeking
20 behavior and is not providing the structure, is not
21 going to PTA meetings, not reading to their child,
22 not providing those things that we would expect in a

1 non-drug-using household to happen in a nurturing
2 environment, then those children can be at risk, but
3 that's more kind of the environmental, not actually
4 the drug of abuse per se.

5 The children – we do know that their visual
6 attention areas, which can be responsible for their
7 impulse control and attention span, those areas,
8 they do seem to be a little bit more at risk in
9 those areas of attention, and that can affect
10 learning if language and attention are involved.
11 Yeah.

12 VICE CHAIR JOHN STEER: Thank you.

13 DR. HAROLYN BELCHER: Hmm-mm.

14 COMMISSIONER BERYL HOWELL: Can I just ask
15 one last question? I have to say, when I read your
16 testimony, Dr. Belcher, I was really just blown
17 away, for want of a better word, because it was
18 totally news to me. I had never heard this report
19 about, you know, fetal exposure to tobacco and
20 alcohol being more damaging –

21 DR. HAROLYN BELCHER: Hmm-mm.

22 COMMISSIONER BERYL HOWELL: – for long-term

1 or even short-term developmental, in terms of its
2 long- or short-term developmental impact on fetuses
3 than cocaine.

4 DR. HAROLYN BELCHER: Hmm-mm.

5 COMMISSIONER BERYL HOWELL: So, if you
6 could just tell me, is this like something that's
7 now commonly understood in the medical profession?
8 Is this a fairly new study? Are there multiple
9 studies that are reaching the same finding? Just to
10 give some context to that particular finding.

11 DR. HAROLYN BELCHER: We've known about
12 alcohol for quite some time, about 20 years or so,
13 and you see now on your wine bottles and all that,
14 "Beware, drinking during pregnancy can cause birth
15 defects." I'm not sure how widely this information
16 is known in the popular press and all, but it is
17 very consistent, particularly alcohol: small for
18 gestational age; they have very specific facial
19 features. They have microcephaly, which is head
20 sizes that are the second percentile or less. They
21 have a flat philtrum. They lose the cupid's bow
22 that you have at the top of your lip. So, flat

1 philtrum, a thin upper lip. They have very specific
2 findings. There are neurologic findings. The part
3 of the brain that connects the right to the left
4 side is not fully developed. So, these things,
5 through MRI studies and through CT studies and
6 through prospective studies of children with alcohol
7 exposure, have been found to be the case.
8 Significant mental health problems, and there is a
9 lot, multiple, multiple studies, dose response
10 curves: The more alcohol, the worse the outcome.
11 So, that pretty much - it is a direct neurotoxin,
12 alcohol is. So, I think that's indisputable.

13 The literature on tobacco, a lot of that -
14 some of that comes from Canada. They have
15 longitudinal studies, and they are pretty much
16 consistent as far as the higher risk of attention
17 deficit types of behavior. The conduct behavior is
18 a little bit more questionable. And actually in, I
19 believe it's September *Pediatrics*, they looked at
20 the IQs, and they were kind of looking at
21 intellectual functioning on tobacco exposure. They
22 did find differences, but once they adjusted for

1 maternal IQ, they found less differences. So, there
2 is some depression, but maybe not as much as
3 initially thought, but, again, there's a higher risk
4 of asthma; low-for-gestational-age babies; smaller,
5 lighter-weight babies. So, those are very
6 significant health findings for those two legal
7 drugs of exposure.

8 CHAIRMAN RICARDO HINOJOSA: Is this
9 something - Dr. Volkow?

10 DR. NORA VOLKOW: Yeah, I just wanted to
11 make a point because one of the things that has been
12 relatively new is, for example, that recognition
13 that nicotine could have very deleterious effects,
14 and there's been studies to show that they were more
15 deleterious than exposure of cocaine during fetal
16 development, were surprising because we tend to take
17 the notion that if a drug is more harmful, like
18 cocaine in an adult brain, that nicotine, which is
19 harmful for your lungs, but in the brain itself is
20 not harmful, therefore it must be worse for the
21 fetus, but it doesn't follow that way because one of
22 the findings that's coming out from science is that

1 nicotine receptors, or the nicotine system, which is
2 activated by cigarettes, is extraordinarily
3 important in the development of the fetal brain.
4 And, indeed, the higher concentration of nicotine
5 receptors you'll ever have was 26 weeks into the
6 pregnancy. At that period of time, it is a critical
7 period where the nicotine receptors are helping to
8 form the architecture of the brain. And thus the
9 consequences of having nicotine on board on your
10 brain when your brain is developing is going to be
11 very different of having nicotine when your brain
12 has basically fully developed. And nicotine
13 receptors are also involved with the development of
14 a wide variety of organs, and that's likely to be
15 the reason why these children born out of mothers
16 who are smokers have a wide variety of medical as
17 well as behavioral problems. And this is relatively
18 new.

19 CHAIRMAN RICARDO HINOJOSA: Is this
20 something that's now totally accepted or it's still
21 open for discussion and continued study or
22 everybody's in agreement on this now? Or where are

1 we?

2 DR. HAROLYN BELCHER: Alcohol, I believe
3 everybody is definitely in acceptance of that, would
4 you say?

5 DR. NORA VOLKOW: And I would also say that
6 everybody agrees that exposure to nicotine during
7 pregnancy leads to a low birth weight, which in and
8 of itself is then accepted to be associated with
9 neuro-developmental problems. So, those are
10 factual. I mean that's accepted.

11 DR. HAROLYN BELCHER: Right. Hmm-mm.

12 CHAIRMAN RICARDO HINOJOSA: Go ahead.

13 VICE CHAIR RUBEN CASTILLO: As I understand
14 your scientific testimony, there's no difference
15 between powder and crack cocaine. Is that correct?

16 DR. NORA VOLKOW: Correct.

17 DR. HAROLYN BELCHER: Biologically, right.

18 VICE CHAIR RUBEN CASTILLO: But the manner
19 of administration does have a difference in the
20 effects.

21 DR. HAROLYN BELCHER: Addiction.

22 VICE CHAIR RUBEN CASTILLO: And that's one

1 of the things we're trying to grapple with, is the
2 secondary, if you will, effects of crack versus
3 powder. One of the things that caught my attention
4 is the hospitalization rate. Is it correct that
5 hospitalization rate for cocaine in general has gone
6 down over the last several years?

7 DR. NORA VOLKOW: That's correct, except
8 perhaps over the past year there's been some
9 indicators, though no significance, showing trends
10 in the opposite direction -

11 VICE CHAIR RUBEN CASTILLO: Okay.

12 DR. NORA VOLKOW: - of some increases.

13 VICE CHAIR RUBEN CASTILLO: Okay.

14 DR. NORA VOLKOW: But what you say is
15 correct: There's no difference between the cocaine
16 hydrochloride and the cocaine base, but there is
17 significant differences on the route of
18 administration, and within that line of thinking,
19 there are other factors that will determine
20 preference. It's much easier to smoke a drug than
21 to inject it, and also the person that may be
22 wanting to take the drug may be afraid of getting

1 HIV. So, they may favor smoking. So, if you want a
2 route of administration that's going to be very
3 rewarding, the easiness of smoking it facilitates
4 its being chosen as such.

5 And that may explain why – and we've seen a
6 similar pattern with methamphetamine, that initially
7 when people didn't know how to smoke it, they were
8 injecting it, but the moment that smoking becomes
9 available, that they will choose that way. So,
10 there is that element that we cannot ignore, that
11 indeed smoking makes it easier than injecting.

12 VICE CHAIR RUBEN CASTILLO: Okay.

13 DR. NORA VOLKOW: And we shouldn't
14 underestimate that.

15 VICE CHAIR RUBEN CASTILLO: And the last
16 thing I wanted to get to, you do have a statistic
17 that shows that smoked cocaine, that is, crack, has
18 72 percent of all the primary cocaine admissions,
19 and I take it the medical reasons for those
20 admissions would be those that you've already
21 testified to, the reduced blood rate and all the
22 secondary effects. Is that right?

1 DR. NORA VOLKOW: The main reason for
2 admissions from cocaine has to do with cardiac
3 complications: Patients – young patients all of a
4 sudden having chest pain and developing a myocardial
5 infarction; cerebrovascular accidents, where the
6 patient no longer can move their face; and seizures.
7 Those are the three most frequent medical
8 complications that leave someone in an emergency
9 room.

10 VICE CHAIR RUBEN CASTILLO: So, if we just
11 stopped at that statistic and just looked at
12 hospital admissions as one indication of the danger
13 to the community, that would mean there's three
14 crack cases being admitted to the hospital for every
15 powder in 2004. Is that correct?

16 DR. NORA VOLKOW: Well, now, one of the
17 things – and I actually – there are two statistics:
18 One of them relates to the number of cases that go
19 for treatment of their addiction problem, and that's
20 where the 76 percent. So, that's where it would
21 come. Correct. Out of the four cases that come to
22 an addiction treatment program, three are from

1 crack, and one will be from hydrochloride. That's
2 correct.

3 In terms of the admissions, the medical
4 admissions, those numbers are not clear how they
5 correspond, but I wouldn't be surprised they are
6 similar. What is determining that difference has to
7 do with people that are taking these two dangerous
8 routes of administration, many more are favoring
9 smoking than injection for the reasons that I said.

10 VICE CHAIR RUBEN CASTILLO: Right.

11 DR. NORA VOLKOW: Not because one is more
12 addictive than the other. Both of them are as
13 addictive.

14 VICE CHAIR RUBEN CASTILLO: Now, I'm not a
15 scientist. I'm just a judge from Chicago, but it
16 would seem to me that if I just looked and took that
17 one piece of evidence that that could justify
18 penalizing crack three times as much as powder.
19 Have you seen anything scientifically that would
20 justify penalizing crack a hundred times more than
21 powder?

22 DR. NORA VOLKOW: Not on pharmacological

1 grounds. Not at all.

2 VICE CHAIR RUBEN CASTILLO: Okay.

3 VICE CHAIR JOHN STEER: Dr. Volkow, could
4 you explain the chart over here a little bit?

5 DR. NORA VOLKOW: Yeah.

6 VICE CHAIR JOHN STEER: I'm having trouble
7 reading portions of it, but it looks like the smoked
8 and intravenous are considerably different in terms
9 of the effect on the brain.

10 DR. NORA VOLKOW: No, no, no. What it
11 shows, what we do is - basically these are images
12 that are done to determine how effective is cocaine
13 when you inject it intravenously versus when you
14 smoke it in blocking the dopamine transporters. So,
15 these are the targets of cocaine. It's through
16 these ones that it increases dopamine. And so, you
17 take images like this one and then you can quantify
18 the percent of those transporters that are blocked,
19 and in the case of intravenous cocaine, it's close
20 to 80 percent, and this is not significantly
21 different with smoked. So, both of them - in fact,
22 in this case it's a little bit more, but it's not

1 significantly different - both of them produce
2 exactly the same level of blockade, and in this, in
3 the panel below, is for these levels of blockade,
4 what are the behavior of rewarding effects of the
5 drug and what they're - here it says with "self-
6 reports of 'high,'" and you can see that the self-
7 reports of high are basically identical, whether you
8 inject it or you smoke it.

9 So, in terms of the efficacy of the drug to
10 block the transporters, they are indistinguishable,
11 and in terms of the self-reports of high, they
12 basically is the same and that's why the emphasis.
13 Pharmacologically, you really cannot distinguish.
14 There's a lot of differences. I have to say that
15 this is a study I did many years ago to address the
16 question that you were just asking me. Well, when
17 you smoke cocaine, what you are doing is you're
18 putting it directly in your lungs, and the lungs is
19 this gigantic surface that allows it immediately to
20 be absorbed into the arterialized blood and goes
21 directly into the brain. When you inject it, it's
22 going to go into your heart, then into the lungs,

1 and then into brain. So, there is a delay, like 45
2 to 60 seconds between one and the other. That's not
3 very long, but it still can have an effect because
4 the rate of the liver is so important. And these
5 studies have shown that even though it's not large,
6 people will prefer the high from the smoke than the
7 high from the intravenous injection, and it's very
8 likely due to that fact, that one is slightly faster
9 than the other, but that's, as I say, minor when you
10 compare it with other routes of administration.

11 So, there is a slight advantage based on
12 what studies have shown in the rewarding effects of
13 smoking, but it's very small. For example, in this
14 imaging study, we did not see the difference in
15 terms of the intensity of the rewarding effects.

16 CHAIRMAN RICARDO HINOJOSA: Commissioner
17 Campbell and then Vice Chair Sessions.

18 COMMISSIONER BENTON CAMPBELL: Dr. Belcher,
19 I had a question to follow up on Commissioner
20 Howell's questions about fetal alcohol syndrome and
21 tobacco use during pregnancy. As is commonly known,
22 both of those substances have dependency and, in

1 some cases, addictive qualities.

2 DR. HAROLYN BELCHER: Right.

3 COMMISSIONER BENTON CAMPBELL: Does that
4 have any factor in the degree to which those two
5 substances have and seem to have had such a profound
6 impact in these studies that you were citing? And I
7 guess the corollary to that is, is there a
8 correspondence between more usage and more -

9 DR. HAROLYN BELCHER: Damage.

10 COMMISSIONER BENTON CAMPBELL: - damage.

11 DR. HAROLYN BELCHER: Right.

12 COMMISSIONER BENTON CAMPBELL: And as a
13 opposed to limited use?

14 DR. HAROLYN BELCHER: Well, both of those
15 drugs are addicting, and I think the studies have
16 shown that actually cigarette use is almost as
17 addicting as cocaine use, some people say, but it's
18 addicting.

19 So, we do know that alcohol, both alcohol
20 and cigarettes are addicting, and so they are habit-
21 forming. So, when women take them during pregnancy,
22 then that results in, as you suggested, a dose

1 response curve that shows the more, at least for
2 alcohol, the more exposure to alcohol, the higher
3 the risk of subsequent neurologic and physical
4 effects on the fetus and on the developing child.
5 So, there definitely is in the alcohol literature
6 documentation of that.

7 Not all pregnancies, about just 30 to 40
8 percent of pregnancies where women have heavy
9 alcohol use, which is 1 and a half ounces of
10 absolute alcohol or 12 ounces of wine or 12 ounces,
11 yeah, of wine every day, about 30 to 40 percent of
12 those pregnancies will have a child with full fetal
13 alcohol syndrome, but the risk goes down as the
14 amount of alcohol exposure is less.

15 I, as far as the cigarette literature, I
16 would have to look and see whether there is actually
17 documentation of dose response curve. I know, in
18 the cocaine literature, there have been several
19 studies looking at the meconium, which the baby's
20 first stool, and quantifying the amounts of cocaine
21 or metabolites of cocaine in the meconium, and
22 documenting that - if you look at the higher levels

1 of exposure that are associated with more
2 qualitative motor difficulties and also, that has
3 been looked at with regard to language outcomes too.
4 So, there seems to be a dose response in the cocaine
5 literature.

6 COMMISSIONER BENTON CAMPBELL: I just have
7 a couple quick follow-up questions. If I
8 understood, there has not been a definitive study
9 that has explored in this context the, with babies
10 going through gestation, between crack cocaine and
11 powder cocaine. Is that right?

12 DR. HAROLYN BELCHER: That's correct.

13 COMMISSIONER BENTON CAMPBELL: You also
14 mentioned one other area which is that there - that
15 children who are born to parents who have used
16 powder or crack cocaine may suffer additional
17 factors sort of from the absence of a stable
18 environment. Can you elaborate on what you mean by
19 that?

20 DR. HAROLYN BELCHER: What I was - I guess
21 what I was alluding to, and I think other persons
22 have documented that, is that if the parent, if the

1 caregiver is still having drug-seeking behavior,
2 they're still drug-dependent and still out on the
3 streets, that they're not available to parent their
4 child and nurture their child and promote a safe and
5 healthy environment for the child. And so, in that
6 situation where you have an absent parent or the
7 child is being moved from one foster home to another
8 foster home, then the child suffers from that type
9 of repeated abandonment or changes in caregivers and
10 the lack of consistency.

11 So, that is very significant, and that's
12 why, I think, we're talking about interventions that
13 provide kind of wrap-around services and provide not
14 only drug treatment, but the social services, job
15 placement, and the whole, kind of 9 yards package,
16 and those are the types of programs I was involved
17 with at University of South Florida, and we did find
18 that they were effective for women. They could get
19 back on their feet, and they could lead very
20 productive lives and raise children who were
21 learning very well. So, it's not irreparable, and
22 children can learn and their parents can kind of

1 turn their lives around, which is really gratifying.

2 COMMISSIONER BENTON CAMPBELL: But if I
3 understand your point, that's more of an aspect of
4 the parents' behavior as opposed to a medical -

5 DR. HAROLYN BELCHER: That's correct.

6 COMMISSIONER BENTON CAMPBELL: - factor
7 associated with -

8 DR. HAROLYN BELCHER: Actual neuro-
9 toxicity. Than the actual neuro-toxicity of the
10 drug.

11 COMMISSIONER BENTON CAMPBELL: I
12 understand.

13 DR. HAROLYN BELCHER: So, it's the social
14 environment, social-economic environment and
15 psychological environment.

16 CHAIRMAN RICARDO HINOJOSA: Judge Sessions?

17 VICE CHAIR WILLIAM SESSIONS: I appreciate
18 your point that it's the method of administration of
19 the drug which is most significant in the high, I
20 guess, that a person gets immediately. My question
21 relates to when someone is coming down from the
22 administering of the drug and its impact upon

1 behavioral controls. You know, one of the arguments
2 that was made 20 years ago for the disparity here is
3 that persons who are coming down from crack cocaine
4 perhaps are more violent or perhaps are less
5 rational. In fact, we heard it from Mr. Briggs this
6 morning, that sometimes crack cocaine - I think he
7 maybe even said because of the cocaine itself,
8 because of the crack itself, people became much more
9 irrational, and he described it as a drive for other
10 drugs, but in a sense, there were some behavioral
11 impact of crack as opposed to powder. And my
12 question is whether or not that is true or not true.
13 I mean I assume from what you say it's not true, but
14 has that been established, that crack does not have
15 a greater impact upon diminishing behavioral
16 controls when somebody is coming off the drug?

17 DR. NORA VOLKOW: As I said, there's no
18 evidence whatsoever that, in and of itself, the
19 chemical form of cocaine, hydrochloride versus
20 freebase, have any difference in the pharmacological
21 effects. So, in that respect, there's also no
22 evidence, to my knowledge, that indeed the crack is

1 associated more with violent behavior than
2 intravenous drug use. I do not know of any study
3 that has shown that.

4 Now, can cocaine produce violent behavior?

5 Well, one of the things that cocaine can do, and
6 this is more likely to happen with repeated
7 administration, is it can facilitate paranoid
8 symptoms, and these paranoid symptoms, the fear that
9 someone else is going to hurt you, can trigger
10 violent reactions. So, yes, cocaine can be
11 associated with violence very much in part driven by
12 the fact that it can induce paranoid thinking in the
13 individual taking the drug. That occurs whether you
14 inject or you smoke, and it even occurs with
15 snorting. The more repeatedly you are doing it, the
16 more likely you are to become paranoid from cocaine.

17 So, the other aspect that we've also come
18 to recognize - and, again, this has nothing to do
19 whether it's freebased or injected - is that
20 repeated use of cocaine, as well as other drugs,
21 affects the areas of the brain that are involved
22 with inhibitory control, and it's inhibitory control

1 that ultimately allows you to use cognition to
2 regulate your emotions. So, in a situation of
3 confrontation, if that area of the brain that allows
4 you to control your emotions is not properly working
5 because it has been damaged by drugs or affected by
6 drugs, then you are much more likely to react in a
7 violent way than you would otherwise if that area
8 were working properly. But, again, that has nothing
9 to with it being crack or intravenous or even
10 snorted.

11 VICE CHAIR WILLIAM SESSIONS: And there's
12 no understanding that you have or no reports that
13 you have which suggest that crack would increase the
14 damage to those inhibition, inhibitions -

15 DR. NORA VOLKOW: Inhibitory areas.

16 UNIDENTIFIED SPEAKER: What she said.

17 VICE CHAIR WILLIAM SESSIONS: Right.
18 Right. [Laughter] I knew that was a medical term
19 of art. Right. There's no suggestion that there's
20 a correlation between whether it's crack or powder -

21 DR. NORA VOLKOW: No. There is absolutely
22 no evidence that has shown that one form, chemical

1 form, is more damaging to these areas that control
2 our emotions and desires, which is basically the
3 frontal cortex. There's no evidence that one form,
4 chemical form, is more damaging than the other.
5 What will determine is what doses you are taking,
6 how frequently do you take them, do you combine them
7 with other drugs, and, for example, a combination
8 that is particularly detrimental is alcohol with
9 cocaine. It's actually detrimental in that it
10 increases your mortality much more than if you take
11 either alone, and it's also the morbidity, and it
12 also increases the damage to the brain. That
13 combination is very detrimental. So, those are the
14 factors that determine - your age. So, it's not the
15 same if you take cocaine when you are 20 years old
16 than when you are 30 or 40. And the other element
17 that we've come to recognize - as I say, there's
18 tremendous variability. Some people can tolerate it
19 with very little damage, and others are more
20 sensitive. And that likely reflects to genetic
21 differences. We're all born differently, and some
22 of those genes may protect us, and some of them may

1 make us more vulnerable. So, these toxic effects.
2 But that's not carrying in - as I said, nothing to
3 do with the base versus the hydrochloride.

4 DR. HAROLYN BELCHER: And then the co-
5 morbidity.

6 DR. NORA VOLKOW: And that's the other
7 aspect. If you have other co-morbid medical
8 condition, for example, if to start with, you may
9 already be born out of a mother that drank alcohol,
10 you're already at a disadvantage. So, having
11 already a co-morbid medical disease or psychiatric
12 disease will make you more vulnerable.

13 CHAIRMAN RICARDO HINOJOSA: Well, thank you
14 all very much. It's been very informative, and we
15 appreciate your taking your valuable time to come
16 share your thoughts with us.

17 DR. HAROLYN BELCHER: Thank you.

18 CHAIRMAN RICARDO HINOJOSA: Thank you both.

19 DR. NORA VOLKOW: Thanks to you.

20 PANEL SIX: ACADEMICS

21 CHAIRMAN RICARDO HINOJOSA: We'll move on
22 to our next panel.

1 Our next panel consists of three
2 distinguished members from academia who have also
3 taken their valuable time to share their thoughts
4 with us.

5 We have Dr. Alfred Blumstein, who is a
6 university professor and the J. Erik Jonsson
7 Professor of Urban Systems and Operations Research
8 and the former dean of the H. John Heinz III School
9 of Public Policy and Management at Carnegie Mellon
10 University. He is also the Director of the National
11 Consortium on Violence Research. He also has served
12 as the Chairman of the Pennsylvania Commission on
13 Crime and Delinquency, and on the Pennsylvania
14 Commission on Sentencing. He earned his bachelor's
15 degree in engineering physics from Cornell and a
16 doctorate in operations research, also from Cornell.
17 He has an honorary doctor of law degree from John
18 Jay College of Criminal Justice. And he will be
19 sharing, this coming year, the Stockholm Prize in
20 Criminology for his work on the development of
21 criminal behavior over the life course of
22 individuals.

1 Dr. Bruce Johnson directs the Institute for
2 Special Populations Research of the National
3 Development and Research Institutes, Incorporated,
4 the nation's largest non-profit research
5 organization focused on drug abuse. Dr. Johnson has
6 been involved in drug abuse research for 30 years
7 and has directed ten federally funded research
8 projects. His research includes works on drug abuse
9 patterns among arrestees and criminals, estimation
10 of the numbers of hard drug users and operatives,
11 and analysis of new drug detection technologies and
12 ethnographic projects focused upon the lifestyles of
13 crack distributors/abusers and violence in crack
14 abuser households. Dr. Johnson received his B.A. in
15 sociology from the University of Wisconsin and his
16 doctorate in sociology from Columbia University.

17 And Dr. Peter Reuter is a professor in the
18 School of Public Policy in the Department of
19 Criminology at the University of Maryland. He is
20 the Director of the Center on the Economics of Crime
21 and Justice Policy and is also a senior economist at
22 the RAND Corporation. Dr. Reuter was a member of

1 the National Research Council Committee on Law and
2 Justice from 1997 through 2002, and the Office of
3 National Drug Control Policy's Committee on Data
4 Research and Evaluation from 1996 to 2003. He has
5 served on a number of task forces and committees
6 dealing with drug control policies and is currently
7 directing a project in global heroin markets. He
8 received his doctorate in economics from Yale.

9 By the fact that these résumés have gone
10 longer, it's no wonder that they're in academia.
11 [Laughter] Obviously, they bring all this expertise
12 to their institutions.

13 And, Dr. Blumstein, we'll start with you,
14 sir.

15 DR. ALFRED BLUMSTEIN: Okay. Thank you
16 very much. I'm really pleased and honored to be
17 here. I was here 4 years ago, and many of the
18 points that I would like to make were applicable
19 then and continue to be applicable today. I think
20 you've just heard some fascinating material on the
21 micro-aspects of crack versus cocaine. I think most
22 of the discussion at this panel will be focused on

1 the macro-aspects, and I'd like to pick up on some
2 of the questions that I heard earlier, in earlier
3 sessions.

4 Could I ask you to turn to page 8 in the
5 testimony that I think was distributed, was it?
6 There's a graph of crime rates, and I want to link
7 some of that to crack markets.

8 What I have here is a graph of murder rates
9 in the U.S. from the Uniform Crime Reports and
10 robbery rates. I've divided the robbery rates by 25
11 so it fits on the same scale. And the first
12 observation is really how close those two major
13 aspects of criminal violence are to each other.
14 There was a peak in about 1980, if you'll notice
15 that, and things started to come down, and that was
16 largely a result of the demographic shifts that
17 occurred with the baby boomers coming into, in the
18 seventies, and coming out of the high crime ages
19 into the eighties, and that's what gave rise to that
20 decline.

21 Then we turned up in '85. And crack
22 started in the early eighties, and '86 was the year

1 that the Congress passed the crack cocaine
2 distinction act. And then we saw about a 25 percent
3 increase in violence over that period, between '85
4 and the peak in 2003 - I'm sorry - in '93. And then
5 a steady decline of about 40 percent between '93 and
6 2000, and then pretty flat since then.

7 Now, interpreting that flat period - the
8 rise was attributable pretty much entirely to young
9 people with handguns, disproportionately young
10 African Americans who were recruited into the crack
11 market starting in '85, partly as a replacement for
12 the large number of people that were being sent to
13 prison in the crack markets in the early eighties,
14 so that the market is resilient. And a basic thrust
15 here is a recognition that we don't avert many drug
16 transactions through incarceration as long as the
17 market is resilient and can find replacements for
18 them.

19 The unanticipated consequence there, what
20 was - the young people were far more dangerous than
21 the older sellers that they replaced, largely
22 because they didn't have the restraint in the use of

1 the weapons, weapons that they had to carry because
2 of their vulnerability to street robbers, and the
3 tightness of the networks of the young people and
4 the diffusion of guns from those in the market to
5 others, so that we saw very much of a rise in the
6 armaments in that community.

7 And this point is extended in the Figure 2,
8 which is on the next page. What you see is really
9 rather striking, I think. This is a graph of the
10 use of handguns in murders, and what I've done is
11 index that to 1985, which is when the young people
12 really started coming into the crack markets. And
13 what you see: not much change among the adults in
14 homicides with handguns; youths went up by a factor
15 of about 2 and a half; juveniles went up by a factor
16 of 5. The guns in the hands of these young folks
17 were a major factor contributing to the rise.

18 And then you see the decline that followed
19 that peak, in this case, in about '94, the decline,
20 as I'm sure Bruce Johnson will say something about,
21 as the young people, as new users dropped out of the
22 crack markets because they came to realize that the

1 harm that was being done, that they saw in their
2 parents and their siblings and so on. So, the
3 demand diminished. As the demand diminished, they
4 didn't need these kids in the market. Police were
5 effectively aggressive at taking guns from the kids
6 in the neighborhoods where this was going on. And
7 all that contributed to that decline to a
8 restoration, a little after 2000 and that flat
9 period after that.

10 The next figure indicates the drug arrests
11 for juveniles. Crack, as has been indicated, was
12 marketed primarily by African Americans. What I
13 have here is for juveniles, the whites being the
14 graph that is higher in the seventies. This is drug
15 arrest rates. White juveniles had a higher drug
16 arrest rate in the seventies, predominantly
17 marijuana, but they came down rather straight. The
18 non-whites started up in about 1985, even though the
19 adults started up much earlier, in the early
20 eighties. They were the ones who were doing the
21 marketing, but they were being removed from the
22 market and the young kids were being brought in as

1 their replacements, and that was the factors that
2 contributed to that large rise on Figure 1, which is
3 the homicide rate, the growth associated with the
4 juveniles using handguns, young people using
5 handguns.

6 The decline from '93 to 2000 was
7 attributable to two major factors: One was the
8 undoing of the rise by the young people as they were
9 no longer involved in the drug markets, and the
10 aggressiveness by police in taking their guns; and
11 second by a steady decline starting at about 1980 of
12 offenders over 30 who were a significant portion of
13 the rapidly growing incarceration rate, presumably
14 through an incapacitation effect.

15 I wanted to get some of these features of
16 some of those trends over time because I think those
17 were some of the issues that a number of questions
18 arose about.

19 My sense of what was going on in the
20 Congress at the time that it passed the 1986 law was
21 that they saw the pressure from the public
22 reflecting the violence going on in crack markets,

1 much more so than in the powder markets. The crack
2 markets were street markets. They were a new
3 product being marketed in generally poor
4 neighborhoods, reflecting the vigorous competition
5 in illicit markets generally where, rather than
6 resorting to the courts, which they can't do, they
7 resort to violence as the means of dispute
8 resolution, whether it be between buyer and seller
9 or whether it be between two buyers competing for
10 the same place, same space.

11 That was a lot of violence, and the
12 Congress, in its wisdom, does what Congress is
13 limited to doing, passing legislation that creates
14 tougher sentences. And the tougher sentences -
15 "Gee, what can we do about the crack violence? And
16 so we will make a tougher sentence and impose a
17 mandatory minimum of 5 years even for 5 grams."
18 Which is what gave rise to the 100 to 1 disparity.
19 That was sort of a mode of response.

20 The issue is that the mode of response that
21 may have been at least considered appropriate then
22 no longer seems to be appropriate in that, while

1 there may be more violence in crack markets, it's
2 nowhere as dramatic as it was in the early eighties.
3 There are differences. The differences in part
4 relate to differences between street markets, which
5 are vulnerable to violence and have an opportunity
6 for violence, and indoor markets, which are much
7 more controlled, much more regulated, don't need the
8 same level of violence. But it has come down
9 appreciably from the level it was, starting in the
10 early eighties, particularly the mid-eighties, when
11 the young people started coming into that market and
12 it represented an opportunity to respond to it.

13 It's clear that there has been some real
14 trends in violence with a widespread reduction in
15 crack markets and a widespread reduction in the use
16 of crack by new users that contributed to the change
17 in the nature of the markets.

18 It's clear that when you look at the micro-
19 information, there seems to be no meaningful basis
20 for distinguishing between the two different
21 chemicals. When you look at the macro, the
22 phenomenon, in terms of the markets, it's clear that

1 the rationale for introducing those differences have
2 largely disappeared, and the basis for imposing
3 different sentences based on the chemistry seems to
4 make little sense when you do have the opportunity,
5 with enhancements, to punish more severely for a
6 gun, to punish even more severely for a gun that
7 gets used, and to the extent that one had to do it
8 in the street markets, one had to carry guns and one
9 had to defend oneself in the street, then the
10 individuals who do that are vulnerable to more
11 severe punishment, not for chemistry, but for
12 behavior, for the actions that they engaged in.

13 It strikes me that this is really the issue
14 that this Commission and ultimately the Congress is
15 going to have to face as it thinks about the changes
16 in policy.

17 I want to draw your attention just to the
18 last data point on Figure 1 again, which is you will
19 notice how strikingly flat the trends are from 2000
20 to 2005. That doesn't say that every city is flat.
21 It says that some went up, some went down, some went
22 up and down, some went down and up, but it was a lot

1 of variation based on local conditions in individual
2 cities. What we've seen, and it has drawn some
3 attention, but we're still below 6 per 100,000,
4 which is an impressive level of homicide that we
5 haven't seen in the U.S. since the sixties. What
6 has drawn a lot of attention is this 2 and a half
7 percent rise between 2004 and 2005. It's a
8 relatively small rise, and there's the open question
9 of whether that is attributable to just a blip, a
10 year-to-year fluctuation somewhere, or whether we're
11 starting to see a trend upward.

12 There's no indication that whatever trend
13 we're seeing is attributable to crack or crack
14 markets. My sense of what's been going on is that
15 rise is not a uniform rise anywhere like the uniform
16 drop from '93, '94 to 2000, but much more individual
17 cities. I've indicated in the testimony a number of
18 the places that have large increases. There's a
19 small number of places, mostly smaller cities,
20 mostly in the Midwest, that had reasonably large
21 rises. Birmingham, Alabama, for example, went up by
22 76 percent in homicide; St. Louis by 51 percent.

1 So, there's a small number of cities that
2 did have a large rise, but my sense is these are
3 very much characteristic of what's going on in the
4 cities. Much of it is shown up in disadvantaged
5 neighborhoods where there are guns out there and
6 individuals with a very low threshold of insult who
7 are willing to respond with excessive vigor,
8 including shooting and murder, a phenomenon
9 described by Elijah Anderson in his book *Code of the*
10 *Street* , where you have these street people who are
11 of that character, a small number of them in the
12 midst of large numbers of decent people, but they
13 are controlling much of the action that goes on in
14 the street.

15 There's no indication that it's because of
16 crack or cocaine. There's no question that some of
17 this could be attributable to violence within drug
18 markets. That violence could be attributable to new
19 people entering the market, older people coming out
20 of prison. We're starting to see the return to
21 communities of people who are leaving prison, whose
22 expertise is in drug marketing and trying to get

1 into it. So, getting a better handle on that will
2 require much more detail on what's going on in the
3 individual cities that saw the sharp rise.

4 The question for next year is the degree to
5 which these cities that saw the sharp rise will
6 continue rising, whether they will be brought down
7 by a mixture of community response, law enforcement
8 response, or whether new cities will start with the
9 large rise and we're going to see an increase in
10 growth continuing what is a relatively small
11 increase, but nevertheless an increase of 2 and a
12 half percent, and see how much higher that goes.

13 It's clear to me that the history of the
14 crack disparity was very much one, the crack cocaine
15 disparity, was very much one that was applicable at
16 the time the Congress passed the law. The
17 differences are far less stark, far less
18 appropriate. It makes a lot of sense to now
19 equalize the sentences, particularly the mandatories
20 for the difference between the two, and use the
21 opportunity for enhancements to deal with the
22 problem that is of concern.

1 And while the Commission is negotiating
2 with the Congress, I think it's appropriate to
3 recognize that the general principle of mandatory
4 minimums are usually triggered by a particular event
5 that the political environment takes great exception
6 to, and so we see an immediate response in terms of,
7 "Well, we'll solve that problem by imposing
8 mandatories," where it applies not only to that
9 event, but the entire judiciary, in terms of the
10 constraints imposed on them.

11 And the appropriateness of mandatory decays
12 over time, as I believe it has clearly in the
13 difference between the crack and the powder. So
14 that it would appear that mandatories are acts of
15 the moment that, when incorporated into statute,
16 keep on forever. And it would be desirable,
17 obviously, to not impose them in the future. It
18 would be desirable, at a minimum, to sunset the
19 mandatory on this particular law, and it would be
20 desirable generally to sunset mandatories more
21 widely, as I believe Michigan did a few years ago,
22 with the opportunity in the Congress to rethink it,

1 to reenact it if it feels it's appropriate under the
2 changed circumstance, but mandatories are almost
3 always driven by an immediate act of concern, and
4 that act usually decays, and it would highly
5 desirable to find ways to take them off the statutes
6 without looking like they're being soft on crime and
7 the political consequence associated with that.

8 CHAIRMAN RICARDO HINOJOSA: Thank you, Dr.
9 Blumstein. Dr. Johnson?

10 DR. BRUCE JOHNSON: Yes. Well, I
11 appreciate this opportunity to present some
12 important findings about crack and cocaine powder
13 and their distribution. I provide much more
14 information in my written paper and lots of other
15 papers that I've submitted to the Commission staff.
16 So, I'm going to focus primarily on changing trends
17 of crack use and cocaine powder usage among
18 arrestees in Manhattan, which is based in turn upon
19 data that we've analyzed from the Arrestee Drug
20 Abuse Monitoring program, or ADAM program, which was
21 run by NIJ from 1987 to 2003.

22 Several central changes have occurred since

1 1980. Important cohort shifts have occurred,
2 especially among African American males arrested for
3 a wide range of crimes. In the early 1980s, as
4 indicated in Dr. Blumstein's presentations, cocaine
5 powder freebasing and especially crack cocaine after
6 1985 became the preferred drug of abuse among
7 youthful and older African American males involved
8 with illicit drugs. This crack epidemic peaked
9 around '87 to '89 in New York City – it peaked a
10 little later in other parts of the country – when
11 about 70 percent of all New York City arrestees were
12 detected as cocaine positive by urinalysis. And I
13 might add the levels of cocaine positivity by urine
14 testing was always among the highest in New York
15 City of any of the 23, 25 cities studied in the ADAM
16 program. And crack – this emphasis on crack also
17 resulted in the Anti-Drug Abuse Act of 1986, which
18 imposed the 100 to 1 sentencing disparity for the 5-
19 year mandatory minimum sentence.

20 Figure 1 in my presentation, if you have it
21 before you, shows a substantial decline in detected
22 cocaine crack use, from about two-thirds in '87

1 through '95 to about two-fifths in 2000 to 2003.

2 And the same has happened with decline in
3 self-reported use, but were lower due to non-
4 disclosure, and I can talk more about that in the
5 questioning period.

6 What's most interesting and most important,
7 though, is that the older cohorts of persons, those
8 aged 35 and older in 2003, comprise a diminishing
9 proportion of the arrestee pool in New York City,
10 and this is the group that continues to have high
11 rates of detected crack use, or cocaine use, but
12 among younger cohorts, those born after 1970, there
13 was a considerable diminution in crack use, and
14 among those born in 1980 and later, only about 20
15 percent were detected as cocaine users in 2002.

16 So, a major shift is - not only there's an
17 overall decline, but a big part of it is because the
18 younger generation, particularly of African American
19 males, has greatly diminished its use of crack
20 cocaine. And my analysis of ethnic variation, which
21 is in my longer written testimony towards the end,
22 shows the details of that change, but essentially

1 the black arrestees under, born in 1970, has
2 declined from about 38 percent to 21 percent. And
3 at this point in time, among white arrestees of
4 about the same age cocaine crack use was actually
5 lower among – but still higher than among their same
6 age black and Hispanic counterparts. Unfortunately,
7 in Manhattan, we don't have many white arrestees or
8 not enough to make solid statements about, and so,
9 if we want better information, we need to turn to
10 other sources of information.

11 I want to talk a little bit about the
12 limited harms associated with crack use. With the
13 exception of crack distribution, which I'll talk
14 about shortly, only a small minority of crack users
15 in New York City now carry guns or use weapons in
16 the 2000s, or engaged in aggravated assault on
17 others, or otherwise harm ordinary passers-by. In
18 short, violence associated with crack seems to be
19 relatively rare among the cocaine crack users. Now,
20 a great deal of that has had to do with policing
21 practices in New York City, which are very hard on
22 gun possession. They've broken up a lot of drug

1 distribution groups and gangs. There's lots of
2 things that have happened to make that happen, okay?
3 But even in the mid - in the early
4 nineties, one of my colleagues, Paul Goldstein, did
5 an analysis of violence associated with crack, and
6 his main theme finding was that almost all the
7 violence that was turning up was what he called
8 "systemic violence," systemic violence being
9 violence that was occurring within the drug
10 distribution apparatus and among people who were
11 engaged in drug selling and distribution. There was
12 very little what he called "pharmacological
13 violence" or homicides that could be traced out,
14 that is, people, because they were "cracked up," or
15 high on crack or coming down from crack, engaged in
16 some kind of violent behavior. That was very rare.
17 It was even quite rare for people to go out and
18 commit robberies against the non-involved citizens
19 in order to gain money to buy their crack cocaine.
20 Far more common was systemic. So, robbery of other
21 drug distributors was a big issue, and still
22 continues to be a big issue because they're the

1 people who don't report it to police. These don't
2 turn up in police statistics, and if you rob a drug
3 dealer, they don't end up in the court system very
4 often, unless they get killed, somebody gets killed.

5 Apparently, as they've grown older, the
6 crack, the heroin and crack generation born 1945 to
7 1969 appear to be relatively successful at avoiding
8 arrest, and even among the younger generation, those
9 born after 1970, their cocaine and crack use seems
10 to be relatively unrelated to different forms of
11 violence.

12 The one particular offense that's most
13 relevant here is, of course, the sale and retail
14 sale and low-level distribution roles of crack and
15 sometime cocaine powder. This is a major activity
16 in many circles in low-income neighborhoods. Among
17 the younger generation, born after 1970, an
18 important minority of persons who primarily used
19 marijuana in the form of blunts, that is, marijuana
20 in a cigar shell, are being recruited to roles that
21 support street-level sales of crack, where the
22 probability of arrest is significant, and earnings

1 from such crack sales may very well be spent to
2 purchase the marijuana for use as blunts, rather
3 than for use as crack.

4 An overall conclusion is that the
5 deterrence effect on the streets of the 100 to 1
6 ratio in federal sentencing guidelines is nearly
7 impossible to document, in New York City at least.
8 Most sellers and distributors rarely mention
9 awareness of it, nor do they report changing their
10 business activities due to it. Moreover, the
11 average crack distributor likely does not know much,
12 with precision, how much he possesses, but often
13 believes it to be under 5 grams, yet he may end up
14 purchasing bundles or vials or bags containing
15 crack, which may in fact exceed the 5-gram minimum
16 and expose them to the sentencing guidelines.

17 Yet very few New York City arrestees face
18 federal indictment or prosecution and so face
19 mandatory minimum sentences, and that's because most
20 cases are prosecuted under New York State penal law,
21 which treats both of them equally, and mandatory
22 minimum sentences are not required. The usual

1 outcome for persons arrested is to be referred to
2 various alternative-to-incarceration programs, and
3 New York State has gotten very good at developing
4 these programs, and I could tell you more about some
5 of them, if you wish.

6 A quick note on the crack to cocaine powder
7 ratio. There's actually some empirical data that
8 are in some of what I've done here. One set is that
9 if you ask people about whether they use crack -
10 arrestees whether they use crack or whether they use
11 cocaine powder, the ratio is about 1.5 to 1, that
12 is, more with crack. A more recent set of studies
13 have also documented that almost 90 percent of ADAM
14 arrestees who tested positive for cocaine had
15 detectable metabolites for crack. There's a special
16 set of metabolites that can be done. And this
17 suggested a disparity ratio that would be 9 for
18 crack versus 1 for cocaine powder, so that a 2 to 1
19 or a 10 to 1 ratio in sentencing guidelines would
20 definitely be more appropriate given this empirical
21 data, than the current 100 to 1 statement.

22 A previously published article documents

1 substantial variation in cocaine use among arrestees
2 at several ADAM sites. Additional analysis of this
3 ADAM data set would be able to address many
4 questions about crack and cocaine use, if this
5 Commission wanted it. And that's particularly
6 important because arrests for crack or cocaine
7 powder at the local level is often a major way that
8 many cases enter or subsequently get transferred
9 into the federal system, as you've heard earlier.

10 And I'd like to end with citing a recent
11 unpublished doctoral thesis which analyzes the
12 sentencing disparity practices, and he argues that
13 if the sentencing practices were set the same for
14 crack at 500 grams as for cocaine powder, his
15 conclusion is that blacks account for 60 percent of
16 the crack and cocaine powder offenders combined, but
17 would benefit from 90 percent of the averted prison
18 years. To put this in perspective, the estimated
19 number of black prison years averted, were crack and
20 cocaine powder sentenced equally, represents more
21 than 4,000 individual 5-year sentences, compared to
22 approximately 150 for whites and 300 for Hispanics.

1 And I thank you for your time.

2 CHAIRMAN RICARDO HINOJOSA: Thank you, Dr.
3 Johnson. Dr. Reuter?

4 DR. PETER REUTER: Thank you very much.

5 This is testimony that I prepared in collaboration
6 with Jonathan Caulkins, a professor and colleague of
7 Al Blumstein at the Heinz School. And we want to
8 make essentially an analytic point rather than an
9 empirical point, which is that one, in making
10 decisions about drug sentences, might try to capture
11 just the inherent qualities of the drugs, something
12 that's specific to the drug itself, or one might
13 want to capture the effects of the interaction
14 between the drug and the society in which it occurs.

15 We, in the end, think that one should go
16 for the inherent qualities, but it's not an
17 un rebuttable argument, and I think in the case of
18 crack and powder, what's important is that a lot of
19 the observed difference in the mid-1980s that
20 generated the concern was the circumstances under
21 which crack were used and who was using it, and
22 those circumstances and that population has changed

1 over time, and that change over time makes the
2 proper sentence, under this sort of contingent
3 measure, quite different.

4 So, consider the mid-1980s and ask how much
5 social damage was associated with a gram of crack
6 versus a gram of powder cocaine, and I think it was
7 reasonable to say that crack generated a great deal
8 of violence. That violence was borne not just by
9 the immediate participants, but had consequences for
10 the communities in which it occurred, and so it was
11 easy to say that the drug caused the violence and
12 that, therefore, we should have harsher penalties.

13 But it's useful to consider two other
14 substances: alcohol and heroin. Young males
15 consume much more of their alcohol in the form of
16 beer than do all the females. The latter more
17 likely consume wine or spirits. For young males,
18 alcohol generates a great deal of violent crime; for
19 older females, alcohol tends to lead to adverse
20 health and family consequences, not a lot of
21 violence against weaker victims. An analysis might
22 show that, on average, beer per unit of ethanol

1 produces greater damage. One would hardly think,
2 though, that beer, I believe, that beer should as a
3 consequence be subject to greater penalties in its
4 use if it were, for example, prohibited.

5 Or take the example of heroin, where it's
6 even clearer. Heroin, when injected, is associated
7 with HIV and many other very serious health
8 consequences. Snorted heroin is not. Do we want to
9 have different penalties that reflect the form of
10 heroin that is being transacted? It seems almost
11 silly to even ask the question because heroin is
12 heroin, and a relatively safe heroin a user is about
13 to snort can very easily be converted into more
14 dangerous heroin, the injectable heroin, just by
15 dissolving it in water.

16 The same can be said of the two forms of
17 cocaine. Relatively safe powder cocaine can be very
18 easily converted into more dangerous crack. But the
19 difference back in the 1980s was in the nature of
20 the user population: young, poorly educated
21 compared to cocaine powder using population, a
22 population associated I think reasonably with low

1 self-control and a great deal of violence. The
2 markets were new. They were open-air markets. One
3 saw a great deal associated with that, a great deal
4 of violence associated with that.

5 As you've heard from both Dr. Blumstein and
6 Dr. Johnson, that has changed. We're basically
7 seeing the end of an epidemic of crack and cocaine
8 powder. It's now an older population. Two-thirds
9 of those seeking treatment with the smokable cocaine
10 as the primary drug of abuse are over the age of 35.
11 I do not believe that we have any studies of
12 violence associated with crack markets in the middle
13 of this decade. I would be shocked if they didn't
14 show much lower rates of violence and not much
15 difference perhaps between crack and powder cocaine.
16 So, the damages associated with the drug are much
17 less now.

18 Presume this analysis is correct. What are
19 the consequences for sentencing policy, specifically
20 for the relationship between penalties for
21 comparable quantities of crack cocaine and powder
22 cocaine? I keep saying not "crack," but "crack

1 cocaine" just to remind us it is the same drug, as
2 you heard from Dr. Volkow and Dr., the other
3 testimony.

4 On the one hand, the reality is that crack
5 cocaine has historically be associated with high
6 levels of violence, regardless of whether it's the
7 drug itself or the interaction of the population.
8 Some might argue that crack has been, is more
9 dangerous in part precisely because it does attract
10 – you know, it's attractive to those for whom
11 stimulants engender particularly harmful behavior,
12 namely, young, poorly educated males in high-crime
13 neighborhoods. Perhaps in a classless society,
14 crack would have not much worse consequences than
15 powder cocaine, but we don't live in such a society
16 and are unlikely to do so in the near future.

17 If the goal of sentencing is in part
18 retributive, then it can be argued that selling
19 crack cocaine has resulted in greater harm to
20 society than selling cocaine powder and thus longer
21 sentences are appropriate. Obviously, though, this
22 ignores the social and racial consequences of the

1 interaction. We produce heavier sentences for drugs
2 that are used by populations that are
3 disproportionately young, low-income, minority
4 males, and others have testified about why we find
5 that inappropriate.

6 There are many sources of injustice in our
7 society for African Americans, which are difficult
8 to deal with. This is one injustice that can be
9 dealt with rather simply. If the crack/powder
10 disparity is reduced from the 100 to, say, 10, just
11 to pick an arbitrary number, the sense of injustice
12 can be lessened while still recognizing that crack
13 might be a more dangerous drug.

14 For us, the decisive factor on sentencing
15 policy is that the contingent relationship, the
16 relationship of the drug to the harms, changes over
17 time. Use of very dangerous drugs in this country
18 has shown repeatedly an epidemic pattern. The drug
19 is popular in the early phase when its positive
20 effects are conspicuous and the adverse effects are
21 still not well understood. As the dangers of a drug
22 more prominent, there can be a sharp fall in

1 initiation rates, and that's we've observed with
2 heroin, cocaine powder, crack cocaine. Each drug
3 has then become associated with a cohort of aging -
4 aging cohort of users. That reduces the level of
5 violence associated with the drug over time. A
6 sentencing structure that ignores this fact and is
7 based solely on the damage inflicted during the
8 early stages, when sentencing regimes are put in
9 place, become increasingly arbitrary, and I think
10 that's what's happened with crack.

11 Thank you.

12 CHAIRMAN RICARDO HINOJOSA: Thank you, Dr.
13 Reuter. Who's got the first question? John?

14 VICE CHAIR JOHN STEER: Dr. Reuter, you
15 probably knew you were going to get asked this when
16 you used a specific number, but how did you arrive
17 at reducing 100 to 10? Any science or just an
18 example?

19 DR. PETER REUTER: Absolutely. I'm merely
20 suggesting that one could convey a sense of
21 indignation about crack at a lower figure and make a
22 difference to the public perception of the injustice

1 of the system. That's all. [Indiscernible]

2 DR. BRUCE JOHNSON: My testimony had about
3 a 9 to 1 ratio in terms of detected metabolites
4 among arrestees, okay? That's the closest piece of
5 actual empirical evidence that I think were used -

6 DR. PETER REUTER: Right.

7 DR. BRUCE JOHNSON: - for a 10 to 1 ratio.

8 CHAIRMAN RICARDO HINOJOSA: Dr. Johnson,
9 you also said 2 to 1, didn't you?

10 DR. BRUCE JOHNSON: Two to one for people's
11 self-reports of what they did, but 9 to 1 for what
12 was actually detected in urine specimens.

13 VICE CHAIR RUBEN CASTILLO: All of you have
14 a lot of crime rate experience, much greater than
15 mine, but it seems to me there's a consensus that
16 there's a much lower rate of violence attributable
17 to crack trafficking. Is that correct?

18 DR. ALFRED BLUMSTEIN: Yes.

19 DR. BRUCE JOHNSON: Yeah.

20 VICE CHAIR RUBEN CASTILLO: Given that, the
21 answer I - the question I would have for all of you
22 to answer is, are we over-incarcerating crack

1 criminal justice defendants with the 100 to 1 ratio?

2 DR. ALFRED BLUMSTEIN: Let me --

3 DR. BRUCE JOHNSON: Go ahead.

4 DR. ALFRED BLUMSTEIN: Let me take that on.

5 VICE CHAIR RUBEN CASTILLO: Hmm-mm.

6 DR. ALFRED BLUMSTEIN: I think, as I hinted
7 in my earlier testimony, the response to a very
8 legitimate concern about drug abuse has been, in the
9 limited repertoire of legislative bodies, "lock them
10 away." In a presidential address I gave to the
11 American Society of Criminology in 1992, I argued
12 the failure of that major incarceration,
13 incarceration that now is over 50 percent of the
14 federal prison population, over 20 percent of the
15 state population, that we're not averting many drug
16 transactions, that we are locking people away. To
17 the extent that we use the criminal justice system,
18 it seems to make more sense to push, use it for
19 inducing treatment by people who might not otherwise
20 go into it, but that the cost and social disruption
21 associated with this massive incarceration for drug
22 offending has not been terribly effective at

1 averting the drug abuse, either – and in many
2 respects, as I indicated earlier, has led to this
3 negative, unintended consequence of bringing the
4 replacements in, who represented more harm than the
5 people they replaced in terms of the violence they
6 engendered.

7 DR. BRUCE JOHNSON: And let me take a stab
8 at that. In New York City, my general sense is that
9 while some prosecutors do, in fact, turn over larger
10 cocaine crack distribution cases to the Feds for
11 prosecution under the mandatory minimums, I don't
12 have good evidence and no evidence – I wish I had it
13 – about how many cases involving crack get referred
14 to the federal system. But I'm clear about one
15 thing: Virtually all the crack cocaine cases at the
16 lower levels, and they might even be possessing more
17 than 5 grams, end up being processed under New York
18 State law, under the – which treats both cocaine and
19 crack similarly.

20 And I would say that New York State, over
21 the past few years, has had maybe a steady arrest
22 rate or maybe a slight decline in cocaine-related

1 arrests and crack-related arrests, and they've been
2 dealing with it mainly through alternative-to-
3 incarceration processes, and over the past decade,
4 they've actually reduced the number of people being
5 held in Rikers Island, which is a city jail, and
6 they haven't been pushing large numbers into the
7 prison system because the penalty structure is
8 basically equivalent and they treat cocaine and
9 crack cases the same; whereas, my colleagues in
10 California, with the three-strikes-and-you're-out
11 mandatory sentences have, I think, almost doubled
12 their population in the past, you know, since 1990.

13 DR. PETER REUTER: One of the marvels of
14 the recent criminal justice system in this country
15 is its ability to keep on locking up more people for
16 drug offenses, even while all the indicators of
17 frequent drug use are declining and whereas arrests,
18 other than marijuana possession arrests, have
19 actually been declining as well. And it's a system,
20 I think, which is sort of running on cruise control,
21 and you have the same people coming back for the
22 same offenses, but now, you know, they are third- or

1 fifth-time offenders and they're serving longer
2 time. And you have to ask, you know, in terms of
3 the effect on the drug problem, is this raising the
4 price? Well, the price of cocaine and heroin, as
5 you know, has fallen fairly steadily for 25 years.
6 Is it making the drugs harder to get? There's no
7 evidence for that. We don't have strong evidence,
8 but the evidence from Monitoring the Future suggests
9 very little change in that. Is this, can this be
10 justified in terms of retribution? I mean that,
11 obviously, is much more judgmental, but in
12 instrumental terms, it's fairly hard to make an
13 argument that locking up so many people and many of
14 them being locked up, obviously, mostly in the state
15 systems, for crack-related offenses seems to me hard
16 to justify.

17 CHAIRMAN RICARDO HINOJOSA: Anybody else
18 have any other questions?

19 If not, thank you all very much. We
20 appreciate the information you have presented to us
21 and the expertise that you bring to the subject, and
22 we appreciate your presence here today very much.

1 This is a good time for us to take our
2 break that was scheduled to be taken, and we are to
3 start again at 3:45.

4 [Recess]

5 PANEL SEVEN: COMMUNITY INTERESTS

6 CHAIRMAN RICARDO HINOJOSA: The next two panels are
7 composed of individuals who represent groups who
8 have a special interest with regards to the criminal
9 justice system.

10 The first panel is composed of Julie Stewart, who is
11 the president and the founder of the Families
12 Against Mandatory Minimums, which is a national non-
13 profit organization founded to address concerns
14 regarding mandatory minimums, minimum sentencing
15 laws at both the state and federal level. And I
16 will say that on behalf of the Commission, we thank
17 FAMM and the interest that it has shown in our work
18 through the years and their consistent help with
19 regards to our work and suggestions through the
20 years.

21 MS. JULIE STEWART: Thank you.

22 CHAIRMAN RICARDO HINOJOSA: Ms. Stewart has received

1 numerous awards for her work, including a Ford
2 Foundation Leadership for a Changing World award in
3 2002. Prior to her work with FARM, Ms. Stewart
4 worked at the Cato Institute as Director of Public
5 Affairs, and she earned her bachelor's degree in
6 international relations from Mills College.
7 Jesselyn McCurdy, is a Legislative Counsel in the
8 Washington office of the American Civil Liberties
9 Union, known to all of us as the ACLU, and in that
10 capacity she obviously covers a broad array of
11 criminal justice issues. Prior to joining the ACLU,
12 Ms. McCurdy was the co-director of the Children's
13 Defense Fund's Education and Youth Development
14 Division, and before that, she was the Assistant
15 Director of the American Bar Association's Section
16 of Individual Rights and Responsibilities. Ms.
17 McCurdy earned a bachelor's degree in journalism and
18 political science from Rutgers, a football
19 powerhouse these days [Laughter] and a law degree
20 from the Columbus School of Law of Catholic
21 University.
22 And Mr. Hilary Shelton is the Director of the

1 NAACP's Washington Bureau, which is the NAACP's
2 legislative and national policy division. Prior to
3 his work with the NAACP, Mr. Shelton was the Federal
4 Liaison and Assistant Director to the Governmental
5 Affairs Department of the United Negro College Fund.
6 He has served on a number of national boards,
7 including the Leadership Conference on Civil Rights,
8 the Center for Democratic Renewal, the Coalition to
9 Stop Gun Violence, and the Congressional Black
10 Caucus Institute. He earned his degree in political
11 science from Howard University and a degree in
12 communications from the University of Missouri in
13 St. Louis, and a degree in legal studies from
14 Northwestern.

15 Ms. Stewart, we'll start with you. Thank you to
16 this panel, just like to all the others, for taking
17 your time to be here with us today to share your
18 thoughts on federal cocaine sentencing policy. Ms.
19 Stewart?

20 MS. JULIE STEWART: Thank you. It's my pleasure. I
21 wish I could have been here all day, but we have a
22 board meeting tomorrow, so I've been doing both

1 today. But thank you for inviting me to testify
2 again on a subject that's come up again and again
3 and again. I've lost count of how many times I've
4 actually testified on behalf of Families Against
5 Mandatory Minimums on the issue of crack cocaine.
6 And so, I know, though, that you know what our
7 position is, which is that we believe that crack
8 cocaine and powder cocaine should be equalized at
9 the current levels of powder cocaine. But I applaud
10 this Commission and prior commissions for taking
11 this issue up over and over again. You've done a
12 thorough job of researching crack cocaine and its
13 penalties through hearings and reports in past dozen
14 years. I also applaud your conclusions, that the
15 harm associated with crack cocaine does not justify
16 substantially harsher treatment compared to powder
17 cocaine. You've tried over the years to act on
18 those conclusions and change crack penalties, but
19 without success because Congress has prevented you
20 from doing so, or they've basically paid no
21 attention.
22 Which brings me to the one question today that I

1 think has real meaning, the question you posed to us
2 today: Have there been any changes since the
3 Commission's last report in 2002 that should be
4 considered by the Commission? Yes. I know I'm not
5 the first to say this today. The change is that the
6 Democrats will soon control the House and the
7 Senate. Now, I'm neither a Democrat nor a
8 Republican, and FAMM is bipartisan but - nor am I
9 naïve enough to think that the control of the House
10 and the Senate by the Democrats is really going to
11 be a panacea for this broken sentencing system. I
12 am quick to remind myself the Democrats are the ones
13 that brought us mandatory minimum sentences, but I
14 do believe that this offers a fresh opportunity, the
15 new control of the Congress, to develop some
16 bipartisan support for sentencing reform, and I
17 believe it's an opportunity that this Commission
18 must really seize on by proposing a guideline
19 amendment to change crack cocaine penalties.
20 A Democratically controlled Congress is not the only
21 change that has occurred since 1995 when you last
22 proposed an amendment to change crack penalties. In

1 that decade, many of the crack myths have been
2 exploded, and that's largely because of the
3 education that this Commission has done and the
4 media and FARM and ACLU and the NAACP and many of
5 the other organizations that you will hear from
6 today. Today the public and the policy makers are
7 much more educated about crack and crack penalties
8 and the racist impact of their application than they
9 were a decade ago.

10 So, I believe that if you propose an amendment that
11 promises genuine relief, you would not be alone in
12 going to the Hill. You will have the company,
13 whether you like it not, of many of the groups that
14 have written and testified and conducted research
15 and come to the Commission hearings and sat through
16 Congressional hearings year after year. These
17 voices may have more impact starting in January than
18 they have in the past dozen years, and although I
19 know, you know, that we all understand that this
20 issue doesn't neatly break down into Democratic and
21 Republican territory, I think a change in the
22 leadership could open some doors that have been

1 slammed shut. And luckily the Commission, as many
2 other groups, is well-connected to members of both
3 parties.

4 By offering a guideline amendment you would also
5 restore a measure of justice to what you know is an
6 unconscionable penalty structure that affects
7 thousands of defendants each year.

8 Since the Commission adopted its 1995 crack report,
9 52,416 federal defendants have been sentenced for
10 crack cocaine offenses. That's an average of about
11 4,765 a year, and the average length of sentence for
12 each of those defendants is roughly 120 months or 10
13 years. So, that means in the past 11 years, crack
14 defendants have been sentenced to a total of 524,160
15 years, which is an astounding number and pretty
16 impossible to comprehend, but we hear daily from
17 people that are serving crack cocaine sentences, and
18 we know what it means in human terms, and it means
19 broken families. It means lack of hope and low
20 self-esteem. It means anger, a felony record, and a
21 really difficult readjustment to freedom and
22 employment after a 10-year prison sentence. There

1 have also been 524 people sentenced under 2D 1.1 for
2 simply possession since 1995. That's almost 50
3 people per year.
4 I'll close by saying that FAMM endorses the
5 recommendations put forward by the federal public
6 defenders, that we should equalize powder and crack
7 at current levels of powder and recommend that
8 Congress do the same, that we should refrain from
9 adding new enhancements, or you should refrain from
10 adding new enhancements because there are already
11 sufficient enhancements on the books in the
12 guidelines to cover all associated behavior, and
13 that you recommend that Congress repeal the
14 mandatory minimum for simple possession of crack.
15 Thank you for your attention. I look forward and
16 the rest of the staff looks forward to working with
17 you in the coming year. Thank you.
18 CHAIRMAN RICARDO HINOJOSA: Thank you, Ms. Stewart.
19 Ms. McCurdy?
20 MS. JESSELYN McCURDY: The American Civil Liberties
21 Union would like to thank the United States
22 Sentencing Commission for this opportunity to

1 testify on cocaine sentencing policy in federal
2 sentences for cocaine trafficking. My testimony
3 today will discuss the extremely arbitrary nature of
4 the 100 to 1 disparity between crack and powder
5 cocaine as resulted in federal government resources
6 to be focused on low-level drug dealers as well as a
7 racially discriminatory impact that has devastated
8 communities of color.

9 In 2002 and now in 2006, we urge the Commission to
10 amend the crack guidelines to equalize crack and
11 powder cocaine sentences at the current level for
12 powder cocaine. Congress passed a number of
13 mandatory minimum penalties primarily aimed at drugs
14 and violent crime, between 1984 and 1990. The most
15 notorious mandatory minimum law enacted by Congress
16 was the penalty relating crack cocaine, passed as a
17 part of the Anti-Drug Abuse Act of 1986.

18 Congress made it explicitly clear that in passing
19 the current mandatory minimum penalties for crack,
20 it intended to target serious and major drug
21 traffickers; however, the opposite has proved true.
22 Mandatory penalties for crack cocaine offenses apply

1 most often to offenders who are low-level
2 participants in the drug trade.
3 If the message Congress wanted to send by enacting
4 mandatory minimums was that the Department of
5 Justice should be more focused on high-level cocaine
6 traffickers, Congress missed the mark. Instead of
7 targeting large-scale traffickers in order to cut
8 off the supply of drugs coming into the country, the
9 law established low-level drug quantities to trigger
10 lengthy mandatory minimum prison terms. The
11 Commission's 2002 report states that only 15 percent
12 of federal cocaine traffickers can be classified as
13 high level, while over 70 percent of crack
14 defendants have low-level involvement in drug
15 activity, such as street-level dealers, couriers,
16 and look-outs.
17 Harsh mandatory minimum sentences for crack cocaine
18 have not stemmed the traffic of cocaine into the
19 United States, but have instead caused an increase
20 in the purity of the drug and the risk it poses to
21 health users. The purity of drugs affects the price
22 and supply of drugs that are imported into the

1 country. One indication that the National Drug
2 Control Strategy has not made progress in cutting
3 off the supply of drugs coming into the country is
4 the fact that the purity of cocaine has increased,
5 but the price of the drug has declined in recent
6 years. According to ONDCP, the purity or quality of
7 cocaine sold on the streets is twice that of the
8 early 1980s, although somewhat lower than the late
9 1980s. As a result there's more cocaine available
10 on the street at a lower price.

11 Data on racial disparity in the application of
12 mandatory minimum sentences for crack cocaine is
13 particularly disturbing. African Americans comprise
14 the vast majority of those convicted of crack
15 cocaine offenses, while the majority of those
16 convicted for powder cocaine offenses are white and
17 Hispanic. This is true despite the fact that whites
18 and Hispanics are the majority of crack users. For
19 example, in 2003, whites constituted 7.8 percent and
20 African Americans constituted more than 80 percent
21 of the defendants sentenced under the harsh federal
22 crack cocaine laws, while more than 66 percent of

1 crack cocaine users in the United States were white
2 or Hispanic.

3 Due in large part to the sentencing disparity based
4 on the form of the drug, African Americans serve
5 substantially more time in prison for drug offenses
6 than do whites. The average sentence for a crack
7 cocaine offense in 2003, which was 123 months, was
8 3.5 years longer than the average sentence of 81
9 months for an offense involving the powder form of
10 the drug. Also due in large part to mandatory
11 minimum sentences for drug offenses from 1984 to
12 2003, the differences between the average time
13 African Americans offenders served in prison
14 increased by 77 percent, compared to an increase of
15 28 percent for white drug offenders. African
16 Americans now serve virtually as much time in prison
17 for a drug offense, at 58.7 months, as whites do for
18 violent offenses, at 61.7 months.

19 The collateral consequences of the nation's drug
20 policies, racially targeted prosecutions, mandatory
21 minimums, and crack sentencing disparities have had
22 a devastating effect on African American men and

1 women and families. Recent data indicates that
2 African Americans make up only 15 percent of the
3 country's drug users, yet they comprise 37 percent
4 of those arrested for drug violations, 59 percent of
5 those convicted, and 74 percent of those who are
6 incarcerated for drug offenses.

7 The effects of the mandatory minimums not only
8 contribute to those disproportionately high
9 incarceration rates, but also separate fathers from
10 families, separate mothers with sentences for minor
11 possession crimes from their children, leave
12 children behind in the child welfare system, and
13 create massive disenfranchisement of those with
14 felony convictions. For example, in 2000, there
15 were approximately 791,000 African American men in
16 prison and jails, but that same year there were only
17 603,000 African American men enrolled in higher
18 education. The fact that there are more African
19 American men under the jurisdiction of the penal
20 system than in college has led scholars to conclude
21 that our crime policies are a major contributor to
22 the disruption of African American families.

1 October 2006 marked the 20th anniversary of the
2 enactment of the 1986 Anti-Drug Abuse Act. For the
3 above-stated reasons the ACLU urges the Commission
4 to recommend amending the federal penalties for
5 trafficking, distribution, and possession of crack
6 cocaine by implementing the following
7 recommendations:

8 The quantities of crack cocaine that trigger federal
9 prosecution and sentencing must be equalized with an
10 increase to the current levels of powder cocaine.

11 Federal prosecutions must be properly focused on the
12 high-level traffickers of both crack and powder
13 cocaine. In order for judges to exercise
14 appropriate discretion in considering mitigating
15 factors in sentencing, mandatory minimums for crack
16 and powder offenses must be eliminated, including
17 the mandatory minimum for simple possession.

18 Thank you so much for this opportunity to express
19 our views on this issue.

20 CHAIRMAN RICARDO HINOJOSA: Thank you, Ms. McCurdy.
21 Mr. Shelton, sir?

22 MR. HILARY SHELTON: Thank you very much. As you

1 mentioned, my name is Hilary Shelton, and I'm
2 Director of the NAACP's Washington Bureau. The
3 Washington Bureau is the federal legislative and
4 national public policy arm of the nation's oldest
5 and largest grassroots-based civil rights
6 organization. As such, we currently have more than
7 2200 membership units throughout the United States,
8 hundreds of thousands of card-carrying members. We
9 also have units in Italy, Korea, Japan, and Germany.
10 I welcome the opportunity to discuss our federal
11 laws regarding crack cocaine prison sentencing
12 ranges and mandatory sentences, and to highlight
13 what we at the NAACP feel is a discriminatory,
14 unfair, and immoral policy.
15 Despite the fact that cocaine use is roughly equal
16 among the different populations of our nation, the
17 vast majority of offenders who are tried, convicted,
18 and sentenced under the federal crack cocaine
19 mandatory minimum sentences are African Americans.
20 Our people and our communities continue to be
21 disproportionately devastated by this law.
22 I was specifically asked by the Commission to

1 discuss any changes that may have occurred in the
2 last 5 years. Unfortunately, because the law
3 governing federal crack cocaine offenders has
4 remained the same, so has the horribly
5 discriminatory impact of our government's policy.
6 In your 2002 report, "Cocaine and Federal Sentencing
7 Policy," the U.S. Sentencing Commission noted that
8 nearly 85 percent of men and women convicted of
9 federal crack cocaine offenses were African
10 American. For fiscal year 2005, the numbers are
11 roughly the same: Almost 83 percent of those
12 convicted of federal cocaine offenses are African
13 American, while according to the 2000 census, only
14 12.9 percent of the entire U.S. population is
15 African American. Furthermore, according to the
16 federal government most recent surveys, less than 18
17 percent of our nation's crack cocaine users in 2005
18 were African American. The continued inequalities
19 that occur as a result of federal policies towards
20 crack cocaine have only exacerbated the Commission's
21 assessment in its 2002 report, that "even the
22 perception of racial disparity [is] problematic.

1 Perceived improper racial disparity fosters
2 disrespect for and lack of confidence in the
3 criminal justice system among those very groups that
4 Congress intended would benefit from the heightened
5 penalties for crack cocaine."
6 Few people today argue that policy makers could have
7 foreseen 20 years ago the vastly disparate impact
8 the 1986 law would have on communities of color, yet
9 the facts that African Americans continue to be
10 severely penalized at much greater rates than white
11 Americans for drug use and that the policy for the
12 federal government is having a devastating effect on
13 our communities and that these laws continue to be
14 maintained show, at the very least, a calloused
15 disregard for our people and our communities.
16 And it is this disregard for the fate of our people
17 and our communities that continues to erode our
18 confidence in our nation's criminal justice system.
19 How can African Americans trust or respect policy
20 makers who perpetuate a law that clearly has such a
21 racially discriminatory impact? And, because it is
22 unfortunately only human nature to punish the

1 messenger, the resulting mistrust, disrespect, and
2 anger that African American communities feel is also
3 taken out on law enforcement representatives and the
4 criminal justice system as well.

5 I would not be fair to say - it would not be fair to
6 say that nothing has changed in the last 5 years.

7 Ongoing research into crack and powder cocaine has
8 further eroded the myths that crack cocaine is more
9 addictive than powder cocaine, that crack cocaine
10 users are, because of their choice in drug use, more
11 violent than powder cocaine users, or that the
12 prolonged presence of crack cocaine in our
13 communities has led to maternity wards full of
14 "crack babies."

15 We have long known that crack and powder cocaine are
16 pharmacologically indistinguishable. Several
17 respected medical authorities have found that crack
18 cocaine is no more addictive than powder cocaine, as
19 we heard earlier today. Furthermore, as this
20 Commission concluded in its 2002 report, the
21 violence that was often associated with crack
22 cocaine is related to the nature of the drug trade

1 and not the effects of the drug itself.
2 Finally, and perhaps most disturbing to the NAACP,
3 was the myth that crack cocaine was responsible for
4 thousands of innocent babies being born addicted to
5 cocaine because their mothers had smoked crack
6 cocaine during their pregnancies. Although the myth
7 of the "crack baby" has largely been debunked by the
8 medical and academic circles, it unfortunately
9 persists in the minds of much of the American
10 public.
11 Furthermore, and perhaps more problematic for the
12 NAACP, the image of the "crack baby" that comes to
13 most Americans' minds is that of an African American
14 infant crying inconsolably in an incubator. It is
15 the myth of the "crack baby" that perhaps best
16 reflects one of the reasons the NAACP would welcome
17 an open, honest, national debate on federal crack
18 cocaine policies. We need to correct the image of
19 crack cocaine – who uses it, and what its impact is
20 on our communities. We also need to change the law.
21 Though illegal drug trafficking devastates our
22 communities and indeed communities across the

1 nation, the debilitating effects of crack cocaine on
2 African Americans have proven to come not only from
3 the use of the drug, but also from the resulting
4 unjust federal sentencing policy.

5 Some argue that the answer would be to increase the
6 penalties for powder cocaine so that they are more
7 in line with those of crack cocaine. The NAACP
8 rejects this proposal, however, as it does not take
9 into consideration the more even-handed, informed,
10 and balanced approach that went into developing the
11 powder cocaine sentencing ranges. And, as our more
12 recent experiences have taught us, it would only
13 fill even more prison cells with low-level offenders
14 serving mandatory sentences, which in turn would
15 create an even larger drain on our nation's
16 financial and human resources while undermining the
17 trust and respectability needed by law enforcement
18 officials to be effective in protecting our
19 communities.

20 I should also state that, for the record, the NAACP
21 is opposed to all mandatory minimum sentences, and
22 that the proposal to increase the penalty for powder

1 cocaine is yet another example of politicians trying
2 to prove themselves "tough on crime" to the
3 detriment of sound and effective policy. As the
4 Commission is well aware, many of our nation's
5 judges also share the NAACP's opposition to
6 mandatory minimums, especially in drug-related
7 cases, and have become increasingly vocal in their
8 disagreement.

9 The NAACP applauds the efforts of the U.S.
10 Sentencing Commission, which has consistently sought
11 to end the disparities between federal penalties for
12 crack and powder cocaine and cited the glaring
13 racial inequities as one of the motivators behind
14 its position. We further would like to applaud the
15 efforts of Congressman Charles Rangel of New York
16 and other members of the Congressional Black Caucus
17 who have tried, through legislation, to correct this
18 inequity.

19 Finally, I would like to extend the appreciation of
20 the NAACP, as well as my own gratitude and
21 admiration, to some of my colleagues in this fight.
22 Among them are the Sentencing Project, the ACLU, the

1 Open Society Institute, and FAMM, institutes and
2 others who have much to shed light and correct this
3 awful problem we're having in our society.
4 The bottom line is this: Until the racial
5 inequities in our nation's war on drugs and other
6 crime initiatives are addressed, communities of
7 color across the nation will continue to distrust
8 the American criminal justice system. The federal
9 government's crack cocaine policy is one glaring
10 example of how the American government has failed an
11 entire segment of its population.
12 I'd like again to thank the Commission for holding
13 this hearing, and I welcome any questions you may
14 very well have for me at this time. Thank you very
15 much.
16 CHAIRMAN RICARDO HINOJOSA: Thank you, Mr. Shelton.
17 Who would like to go with the first question?
18 COMMISSIONER BERYL HOWELL: Could I - I'll go first,
19 I guess. I understand that all three of you would
20 like the Sentencing Commission to sort of take the
21 plunge, send a recommendation to Congress to get the
22 debate started up there, or participate in it in an

1 active way. Of course, the Commission's most recent
2 recommendation was not 1 to 1 at the powder level,
3 but was in fact was 20 to 1 by raising the 5 grams
4 to 25 grams.

5 MS. JULIE STEWART: And lowering 500 to 4 or
6 something -

7 COMMISSIONER BERYL HOWELL: Right.

8 MS. JULIE STEWART: Three -

9 COMMISSIONER BERYL HOWELL: So, the question is,
10 you're very brave to ask the Commission to send its
11 recommendation to Congress without knowing what a
12 recommendation is.

13 MS. JULIE STEWART: That's if it's a good one.

14 [Laughter]

15 COMMISSIONER BERYL HOWELL: So, I mean, is it your
16 view that it's better, even if the Commission were
17 to reconfirm - I mean it's different commissioners
18 on the Commission than were present in 2002 - but if
19 the Commission as a bipartisan, you know, to reach a
20 bipartisan, unanimous decision, decided to adopt a
21 recommendation that was made in 2002 and would your
22 view still be the same, that you think the

1 Commission should send that recommendation and
2 guideline to Congress?

3 MS. JULIE STEWART: I would first recommend -

4 COMMISSIONER BERYL HOWELL: Would we then lose your
5 support?

6 MS. JULIE STEWART: You want to lose it, don't you?

7 [Laughter] I would first recommend that the
8 Commission look back at the 1995 debate about the
9 crack amendment. And I have the records, and I'm
10 sure you do as well, John Steer and others.
11 There was a lot of discussion about a 10 to 1 and a
12 20 to 1 back then, and I'm very loath to use ratios
13 because I think that we get caught in the ratio race
14 instead of what the correct penalty should be. And
15 no one, even back then, even though we were talking
16 ratios, no one was talking about lowering powder
17 cocaine penalties. The 10 to 1 and the 20 to 1 were
18 based on different arguments. I know Judge Tacha
19 had a very sound argument for her, I believe, 10 to
20 - 20 to 1 perhaps, and Mike Goldsmith had another
21 one for a 10 to 1, but there were some very
22 legitimate arguments for a disparity, but it didn't

1 move powder cocaine at all.
2 Now, would we be able to live with that? I mean I
3 remember, you know, sitting in the room when they
4 voted on the 1 to 1, and it was a 4:3 vote, and I
5 remember kind of going, "Yeah... I think this is
6 good, but not really, because it was not going to
7 fly on the Hill." And so, if one of those other
8 recommendations had managed to be the one that was
9 voted one, we probably would not be sitting here
10 today. People would have been able to live with a
11 10 or a 20 to 1, you know, not moving powder.
12 So, I'm not convinced that the only way to get
13 something passed is to change powder. I think that
14 there still are some legitimate arguments about
15 changing crack and leaving powder alone, not making
16 them equal, but making - but leaving powder
17 untouched, and I would, you know, love to see you
18 take a look at that again. Maybe you have, and
19 maybe I'm talking out of line here, but that would
20 be my first choice.
21 My second thought is that if you have to, you know,
22 do something that changes powder, I'd look at it.

1 It's not my preference, but sometimes the perfect is
2 the enemy of the good, and I think that there has to
3 be a cost-benefit analysis done at some point to see
4 how many people would benefit versus how many people
5 would be penalized.

6 VICE CHAIR WILLIAM SESSIONS: Can I say, I think
7 that you've got our recommendation wrong in 2002. I
8 mean I was here, and I think you were as well, but
9 our recommendation was 25 grams and leave powder the
10 same as it was before.

11 MS. JULIE STEWART: You're right. There have so
12 many recommendations.

13 VICE CHAIR WILLIAM SESSIONS: Right.

14 MS. JULIE STEWART: I failed to remember that one
15 exactly. You're right. In '97, it was moving in
16 both directions.

17 VICE CHAIR WILLIAM SESSIONS: Correct.

18 MS. JULIE STEWART: That's right.

19 VICE CHAIR WILLIAM SESSIONS: In '97, it was moving
20 in both directions.

21 MS. JULIE STEWART: Yeah.

22 VICE CHAIR WILLIAM SESSIONS: But in 2002, we made a

1 very strong statement that powder cocaine -
2 MS. JULIE STEWART: Right. That's right.
3 VICE CHAIR WILLIAM SESSIONS: - should be left were
4 it was, but -
5 MS. JULIE STEWART: I stand corrected. Yeah.
6 VICE CHAIR WILLIAM SESSIONS: But just taking
7 Commissioner Howell's discussion just a little bit
8 further, and this is for all three of you, because
9 all three are very actively involved in Congress, on
10 the Hill.
11 COMMISSIONER BERYL HOWELL: The other haven't
12 answered yet, Bill
13 VICE CHAIR WILLIAM SESSIONS: Pardon me?
14 COMMISSIONER BERYL HOWELL: Ms. McCurdy and Mr.
15 Shelton hadn't answered yet.
16 VICE CHAIR WILLIAM SESSIONS: Oh, okay. Well, maybe
17 I should hold off [Laughter] and ask her that after
18 she - after you answer her.
19 MS. JESSELYN McCURDY: Well, Judge Sessions, I'm
20 glad that you clarified the 2002 recommendation,
21 because I was going to say that we would not be in
22 favor of lowering the powder cocaine level, again,

1 because our focus has been – our focus, we believe,
2 should be on using federal resources to target high-
3 level traffickers, and once, again, you start
4 fiddling with the powder trigger level and lowering
5 it, you're getting further and further away from
6 focusing federal resources on high-level
7 traffickers.

8 Whether we could support 20 to 1 the way that you
9 recommended in 2002, I would first encourage you to
10 consider equalization, and equalization at the level
11 of powder cocaine currently, but I would also
12 emphasize to you what Mr. Kramer from the Federal
13 Public Defenders Office said this morning, basically
14 that there is interest in this issue on both sides
15 of the aisle in Congress. As we know, Senator
16 Sessions has introduced his bill. It's 20 to 1. It
17 would lower powder cocaine. But I've had
18 conversations with Senator Sessions' office. I
19 really think they are genuinely interested in doing
20 something about this issue. Whether they would be
21 able to move from their version of the bill, I don't
22 know.

1 I have had conversations also with Mike Volkov,
2 who's a chief counsel from the House Judiciary
3 Committee, who - I feel comfortable saying this
4 because he has publicly said that he thinks the
5 ratio should be 1 to 1. And Mr. Kramer talked about
6 that this morning. And so, I think that we are -
7 there are opportunities on both sides of the aisle
8 in Congress, and so I wouldn't - I would be open-
9 minded, as you are thinking through recommendations
10 and possible amendments to the guidelines, because
11 we are now 4 years later. We're 4 years down the
12 road in terms of how Congress would look at this
13 issue, and I hope that you would take that into
14 account as you are trying to come to a conclusion
15 about your recommendations.

16 MR. HILARY SHELTON: Commissioner Howell, I think
17 that the Commission deserves an awful lot of
18 commendation for taking this issue on. You've
19 already shown quite a bit of courage for raising
20 this issue yet again. I mean too often in our
21 society, when issues that have a such profound
22 effect on so many people - "The decision's been

1 made. We want to leave it there and not open that
2 door again." But being with an organization like
3 the NAACP, we're kind of used to pushing at that
4 door and appreciate your willingness to do that as
5 well.

6 We support part of the 2002 report, the part that
7 says leave powder cocaine where it is. We, however,
8 don't support the part that says anything beyond a 1
9 to 1 ratio. Quite frankly, we think that's where
10 the debate should begin. The question today is, why
11 should we have a longer sentencing range for
12 something that's actually a derivative of a drug
13 that we now have a very clear sentencing range on,
14 one that was done outside the challenges of emotion,
15 that was fed by mediated images of outdoor drug
16 markets that were limited to the least expensive of
17 the drug?

18 So very well, we think that issue ought to be taken
19 on again now. I think things are a little bit
20 different. We've had a lot longer time to look at
21 the effects of the drug and to compare the two and
22 see that very well, first, the Commission was right

1 with its powder cocaine recommendations and the
2 Congress was right, too, but, unfortunately, the
3 crack cocaine issue is something quite different.
4 I remember very well those debates and discussions.
5 I remember those video images on the streets of
6 California, in Los Angeles and just about any major
7 city in our country, and I understand how that very
8 well worked and affected the judgment of politicians
9 that had to rush home to get reelected. But very
10 well I think things are different now, and I think
11 the Commission has a different kind of
12 responsibility. The election was last week. It's
13 time for us to make this recommendation now.

14 CHAIRMAN RICARDO HINOJOSA: We'll start with Judge
15 Sessions and then Commissioner Steer.

16 VICE CHAIR WILLIAM SESSIONS: So, now I'll follow up
17 with [Laughter] [Indiscernible].

18 In addition to the recommendation, a part of the
19 recommendation included various enhancements to
20 address not drug quantity, but really culpability.
21 We talked about it this morning. Culpability as
22 opposed to quantity. And I think Ms. Stewart has

1 indicated that she opposes that part of the
2 recommendation, but, again, we're going up before
3 Congress. Of course, one piece of advice we've
4 ordinarily received of, "Have a balanced piece of
5 possible legislation." It has a much better chance
6 than one that dramatically decreases penalties or,
7 for that matter, increases penalties, but decreases
8 penalties here.

9 So, what do you think about having -- as opposed to
10 these, the 5 grams, et cetera, or a ratio -- have a
11 much more concentrated ratio, but also focus in upon
12 some of those culpability factors, which would have
13 a broader range not just to the African American
14 community, but to all communities? For instance,
15 causing bodily injury, using weapons, et cetera.

16 MS. JULIE STEWART: Aren't they already completely
17 available to you under the current guidelines? I
18 mean I'm just totally unclear why you have to add
19 them. You might want to underline them and send the
20 whole thing to the Hill with your recommendation,
21 but I don't feel like there's anything new that
22 isn't already taken into consideration by the

1 current guidelines.

2 VICE CHAIR WILLIAM SESSIONS: Well, of course, the
3 proposal that was made was a sliding scale, taking
4 bodily injury, for instance, having a different
5 level of enhancements for serious bodily injury,
6 life threatening bodily injury as opposed to bodily
7 injury, or to discharging firearms or brandishing
8 firearms as opposed to possessing firearms, and
9 graduate penalties in that regard so that, as a
10 result, by applying those to the drug offenses, then
11 you have a little bit more of a drug guideline which
12 focuses in upon culpability as opposed to drug
13 quantity.

14 MS. JULIE STEWART: Well, I'm all in favor of
15 culpability versus quantity. Absolutely. But I
16 still don't necessarily think that judges can't
17 figure out the culpability given the guidelines that
18 are already on the books.

19 MR. HILARY SHELTON: I would - why don't you go
20 first, and then I'll go after that.

21 MS. JESSELYN McCURDY: I would be much more open to
22 sentencing enhancements if we could get the ratio to

1 1 to 1 because I think then we - because there kind
2 of is already a built-in enhancement in terms of
3 where we were back in '86, in terms of the violence
4 that was thought to be associated with crack and the
5 addictiveness and on and on - the myths. So, if we
6 could get the ratio to 1 to 1 of current level of
7 powder cocaine, then I think we're more
8 realistically dealing with the culpability, more
9 realistically dealing with the weapons that may or
10 may not be involved, the violence that may or may
11 not be involved in crack cases.

12 MR. HILARY SHELTON: I would only add to that that I
13 agree that all these tools are already available,
14 and, quite frankly, as we talk about issues of
15 culpability, if we have to talk about those
16 simultaneously with mandatory minimums, then we'd
17 have a major problem. NAACP is a strong believer in
18 judicial discretion, that is, we go through a very
19 arduous process to place judges on the bench, a
20 process in which we've been in very open fights over
21 which judges are going to be placed on the bench
22 because we challenge their ability to do a great

1 job. It's a very arduous process. I think, with
2 the tools available now, the options available, the
3 kind of information that's available, the judges
4 should be left to their discretion in how to apply
5 these other issues, these other layers, quite
6 frankly, to a sentencing range.

7 CHAIRMAN RICARDO HINOJOSA: Vice Chair Steer?

8 VICE CHAIR JOHN STEER: I just want to continue
9 along the same line to clarify, get you to clarify
10 what you are recommending that this Commission do in
11 terms of procedure. A key difference, again,
12 between the 2002 and the 1995 mode of procedure was
13 not only a difference between a 1 to 1 and a 20 to 1
14 ratio, but in 1995, the Sentencing Commission not
15 only made a statutory recommendation; it first
16 promulgated an amendment, sent it to Congress, and
17 put Congress in the position of "take it or reject
18 it," which created an entirely different dynamic.

19 Is that what you are recommending that this
20 Commission do? And, if so, why would you want to
21 squander the good will that has never been higher as
22 I can - since this 1986 enactment by Congress, the

1 will to do something, and risk it on turning this
2 into a fight over who is going to be the primary
3 architect of sentencing policy – the people's
4 elected representatives or some appointed
5 bureaucracy in Washington? Why would you allow the
6 opponents of this an opportunity to do that? That's
7 my question.

8 MS. JULIE STEWART: Is that what you think they'll
9 do?

10 VICE CHAIR JOHN STEER: I think [indiscernible].

11 MS. JULIE STEWART: I mean this is a new Congress.

12 VICE CHAIR JOHN STEER: I think [indiscernible].

13 MS. JULIE STEWART: It's a new Congress. I'm
14 fascinated by your assessment actually. I mean I
15 think that we don't know what this Congress is going
16 to do, and it's not a totally new Congress. There
17 are a lot of familiar faces there. But it's a new
18 Congress from 1995. The Republicans were in control
19 in '95.

20 I guess I don't see – I mean, first of all, I see
21 this body, and I wish everybody else saw this body,
22 the Commission, as exactly where sentencing policy

1 should rest. Period. Why did we create the
2 Sentencing Commission? Why did Congress do that?
3 Because they were supposed to take it out of the
4 hands of Congress. So, I mean I would love for you
5 to all stand up and say, "Damn it, this is where
6 sentencing policy should rest." And, you know, I
7 realize you do that and you get slapped down, and
8 that's what happened in '95, and perhaps it would
9 happen now and perhaps it won't. I just don't see
10 that you can judge exactly what - that you can take
11 what happened in '95 and assume it's going to repeat
12 itself now.

13 So, I - you know, I don't know - I guess I don't see
14 it as setting up a fight. I think that it does take
15 groundwork to be laid, and I think that there was
16 not enough groundwork laid in '95 when that vote was
17 passed and it just was sprung on Congress and they
18 felt like they had, you know, been somehow hit
19 upside the head. I think that, you know, there's a
20 lot to be done, and you have very competent people
21 on the staff and among the Commission to do that
22 work. I don't think it should be, you know, in the

1 May cycle necessarily, May of 2007. Maybe it takes
2 another year to submit a guideline amendment. But I
3 think that I guess I just wouldn't assume that what
4 happened 11 years ago will repeat itself this year.

5 CHAIRMAN RICARDO HINOJOSA: Mr. Shelton?

6 MR. HILARY SHELTON: And I would say, listening to
7 your comments, it seems to be deeply rooted in the
8 politicization of this kind of an issue, but I would
9 say that I think that, in this particular upcoming
10 Congress, you've got a tremendous opportunity. I
11 think the American people have spoken very loudly,
12 and clearly they're not happy with the status quo,
13 with business as usual. And it very well - I think
14 just about any policies that are, were raised up as
15 being inconsistent with the needs and concerns of
16 our local communities are going to be looked at very
17 favorably by the American people and consequently
18 also by their elected representatives in Washington,
19 at least theoretically.

20 So, I would argue that now is the time to lift these
21 issues up and really begin to unpack this issue, to
22 kind of unfold what's been going on in our nation

1 and look freshly at the concerns. I think the
2 American people have spoken and very well what
3 they've said in this last election, and this is how
4 some of us interpret it, very well said, "We have
5 not been happy with what's been happening, and very
6 well we'd welcome the opportunity for major change."
7 So, I think you have an incredible opportunity with
8 all of that going on, on Capitol Hill and throughout
9 the country.

10 VICE CHAIR JOHN STEER: No disagreement about that,
11 but you want to push the issue by having the
12 Commission send an amendment to the Hill?

13 MR. HILARY SHELTON: An amendment? A recommendation
14 [indiscernible]? Sure.

15 VICE CHAIR JOHN STEER: Not just a recommendation
16 for statutory change, but you want to have the
17 Commission bite the bullet and send an amendment?

18 MR. HILARY SHELTON: Yes, sir.

19 MS. JULIE STEWART: Couldn't it go - excuse me -
20 couldn't it go at the same time as work on statutory
21 change?

22 VICE CHAIR JOHN STEER: Oh, sure. It could. That's

1 essentially - well, that's not exactly what the '95
2 Commission did -

3 MS. JULIE STEWART: No.

4 VICE CHAIR JOHN STEER: They sent their amendment
5 first -

6 MS. JULIE STEWART: Right.

7 VICE CHAIR JOHN STEER: - and their recommendation
8 for statutory change was a little while later.

9 MS. JULIE STEWART: But I mean, those of us who work
10 on the Hill, as you've said, I mean, are working all
11 the time to try to get Congress to, you know, get
12 rid of mandatory minimums. Period. But I mean
13 there's no reason we couldn't be working on a
14 statutory strategy at the same time that you send
15 forward a guideline amendment - or before you send
16 forward a guideline amendment.

17 CHAIRMAN RICARDO HINOJOSA: Judge Castillo, you had
18 a question.

19 VICE CHAIR RUBEN CASTILLO: Yeah, I guess that we're
20 following up -

21 VICE CHAIR WILLIAM SESSIONS: [Indiscernible] Ms.
22 McCurdy had -

1 VICE CHAIR RUBEN CASTILLO: Oh, I'm sorry.

2 MS. JESSELYN McCURDY: If I could quickly respond to
3 that, Judge Hinojosa.

4 CHAIRMAN RICARDO HINOJOSA: Yes.

5 MS. JESSELYN McCURDY: I must admit I am a little
6 nervous about that strategy, but - because I don't
7 know what you're going to recommend. [Laughter]

8 COMMISSIONER BERYL HOWELL: Neither do we.
9 [Laughter]

10 MS. JESSELYN McCURDY: So, we're all in the same
11 boat.

12 COMMISSIONER BERYL HOWELL: Yes.

13 MS. JESSELYN McCURDY: But I do think that we are
14 frustrated. We are 20 years into this fight, and
15 this Sentencing Commission has done wonderful work
16 on this issue year after year after year, and we
17 cannot make progress. Congress cannot make
18 progress, for whatever reason, whether it's
19 politics, whether it's lack of will, and I think we
20 are just at the point where we are ready, I think.
21 And we see that there is some movement in Congress,
22 again, on both sides of the aisle where there is a

1 certain frustration about – and reality that has,
2 that people are aware of, in terms of debunking the
3 myths, in terms of the fact that the drugs are not
4 any different from each other in terms of effects.
5 And so, we are just ready to push this issue as
6 advocates because we are frustrated. And I do think
7 it's 11 years later: There has been some change,
8 and there is some will on both sides of the aisle to
9 address this issue one way or the other.

10 CHAIRMAN RICARDO HINOJOSA: Judge Castillo, and then
11 Commissioner Reilly will have the last question.

12 VICE CHAIR RUBEN CASTILLO: Well, just to follow up
13 on Vice Chair Steer's question, and I think he would
14 first of all agree that we're not a bureaucracy, but
15 we're an expert body on sentencing, and today we've
16 spent the whole day taking expert testimony from
17 others, and I'm just as frustrated as anyone else.

18 It seems to me in 2002 we sent a report without
19 guideline recommendations. We used a cautious
20 approach, and here we are 4 years later. And it
21 seems to me that there is a lack of leadership on
22 what is a difficult, but troubling criminal justice

1 issue.

2 Now, the Justice Department came here first thing

3 this morning and said, basically, "Trust us. We're

4 willing to have a dialogue," and have not said that

5 they're in favor of the 100 to 1 ratio at this

6 point, but are basically willing to dialogue it, but

7 basically also tell that they thought the Commission

8 should not act without Congress acting first. But

9 I'm concerned by previous times when, and even today

10 there's been representations on the part of those

11 who are prosecuting cases saying, "Trust us. This

12 isn't that big of a deal because low-level crack

13 cases are being diverted to the state systems, which

14 don't have this differential. If they had it

15 before, they've eliminated it. They're not driving

16 a 1986 vehicle anymore. They've seen the light."

17 They're also saying that they're going after high-

18 level drug offenders, but everything that I've seen

19 tends to indicate to the contrary. Now, have your

20 studies or have your statistics or, Ms. Stewart,

21 have your membership shown anything differently?

22 I'm taken by the fact that you're even telling me

1 there's 50 cases a year for simple possession in the
2 federal system. So, do you have any comments on the
3 part of people saying this isn't a big problem
4 anymore?

5 MS. JULIE STEWART: Well, frankly, I haven't seen
6 any reduction in the number of, you know, people who
7 contact us for crack cocaine cases. I'm always
8 fascinated reading the pre-sentence reports. You
9 read about their assets, and it's like, "Well, they
10 own a 1967 Chevy that they still owe money on." I
11 mean these are not kingpins. These are - you know,
12 a lot of the people are very average people, so
13 especially or, you know, lower-income people,
14 especially on the crack cocaine cases that we see.
15 My evidence is anecdotal. I don't have the hard
16 numbers at my fingertips, but you do.

17 MR. HILARY SHELTON: The short answer is
18 no.

19 VICE CHAIR RUBEN CASTILLO: Hmm-mm.

20 MR. HILARY SHELTON: We have seen no
21 difference. The effect is devastating. It
22 continues to be devastating.

1 MS. JESSELYN McCURDY: And I do think also
2 that, again, something that has come out in today's
3 testimony is there is this, again, temptation to
4 deal with the lower-level cases because they are
5 easier cases to prove, as opposed to trying to deal
6 with the importers who are importing 25, 30
7 kilograms, thousands of kilograms into the country,
8 and those are more difficult cases to bring forward,
9 but maybe the 5-, 10-, 25-gram crack cases are
10 easier cases to prove. And so, there's that
11 temptation, when you have the ability to do that,
12 and, anecdotally, there's this concern about - that
13 we've seen in a few cases - around law enforcement
14 agents encouraging people to cook powder cocaine
15 into crack cocaine in order to get the higher
16 sentencing, in order to trigger the mandatory
17 minimum sentence. Again, I think that's the
18 temptation also by law enforcement that we continue
19 to be concerned about.

20 CHAIRMAN RICARDO HINOJOSA: Commissioner
21 Reilly, you have the last question, sir.

22 COMMISSIONER EDWARD REILLY, JR.: I really

1 don't have a question; I think more of a comment,
2 but when you talk about frustration, I think we're
3 all very frustrated. Just look around and listen to
4 the debates, and each time we hear them, we become a
5 little bit more educated, and I guess the point I
6 would make is that you do have new members of
7 Congress. I'm not sure, because I've been a little
8 bit out of the arena in terms of this election, but
9 how big of an issue was the crack cocaine issue at
10 all in any of the elections that you're aware of? I
11 mean, was it discussed? Was it brought up?

12 MS. JULIE STEWART: I didn't hear anyone
13 talk about -

14 MR. HILARY SHELTON: No.

15 MS. JULIE STEWART: - really even drug
16 policy more broadly, or sentencing policy.
17 Definitely not.

18 COMMISSIONER EDWARD REILLY, JR.: Well, I
19 think the fact that you do have quite a sizeable
20 number of judges who have indicated their
21 frustration also and their desire to see the law
22 changed and the fact that, as I've heard some of the

1 other Commissioners speak today here, when you talk
2 about the package that has to go up or the proposal
3 that has to go up or the amendment or whatever it
4 is, recommendation, whatever else, you know, you
5 have to be able to craft and build some enticements.
6 You have to give people a place to hang their hat,
7 particularly those in the Senate or the House.
8 So, I would think that that's one of the issues that
9 I see coming up here, is that it's going to be a
10 very frustrating thing to try to craft something
11 that's acceptable and recognizing that the
12 Department has its input, and the public has its
13 input. And so, this has been a very valuable, I
14 think, process today, but I think we're all
15 frustrated with the fact it's what is it that we can
16 develop? What other enhancements to go along with
17 whatever it is that we want to send up to the Hill?
18 And, hopefully, this may very well be the year that
19 the Congress, the new Congress - or next year, the
20 new Congress will look at it very seriously, because
21 I do think there is a strong feeling that something
22 has to be done, and I certainly concur in that.

1 MS. JULIE STEWART: It would be very
2 troubling if we're here 5 or 10 years from now
3 having the same conversation again. Thank you all.

4 CHAIRMAN RICARDO HINOJOSA: Thank you all
5 very much.

6 MS. JESSELYN McCURDY: Thank you.

7 CHAIRMAN RICARDO HINOJOSA: And we
8 appreciate the work that you as individuals do and
9 certainly the groups that you represent to the
10 criminal justice system. Thank you all very much.

11 [Pause]

12 PANEL EIGHT: COMMUNITY INTERESTS

13 CHAIRMAN RICARDO HINOJOSA: This group also
14 represents different organizations and groups that
15 have interest in the criminal justice system and,
16 certainly, in federal cocaine policy.

17 We have Ryan King, who is a Policy Analyst at the
18 Sentencing Project. His research specialization is
19 the American criminal justice system, with recent
20 work on the national coverage by the American media
21 on methamphetamine use. Mr. King's work has
22 appeared in local and national press as well as in a

1 number of criminology journals. Mr. King earned a
2 bachelor's degree in anthropology from the
3 University of Pittsburgh, a master's in criminal
4 justice from Monmouth University, and a master's in
5 justice, law, and society from American University.
6 Ms. Nkechi Taifa is a Senior Policy Analyst for the
7 Open Society Institute and Open Society Policy
8 Center, focusing on issues of criminal and civil
9 justice. Ms. Taifa convenes the Justice Roundtable,
10 a network of advocacy groups advancing federal
11 criminal justice policy. She has served as an
12 adjunct professor at Howard University School of
13 Law, and she has served as counsel for the American
14 Civil Liberties Union, the Women's Legal Defense
15 Fund, and the National Prison Project. She earned
16 her law degree from the George Washington Law
17 School, and is the recipient of numerous awards for
18 her criminal justice work.

19 Ms. Angela Arboleda is the Associate Director for
20 Criminal Justice Policy at the National Council of
21 La Raza, the largest national Hispanic civil rights
22 and advocacy organization in the United States. Ms.

1 Arboleda is responsible for civil rights and
2 criminal justice policy analysis for La Raza. Prior
3 to joining La Raza, Ms. Arboleda worked at the
4 National Organization for Women, the Feminist
5 Majority Foundation, and the Service Employees
6 International Union. She is a graduate of the
7 Elliott School of International Affairs at George
8 Washington University.

9 And, Mr. King, we'll start with you, sir.

10 MR. RYAN KING: Thank you. Good afternoon,
11 Commissioners. The Sentencing Project has been
12 engaged in research and advocacy regarding federal
13 cocaine policy for more than a decade, and we
14 welcome the opportunity to address the Commission
15 today.

16 We support the Commission's past work on this
17 important and challenging issue and applaud its
18 continued willingness to solicit public comment on
19 any future considerations to amend the current
20 sentencing structure.

21 You have my written testimony which discusses these
22 issues in greater depth, but allow me to briefly

1 draw your attention to four highlighted points in
2 the time I've been allotted.

3 First, the current sentencing structure with its
4 reliance on quantity as a primary determinant for
5 sentence length is flawed by design and calibrated
6 to target low-level crack cocaine users with 5-year
7 mandatory minimum sentences. The two-tiered penalty
8 structure of mandatory minimums was devised to focus
9 on major traffickers, defined as someone who
10 operates a manufacturing or distribution network,
11 with a 10-year mandatory minimum sentence, and
12 serious traffickers, defined as someone who manages
13 retail-level traffic in substantial quantities, with
14 5-year mandatory sentence.

15 The problem that has emerged is the weight level
16 necessary to warrant a 5-year mandatory sentence for
17 crack cocaine is set so low that it largely impacts
18 low-level users. Five grams of crack cocaine
19 translates into anywhere between 10 and 50 doses, an
20 amount likely for personal consumption. Meanwhile,
21 500 grams of powder cocaine yields 2,500 to 5,000
22 doses. While someone arrested with 500 grams of

1 cocaine, about 1.1 pounds, is likely to be engaged
2 in a network that is distributing "substantial"
3 street quantities, someone with only 5 grams of
4 cocaine is not. This small quantity trigger has
5 resulted in a disproportionate number of low-level
6 offenders being convicted for crack cocaine
7 offenses. In 2000, 73 percent of persons convicted
8 for a crack cocaine offense were street-level
9 dealers or of lesser culpability. Meanwhile, only
10 one in five defendants met the criteria of a major
11 or serious trafficker.

12 In addition, the reliance on a single factor to
13 determine sentence exacerbates the afore-mentioned
14 problems, exposing defendants who have played
15 peripheral roles in the drug trade to sentences far
16 out of proportion to their conduct in spite of
17 attention to mitigating evidence.

18 The Commission should recommend that Congress repeal
19 the mandatory minimum sentences in the federal drug
20 statutes. If Congress is unwilling, then the
21 Commission should recommend that Congress broaden
22 the consideration of relevant conduct as criteria in

1 sentencing in order to more accurately reflect the
2 defendant's participation in a drug enterprise.
3 Next, the rationale that more severe crack cocaine
4 penalties are necessary because of heightened
5 correlations with more serious offenses amounts to
6 either a double-counting of offense characteristics
7 in cases with a serious concurrent offense or an
8 unwarranted sentence enhancement in the remainder of
9 cases. By treating crack cocaine more severely,
10 Congress codified the unsubstantiated and
11 subsequently refuted belief that all crack
12 defendants manifest a tendency toward more serious
13 criminal offending.
14 This prejudice creates a significant disparity in
15 sentence length for persons convicted for crack
16 cocaine offenses and is problematic for two reasons:
17 First, for individuals who have not engaged in a
18 lesser included or more serious offense, the
19 enhanced penalty scheme categorically subjects crack
20 cocaine defendants to a punishment for uncommitted
21 behavior. Secondly, for persons who have been
22 charged with a concurrent offense, the enhanced

1 penalty double-counts the charged conduct. For
2 example, the 28 percent of crack cocaine defendants
3 for whom a weapon was involved in their offense
4 already face a statutory enhancement of a minimum of
5 5 years for having a weapon present during the
6 commission of a drug trafficking crime.
7 The harsh crack cocaine penalties unfairly penalize
8 some defendants' behavior in which they did not
9 engage, while double-counting the punishment for
10 others. The Commission should recommend that
11 Congress amend the federal cocaine sentencing laws
12 by raising the weight of crack cocaine necessary to
13 trigger a 5- and 10-year mandatory, to 500 grams and
14 5,000 grams, respectively.
15 Thirdly, the current federal cocaine sentencing
16 policy has failed to produce any appreciable impact
17 on the crack cocaine market. As stated in the
18 Sentencing Reform Act, the goal of a federal
19 criminal sentence is to both punish as well as deter
20 future criminal activity. For drug offenses, the
21 results have not been encouraging in this regard.
22 Contrary to the underlying theory of drug

1 enforcement, that increased pressure on market
2 distribution patterns will result in a limiting of
3 supply and a subsequent increase in demand and cost,
4 the average price per gram of a purchase between 1
5 and 15 grams of crack cocaine actually fell by 57
6 percent between 1986 and 2003. If law enforcement
7 or stiffer sentences were effective in deterring
8 market entry, it would be expected that supply would
9 decline and prices would increase. However, the
10 data indicates the opposite. The drop in prices
11 suggests either an increase in supply or a decrease
12 in demand. Considering the household drug survey
13 responses, which demonstrate stability in the number
14 of users and new initiates during the period, there
15 is little support for the theory that reduced demand
16 is driving down prices.

17 The federal cocaine sentencing structure with its
18 sole reliance on harsh sentencing and supply-side
19 enforcement has provided no noticeable impact on
20 crack cocaine distribution or national consumption.

21 The Commission should recommend to Congress that
22 these laws are reformed in concert with a national

1 drug abuse prevention model that directs resources
2 to demand reduction.

3 Finally, the national consensus regarding demand
4 reduction versus law enforcement has evolved over
5 the last two decades to support a more treatment-
6 oriented agenda. In 1986, the National Drug Control
7 Strategy was almost exclusively focused on
8 enforcement and interdiction, with treatment
9 relegated to those individuals with the discretion
10 and means to seek it privately. Beginning in 1989
11 with the first drug courts in the Miami-Dade area,
12 the United States has experienced an evolution in
13 thinking about how best to address drug abuse. By
14 2006, more than half of the states have modified
15 their drug laws. These developments include
16 establishing diversion programs for certain
17 categories of offenders, repealing some provisions
18 of mandatory sentences, and increasing funding for
19 treatment options.

20 The federal cocaine sentencing laws stand in stark
21 contrast to this momentum for reform. The
22 structural emphasis on weight of the drug as the

1 primary indicator of the involvement in the
2 narcotics trade ensnares numerous low-level drug
3 users in prison for long mandatory sentences.
4 Whereas this approach may have been the standard by
5 which drug abuse was addressed in the 1980s, the
6 passage of time has rendered this strategy
7 ineffective at best, and counterproductive at worst.
8 Although the Commission is not charged with helping
9 establish or monitor the country's drug abuse
10 prevention strategy, there are affirmative steps
11 that you can take to bring our criminal sentencing
12 in harmony with development in other areas. While
13 it is beyond the Commission's purview to expand the
14 availability of drug treatment options, it can take
15 the important step of ensuring that low-level
16 offenders are not subjected to harsh sentences -
17 guideline or mandatory minimum sentences. In no
18 section of the criminal code is this more necessary
19 than the federal cocaine structure, where the
20 unreasonably low-weight threshold for crack cocaine
21 subjects many defendants who might benefit from
22 treatment to harsh mandatory sentences.

1 In conclusion, federal cocaine sentencing policy is
2 an antiquated relic of an era where the conversation
3 about combating drug abuse was focused on
4 enforcement and interdiction. The Commission would
5 be doing a service to the citizens of the United
6 States if it requests that Congress revisit the
7 decisions of 1986 and apply a lens of analysis that
8 benefits from two decades of accrued wisdom and
9 knowledge about the consequences of a punitive
10 sentencing model to addressing drug abuse. Thank
11 you.

12 CHAIRMAN RICARDO HINOJOSA: Thank you, Mr.
13 King. Ms. Taifa?

14 MS. NKECHI TAIFA: Thank you very much for
15 this opportunity to testify before this very
16 esteemed Commission. Today you've heard about
17 violence. You've heard about harm, addiction,
18 pharmacology, law enforcement patterns, micro-
19 biotics, biology, macro-dyanmics. We've heard a lot
20 of things, but one of the things that you have not
21 been apprised about, which is a change since the
22 2002 report, is the broad-based movement across this

1 country demanding that change occur and that it
2 happen now.

3 The Justice Roundtable has brought together criminal
4 justice, civil rights, human rights, grassroots,
5 academics, formerly incarcerated persons, and
6 religious groups as part of its national campaign
7 "Time to Mend the Crack Injustice," using the 20-
8 year anniversary of the crack law's passage as a
9 catalyst to once again focus public and legislative
10 attention to this issue. Our campaign has featured
11 letters to Congress, Hill briefings and reports,
12 demonstrative show and tell, as well as advocacy
13 before international bodies. The campaign's
14 rallying cry has been, "20 years of discriminatory
15 cocaine sentencing is enough!"

16 The studies are completed. The research is
17 compelling. The analysis is sound. Now is the time
18 to mend this crack in our system of justice. We
19 have delivered several open letters to Congress, one
20 authored by over 50 organizations, another with
21 religious leaders, yet another with academics. We
22 have hosted Hill briefings; written articles,

1 reports, and white papers. An article was just
2 published just yesterday in the *L.A. Times*, authored
3 by one of our key strategists, Eric Sterling,
4 sitting right over there, who, as counsel to the
5 House Judiciary Committee in 1986, assisted in
6 writing the very mandatory minimum sentences for
7 crack cocaine offenses that we are advocating
8 against today, calling it the biggest mistake of his
9 professional life. That *L.A. Times* article was
10 based on his larger white paper, properly titled
11 "Getting Justice off Its Junk Food Diet," whose
12 thesis is that the proper federal anti-drug role
13 must focus on the highest-level traffickers, that
14 every federal case against a street-level or local
15 trafficker, who could be investigated and prosecuted
16 by state and local law enforcement agencies, is a
17 distraction from the critical federal role and a
18 waste of federal resources.

19 That paper was the basis for perhaps one of the most
20 significant features of the Justice Roundtable's
21 awareness campaign: the depiction of crack cocaine
22 drug quantities with visual analogies. In an

1 example of creative show and tell, each member of
2 the House and Senate Judiciary Committees was
3 delivered a baggie containing five packets of the
4 artificial sweetener Sweet'n Low, 5 grams, each one
5 is equal to a gram; a couple of peanuts, these are
6 peanut prosecutions; and a candy bar – a candy bar
7 to Julie – of 50 grams, so that if I were in court,
8 I'd ask to approach the bench and ask for this to be
9 marked for identification as evidence, but since I'm
10 not, I'll just kind of hold it up here –

11 CHAIRMAN RICARDO HINOJOSA: Except we might
12 eat the candy bar. [Laughter]

13 MS. NKECHI TAIFA: Every bite you take,
14 realize that someone is serving 10 years in prison
15 for this amount of crack cocaine. Every time you
16 put Sweet'n Low or a sugar packet in your coffee,
17 realize that someone is spending 5 years in prison
18 for just that tiny amount.
19 We did this so that legislators could graphically
20 see that, for the past 20 years, low-level crack
21 cocaine offenders selling sugar-packet- and candy-
22 bar-size quantities of crack cocaine received long,

1 5- and 10-year sentences, being punished far more
2 severely than their wholesale drug suppliers, who
3 provide the powder cocaine from which the crack is
4 produced.

5 The Justice Roundtable told Congress that the proper
6 federal role must be focused on kingpins, those
7 international- and national-level traffickers who
8 smuggle drugs into the country by the hundreds or
9 thousands of pounds. If the DOJ is not focused on
10 these highest-level cases, and it has not been, then
11 those cases simply are not being brought. And,
12 sadly, it is this lack of priority at the apex of
13 the drug distribution chain which has resulted in
14 the deterioration of many low, inner city
15 communities.

16 Another approach utilized by the 20th anniversary
17 year campaign was to request that the Inter-American
18 Commission on Human Rights, which is an organ of the
19 Organization of American States, convene a hearing
20 on this issue. Perhaps the most pertinent part of
21 that historic March 3rd proceeding were the closing
22 words of Judge Patricia Wald, former chief judge of

1 the U.S. Court of Appeals for the District of
2 Columbia, circuit and former judge on the
3 International Criminal Tribunal for the Former
4 Yugoslavia, who testified on the behalf of the
5 American Bar Association, and she concluded, and I
6 quote, "Unduly long and punitive sentences are
7 counterproductive, and, candidly, many of our
8 mandatory minimums approach the cruel and unusual
9 level as compared to other countries as well as to
10 our own past practices. On a personal note," she
11 continued, "let me say that on the Yugoslavia War
12 Crimes Tribunal, I was saddened to see that the
13 sentences imposed on war crimes perpetrators
14 responsible for the death and suffering of hundreds
15 of innocent civilians often did not come near those
16 imposed in my own country for dealing in a few bags
17 of illegal drugs."
18 We are now coming to the close of the 20th
19 anniversary year of the passage of this law. Please
20 do not lose sight of the fact that, 10 years ago,
21 this Commission unanimously agreed that the penalty
22 triggers for simple possession of crack and powder

1 cocaine should be equal, but the majority is saying
2 don't differentiate the triggers for distribution as
3 well. Indeed, the only dissenting Commissioner to
4 provide an alternative ratio for distribution stated
5 that a 5 to 1 ratio "may be a good starting point
6 for analysis."
7 Although this Commission was designed to insulate
8 criminal sentencing from politics, it was restrained
9 from accomplishing its given task: the
10 consideration of sentencing policies free from
11 pressure.
12 In closing, despite its 15-year review of guideline
13 sentencing when this Commission reported that
14 revising this one sentencing rule would do more to
15 reduce the sentencing gap between blacks and whites
16 than any other single policy change and would
17 dramatically improve the fairness of the federal
18 sentencing system, and despite this Commission
19 unfortunately adhering to Congress's mandate to
20 maintain a difference in the penalty triggers,
21 Congress has yet to address any of this Commission's
22 recommendations since 1995.

1 In sum, two decades of stringent crack sentencing
2 has not abated or reduced cocaine trafficking, nor
3 improved the quality of life in deteriorating
4 neighborhoods. What it has done, however, is
5 incarcerate massive numbers of low-level offenders,
6 predominately African American, and increasingly
7 women, who are serving inordinately lengthy
8 sentences, at an enormous cost to taxpayers and
9 society, with no appreciable impact on the drug
10 trade. The Justice Roundtable asserts that the 20th
11 anniversary is the perfect time to correct the gross
12 unfairness that has been the legacy of the 100 to 1
13 ratio.
14 We applaud this hearing and strongly call for the
15 restoration of the Commission's original 1995
16 recommendation, which begins to place the focus of
17 federal cocaine drug enforcement on major
18 traffickers, where it should be. Let us not allow
19 another anniversary to pass without rectifying this
20 20-year legacy of injustice.

21 CHAIRMAN RICARDO HINOJOSA: Thank you, Ms.
22 Taifa, and I hope I've done a better job with your

1 name than people sometimes do with mine.

2 MS. NKECHI TAIFI: You're fine. [Laughter]

3 CHAIRMAN RICARDO HINOJOSA: Okay. Ms.
4 Arboleda?

5 MS. ANGELA ARBOLEDA: Well, I am the last
6 person to testify, so I'll try to be brief, but I
7 want to begin by thanking Chairman Hinojosa; Vice
8 Chairs Castillo, Sessions, and Steers; and the other
9 Commissioners. On behalf of the National Council of
10 La Raza, I thank you for holding this hearing on an
11 issue that is very important to the Latino community
12 in the United States. We urge a thorough revision
13 of the drug sentencing guidelines in the United
14 States, particularly in light of the 20-year
15 anniversary of the enactment of the Anti-Drug Abuse
16 Act of 1996.

17 I will begin my statement by sharing a short
18 vignette that illustrates what NCLR believes we
19 should focus on. Second, I will highlight the
20 disparities that Latinos suffer vis-à-vis drug
21 policy. And, finally, my testimony will conclude
22 with recommendations to promote drug sentencing

1 policies and practices that are equitable for all
2 Americans.
3 Here's is the vignette: In 1997, Carlos Lehder
4 Rivas, one of the co-founders of the Medellin
5 cartel, also known as the "godfather" of cocaine
6 trafficking, was accused of smuggling 3.3 tons of
7 powder cocaine, which constitute about 80 percent of
8 cocaine imports into the United States. At the peak
9 of Mr. Lehder's leadership, a jet loaded with as
10 much as 300 kilograms of cocaine would arrive in his
11 private airport in Norma Cay every hour of every
12 day. Although Lehder was convicted and sentenced to
13 life plus 135 years for drug trafficking,
14 distribution, and money laundering, none of his
15 assets were seized. Instead, he exchanged testimony
16 against Manuel Noriega, Panama's former dictator, in
17 1992, and the U.S. government reduced Mr. Lehder's
18 sentence for 55 years.
19 Fabio Ochoa Vazquez, a highly ranked member of the
20 Medellin cartel, was later accused for leading a
21 smuggling operation of approximately 30 tons of
22 powder cocaine into the United States between 1997

1 and 1999. He was indicted in 1999, extradited in
2 2001, and convicted in 2003 in the U.S. for
3 trafficking, conspiring, and distributing cocaine in
4 this country. He was sentenced for 30 years in U.S.
5 federal prison.

6 The 1996 law commission intended to curb the crack
7 epidemic by focusing on major traffickers. Instead,
8 over the past 20 years, numerous studies have
9 documented that the 100 to 1 powder/crack ratio
10 directly contributes to the blatant racial
11 discrimination in the justice system affecting
12 African Americans, but increasingly Latinos as well.

13 Although the spirit of the law was to go after the
14 ringleaders, what we know now is that prisons are
15 filled with low-level, mostly non-violent drug
16 offenders, many of whom turned friends and family
17 members to law enforcement in turn for lenient
18 sentences.

19 Moreover, drug use rates per capita among minorities
20 and white Americans are consistently relatively
21 similar. However, government has done little to
22 institute a real solution to drug addiction, and

1 that is treatment, despite the fact that substance
2 abuse treatment is more effective and less costly
3 than incarceration.

4 Let me share with you a few statistics about the
5 impact of drug laws on Latinos. In 2000, Latinos
6 constituted 12.5 percent of the population in the
7 United States, according to the U.S. census; yet,
8 according to the U.S. Sentencing Commission's own
9 data, Hispanics accounted for 43.4 percent of the
10 total drug offenders that year. Of those, about 50
11 percent were convicted for possessing or trafficking
12 powder cocaine and only 9 percent for crack cocaine.
13 This is a significant increase from the 1992
14 figures.

15 Contrary to popular belief, and as stated earlier,
16 the fact that Latinos and other racial and ethnic
17 minorities are disproportionately disadvantaged by
18 sentencing policies is not because minorities commit
19 more drug crime or use drugs at higher rates than
20 whites. Instead, the disproportionate numbers of
21 Latino drug offenders appears to be the result of a
22 combination of factors, including racial profiling,

1 which targets Hispanics and other minorities
2 disproportionately. Furthermore, the evidence
3 strongly suggests that Latinos encounter
4 discrimination in every stage of the criminal
5 justice system, and there is specific statistics in
6 the testimony that I have submitted for the record.
7 Over the past decade, public opinion research
8 reveals that a large majority of the public is
9 prepared to support rational sentences, including
10 substance abuse treatment, for low-level drug
11 offenders. The cost of excessive incarceration to
12 the groups and the broader American society is
13 extremely high. It reduces current economic
14 productivity, creates barriers to future employment,
15 inhibits civic participation, and growing racial and
16 ethnic societal inequities. NCLR believes that the
17 Commission can play a critical role in reducing the
18 unnecessary and excessive incarceration rates of
19 Latinos and African Americans in the United States.
20 Finally, NCLR commends the Commission's 1995 and
21 2002 recommendations to Congress, which call for the
22 elimination of the threshold differential that

1 exists between crack and powder sentences. Given
2 that crack is a derivative – that crack derives,
3 excuse me, from powder cocaine and that crack and
4 powder cocaine have exactly the same psychological
5 and pharmacological effects on the human brain,
6 equalizing the ratio to 1 to 1 is the only fair
7 solution to eradicate disparities.

8 Today, NCLR urges the U.S. Sentencing Commission to
9 consider the following four recommendations:

10 Number 1. Substantially redress the crack/powder
11 disparity by raising crack thresholds and
12 maintaining powder where it is. Over the last 20
13 years, it has been proven that the 1 to 100
14 crack/powder sentencing ratio has a negative impact
15 on African Americans, and increasingly on Latinos as
16 well. Therefore, NCLR calls for closing the gap
17 between crack and powder sentences.

18 Number 2. Resist proposals that would lower the
19 powder threshold in order to achieve equalization
20 between crack and powder. NCLR believes that the
21 only proper way of equalizing the ratio is by
22 raising crack threshold and not lowering the powder

1 threshold. According to the Commission's own data,
2 reducing the powder threshold would have a
3 disproportionate, negative impact on the Latino
4 community. Achieving equalization by lowering the
5 powder threshold might be perceived as reducing
6 sentencing inequities; in fact, it would have a
7 perverse effect of not reducing high levels of
8 incarceration of low-level non-violent African
9 Americans, while substantially increasing
10 incarceration of low-level non-violent Latinos. In
11 our judgment, the real-world, tangible harm produced
12 by lowering powder threshold would far outweigh the
13 abstract, symbolic value of reducing the statutory
14 sentencing ratio.

15 Third, take more – make more widely available
16 alternative methods to punishment for low-level,
17 non-violent offenders. A SAMHSA study recently
18 found that drug sales were reduced by 78 percent,
19 shoplifting by 82, assault by 78 percent when
20 treatment was present. Treatment decreases arrest
21 of crimes by 64 percent, and only after 1 year of
22 treatment, the use of welfare was declining

1 substantially and employment increased by 18.7
2 percent.
3 Lastly, we urge that DEA agents and federal
4 prosecutors concentrate on solving the real problem,
5 and that was exhibited in my vignette, by deterring
6 the importation of millions of tons - I'm saying
7 "tons," not "grams" and "kilograms" - of tons of
8 powder cocaine and prosecuting ringleaders to the
9 full extent of the law. Even at the current highest
10 levels of crack and powder which trigger the maximum
11 mandatory minimums, it is a relatively insignificant
12 measure to deter drug trafficking and promote
13 community safety. These low-level actors are
14 disposable, given that they are replaceable. In
15 fact, the spirit of the 1996 law should be renewed
16 by investing in training and resources, and
17 reinvesting in a vision of safety, while
18 concentrating on the large-level kingpins. Data
19 from the U.S. Sentencing Commission show that 70
20 percent of the federal cocaine cases have been
21 brought against low-level offenders, while only 7
22 percent were brought by high-level defenders.

1 NCLR urges that any threshold be scientifically and
2 medically justified, and correlated directly to the
3 impact and penalties of both defendants and the
4 larger society. We urge the Commission to seize
5 this unique opportunity to simultaneously narrow
6 drug sentencing disparities and reduce incarceration
7 for low-level drug offenders.

8 Thank you.

9 CHAIRMAN RICARDO HINOJOSA: Thank you, Ms.
10 Arboleda. Who's got the first question?

11 VICE CHAIR RUBEN CASTILLO: I only have one
12 request - it's not a question - but since Ms. Taifa
13 referenced Mr. Sterling's paper, I'd like that to be
14 made part of the record, with everyone's permission.

15 CHAIRMAN RICARDO HINOJOSA: There shouldn't
16 be any problem with that.

17 COMMISSIONER BERYL HOWELL: That's the
18 benefit of going last. [Laughter]

19 CHAIRMAN RICARDO HINOJOSA: Did you all
20 have any thoughts on the questions that were asked
21 of the prior panel with regards to, do you have
22 viewpoints as to the recommendations of the

1 Commission? And are some things acceptable and not
2 acceptable with regards to your statements?

3 MS. NKECHI TAIFA: Well, let me just start,
4 if I may. I think the Commission should take the
5 bull by the horns and take leadership, as it has
6 done in the past, and do the right thing.
7 I agree that this is a new Congress coming up,
8 though I was around in '95 in October; I really
9 thought that bill was going to be signed the right
10 way, but I will just leave that alone. [Laughter]
11 But the DOJ came here this morning and said let's
12 dialogue, you know, let's talk. I don't see why, as
13 part of this discussion, I don't think we have to
14 wait for that, but let's talk to Mr. Acosta, who was
15 here. Let's talk to Jeff Sessions. Let's talk to
16 Mr. Biden, I think might be working on something.
17 Let's talk to Mr. Conyers, Mr. Scott, Mike Volkov.
18 We haven't even - I don't know exactly where Mr.
19 Sensenbrenner is, but there is room - Mr. Inglis, on
20 the House, is very interested in these issues.
21 There is some strong bipartisan receptivity, shall
22 we say, to doing something, and I think that the

1 Commission should address it from its first and best
2 recommendation, which was free from any type of
3 political pressure, which was the 1995
4 recommendation.

5 I do not recommend waiting. What happens has to
6 happen next year because then we're going to get
7 into an election-year cycle, okay? And then we'll
8 fall prey the same politics as usual. I think we
9 need to take the bull by the horns. We can sit down
10 and talk and dialogue. I'm all for that, but we
11 should not let that stymie us into non-action.

12 CHAIRMAN RICARDO HINOJOSA: Mr. King?

13 MR. RYAN KING: I think it would be a
14 tragedy to allow political concerns to take over and
15 obscure good policy. The purpose of the Commission
16 is for devising policy, analyzing and using
17 evidence, and putting forth these sort of
18 recommendations. And I'm not naïve. I'm realistic
19 that these political issues come in, but it is a
20 shame that when we're talking about – we've had, by
21 and large, a really esteemed group of people come
22 here and talk about the real need for reform, and it

1 would be a shame that all of those people's voices
2 are drowned out by these political concerns.
3 So, I would echo Nkechi's remarks and some of the
4 remarks of the prior panel, and also really not to
5 sell ourselves too short. I don't work on the Hill
6 personally, but colleagues in my office do as well
7 as Nkechi and other folks who've been here, and I'm
8 constantly hearing about really positive bipartisan
9 support. There is a conversation that's already
10 ongoing, before the past elections, before any
11 recommendations or anything comes out from the
12 Commission. So, it seems to me that, if the
13 Commission came forth with ambitious recommendations
14 and ones that were really grounded in empirical
15 evidence and support, that those would be a valuable
16 addition to that already ongoing dialogue, and to
17 try to remain optimistic for what is going forward
18 next year.

19 MS. ANGELA ARBOLEDA: I would just add that
20 the Commission has always been perceived as the
21 voice of reason, a voice that is not tainted by
22 politics, but by science, by research. And so, I

1 urge you to continue the legacy of this Commission
2 by doing the same thing and not waiting. I echo
3 what all of my colleague in this panel and the
4 previous panel have stated, and I believe that come
5 January is the right time, and that a strong, clear
6 message from the Commission can put us in a very
7 good pathway. And we hope that the recommendation
8 is one that we'll like.

9 VICE CHAIR WILLIAM SESSIONS: I've heard
10 the word "dialogue" a number of times, and from the
11 three of you as well. And having been involved in
12 this debate for a number of years, I sometimes
13 confuse the word "dialogue" with "monologue" because
14 oftentimes one gets into the thickets of the debate,
15 and then one hears people who are calling for
16 dialogue speaking from their own perspective.
17 Now, either there have been proposals out there,
18 various proposals suggest, obviously, increasing the
19 threshold for crack, but then decreasing the
20 threshold for powder cocaine, and you feel quite
21 strongly opposed to that.

22 MS. ANGELA ARBOLEDA: That's right.

1 VICE CHAIR WILLIAM SESSIONS: There is, in
2 the concept of dialogue, some compromise down the
3 road here, the possibility of compromise down the
4 road. And do each of you feel, from your own
5 perspective, from your own organization's
6 perspective, that compromise is possible in this
7 area? That's the first thing. And the second thing
8 is, Mr. King, you suggested that we make
9 recommendations. It's unclear to me whether you're
10 suggesting that we just make another recommendation
11 like we did in 2002 or we actually pass guideline
12 amendments together with recommendations in regard
13 to statutory changes in 2006, but... So, those two
14 issues I throw out.

15 MS. ANGELA ARBOLEDA: Let me begin with the
16 compromise issue. We believe that the right thing
17 to do is to equalize the ratio 1 to 1. Is there
18 room for compromise? We'll be happy to see what
19 that compromise may look like. However, I am
20 hesitant to say that we will sign on to a compromise
21 without knowing exactly the cost effects. So, I
22 want to echo what Julie Stewart had to say earlier,

1 which is let's look at a cost-benefit analysis.
2 Let's see how many people would be locked up, what
3 those costs will entail, what is it that we're
4 compromising? Let's not blind ourselves by saying
5 we're going to, you know, keep as many African
6 Americans in prison, and let's put more Latinos, and
7 now everybody's happy. You heard from the NAACP,
8 and they are strong brothers and sisters with NCLR
9 on this point.
10 What we're trying to achieve here is we're trying to
11 achieve parity. We're trying to achieve security.
12 We're trying to achieve safety. We're trying to go
13 after the bad guys, the big kingpins, the Fabio
14 Ochoas, the Lehders. So, that's what I'm hoping
15 Congress will do, and that's what I'm hoping that
16 your recommendation would echo.

17 MS. NKECHI TAIFA: I'd like to say, first
18 and foremost, number 1, fixing the crack cocaine
19 disparity is the compromise, okay? All of us
20 believe there should not be any mandatory minimum
21 sentences. Period. That's the position we really
22 should be up here dealing with. You all had your

1 report in 1993, I think it was, detailing the issues
2 dealing with mandatory minimum sentences. That was
3 even before crack. Crack is one subset of the whole
4 mandatory minimum sentencing scheme. Fixing that,
5 in my opinion, is the compromise. That's number 1.
6 But, number 2, if there is any type of negotiation
7 to go on – which happens all the time on the Hill;
8 that's how this country runs – it must, as this
9 Commission said earlier, be based on sufficient
10 policy basis. It cannot be based on any other
11 numbers being plucked out of a hat, which is
12 basically what happened in 1986, which is basically
13 what happened in 1997, in 2002. It cannot be based
14 on that. There must be sufficient policy basis to
15 justify whatever sentencing scheme is brought out,
16 particularly a gain as this Commission has brought
17 out, when one form of cocaine is so easily
18 transferred, 15 minutes, into another form of
19 cocaine. There must be some [indiscernible].
20 So, that's what I say with respect to that, and the
21 openness needs to be on all sides. It cannot just
22 be from the Commission, okay? The dialogue has to

1 be on - I don't know which side of the aisle folk
2 are on here - but the whole perspective. It just
3 has to. Mr. Jeff Sessions needs to be open to
4 compromise, and not just be set, saying this is the
5 way it's got to be.

6 MR. RYAN KING: I don't have a - well, let
7 me - I'll address both of your questions. I don't
8 have a whole lot to add on the first except to agree
9 that the need for any decisions that are made,
10 whether - around a compromise - to be based in
11 really sound policy analysis. One thing the
12 Sentencing Project has advocated for, and other
13 organizations as well, is what we call "racial and
14 ethnic impact statements," which are essentially to
15 document, if there's going to be policy changes,
16 what the racial or ethnic impact of that policy
17 change in sentencing will be. And I think one of
18 the problems that got us to where we are right now
19 today is the fact that policy, the 100 to 1, wasn't
20 based on any sort of empirical reality.
21 So, you know, one of the things that's most
22 important is, if we're going talk about compromises,

1 we need to know what that's going to look like, in
2 terms of who's going to be affected, what the prison
3 population's going look like, and what that impact's
4 going to be long-term.

5 And then, secondly, although my remarks and written
6 testimony address specifically recommendations, we
7 would advocate in addition for an amendment to be
8 submitted by the Commission.

9 CHAIRMAN RICARDO HINOJOSA: Thank you all
10 very much, and you, like the prior panel and
11 everybody else who has spoken, obviously have
12 devoted a lot of thinking to this issue, and we
13 appreciate that, and we certainly appreciate the
14 work that your different groups that you represent
15 also do in the criminal justice field. Thank you
16 all very much.

17 MS. NKECHI TAIFA: Thank you.

18 MR. RYAN KING: Thank you.

19 MS. ANGELA ARBOLEDA: Thank you.

20 CHAIRMAN RICARDO HINOJOSA: And we
21 appreciate your patience in being the last group
22 today.

1 MS. NKECHI TAIFA: Okay. Thank you.

2 And if you all want this, for the record.

3 [Laughter]

4 UNIDENTIFIED SPEAKER: These are for your
5 next demo.

6 CHAIRMAN RICARDO HINOJOSA: I would like -

7 UNIDENTIFIED SPEAKER: I would like the
8 peanuts.

9 CHAIRMAN RICARDO HINOJOSA: I would like,
10 on behalf of the Commission, thank everybody who has
11 participated today. It has been very informative
12 and very helpful with regards to the Commission's
13 work, and we appreciate it very, very much. If
14 anybody else would like to say something, please
15 feel free to do so.

16 Thank you all.

17 [Whereupon, at 5:10 p.m., the hearing concluded.]