Prepared Testimony of

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Chairman Hinojosa, Members of the Commission, good morning. My name is Steven Chanenson and I want to thank you for the opportunity to address the United States Sentencing Commission on this vital topic. In my comments today I hope to convince you (1) that simple justice – both real and perceived – counsel in favor of making Amendment 706 retroactive in some form, and (2) that there are several ways to achieve that goal, all of which involve the Commission doing what it does best – providing guidance.

By way of background, I am a Professor of Law at Villanova University School of Law where I teach and write on criminal sentencing. I am an Editor of and frequent contributor to the FEDERAL SENTENCING REPORTER. Since 2002, I have also been a gubernatorial appointee to the Pennsylvania Commission on Sentencing where I chair the Commission's Research Committee. Of course, I speak here today solely as a private individual, but I bring the perspective of someone who has seen and worked in both state and federal criminal justice systems.

## I. Introduction.

The United States Sentencing Commission is facing an important issue with serious consequences for defendants, for our neighborhoods, and for our criminal justice

system as a whole. The retroactivity of the new crack cocaine guidelines involves questions of both pure policy and practical procedure. It implicates matters of equity as well as of efficiency.

But you know that already.

The Commission has been concerned about the sentences for cocaine base ("crack") – particularly as they relate to the sentences for powder cocaine – for more than a decade. The Commission has issued reports in 1995, 1997, 2002, and 2007 concerning crack cocaine sentencing. Each time, the Commission stated that the current sentencing scheme, particularly the Congressional mandatory minimum sentences reflecting the 100-to-1 quantity ratio, were inappropriate.[1] In all four reports, this Commission has "stressed (1) that the 100-to-1 crack/powder ratio is disproportionate to the relative harms presented by the two drugs; (2) that some harms associated with crack could and should be addressed by Guideline enhancements that are not drug-specific; and (3) that severe crack penalties fall disproportionately on lower-level offenders, and most significantly on African-Americans."[2] Notably, these powerful reports represent the considered and informed views of more than dozen different Sentencing Commissioners – including eight federal judges and three Chairs – appointed by three different Presidents and confirmed by Senates controlled by both political parties. Each report has emphasized that a faithful commitment to the principles reflected in the Sentencing Reform Act of 1984 ("SRA") demands modification of the sentencing rules for crack offenses.

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[1] *See, e.g.,* Steven L. Chanenson, Booker *on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J. L. & PUB. POL'Y 551 (2006).

[2] Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT. REP. 291 (2007) (citations omitted).

Although Congress has not acted to modify the mandatory minimum sentencing provisions, the Commission passed Amendment 706, which reduced the crack quantity thresholds such that base offense levels now yield guideline ranges that include, instead of exceed, the statutory mandatory minimum penalties.[3] Functionally, this amendment reduced by two points the base offense level for most crack offenders. Congress allowed this change in the guidelines to go into effect on November 1, 2007, and there is on-going and serious discussion of various legislative proposals to further reform drug sentencing policies. Significantly, when passing Amendment 706, this Commission stated clearly that justice demands further reforms and explained its partial action by stressing that "the problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of those problems."[4]

**II. Policy Considerations: USSG § 1B1.10 Criteria and Beyond.**

In USSG § 1B1.10, the Commission has set forth general principles concerning whether a guideline reduction should be applied retroactively. The Commission looks at (1) the purpose of the amendment; (2) the magnitude of the change; and (3) the difficulty involved in applying that change.[5] The first two of these factors clearly support retroactive application of Amendment 706. The third factor is more complicated, as will be discussed in Section III. Nevertheless, taken together, these factors strongly militate in favor of a retroactive application of Amendment 706 in some form.

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[3] USSG App. C, Vol. III, Amend. 706 at 230.

[4] USSG App. C, Vol. III, Amend. 706 at 230.

[5] USSG § 1B1.10, p.s., comment. (backg'd.) states: "Among the factors considered by the Commission in selecting the amendments included in subsection (c) [which allows for retroactive application] were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)."

As noted above, Amendment 706 reflects the Commission's deeply held belief that the old crack guidelines, particularly as compared to the powder cocaine guidelines, were wrongly imprisoning certain offender for too long in light of the principles set forth by Congress in the SRA. The Commission has been trying to change crack cocaine sentencing since 1995. The Commission viewed this amendment as an effort to more faithfully implement Congress's will as expressed in the SRA.[6] Although not explicitly stated in its reasons for Amendment 706, one can reasonably infer that the Commission also continued to be concerned about the disparate racial impact caused by crack sentencings.[7] The purpose of this amendment was to take a step towards righting a significant and long-standing wrong that was depriving many defendants of their liberty well beyond what was justified by Congress's statement of valid sentencing purposes. The Commission cannot fully realize and effectuate the purpose of righting past wrongs unless there is the possibility for retroactive application in appropriate cases.[8]

Concerning magnitude, the Commission estimates that the average sentencing reduction if its estimates of judicial behavior applied would be 27 months, with 63.5% of eligible offenders receiving a sentence reduction of 24 months or less.[9] The Commission appears to have adopted the six-month standard set forth in the Senate Report

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[6] *Cf.* USSG App. C, Vol. III, Amend. 706 at 230 ("Current data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere.").

[7] *See, e.g.,* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 154 (1995) ("The 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants.").

[8] *Cf.* Barry Boss, *Statement on Behalf of the American Bar Association*, at 3 (Nov. 13, 2007), available at http://www.ussc.gov/hearings/11_13_07/Boss_testimony2.pdf ("At the very least, principles of fairness, consistency, and proportionality should likewise lead the Commission" to make Amendment 706 retroactive).

[9] Memorandum from Glenn Schmitt to Honorable Ricardo Hinojosa, *Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive,* at 23 (Oct. 3, 2007).

accompanying the Sentencing Reform Act.[10] It is clear that this is a change of sufficient magnitude to warrant retroactive application.

The final criteria mentioned in USSG § 1B1.10 deals with the difficulty of applying the amendment retroactively. Unfortunately, there is no explication of the kind of "difficulty" the Commission envisioned. One logical concern would be the level of difficulty for the sentencing judge to reevaluate the defendant's sentence in light of the newly revised guideline. On that basis alone, Amendment 706 should not generally be too difficult to apply because the sentencing judge originally had to come to some conclusion about the amount of crack involved.[11]

On a broad policy level, it is hard to find a principled reason based on the provisions of the SRA for the Commission to refuse to make Amendment 706 retroactive. This is especially the case because of the Commission's sustained criticism of the crack penalty scheme and because of the disparate racial impact underlying much of that criticism. As I have co-authored elsewhere:

> [C]ocaine sentencing issues are now much broader than just the question of what is the "right" punishment for violating certain federal drug laws. The larger problem is one of fairness and justice—both its reality and its perception. Federal cocaine sentencing policy has been so out of balance for so long that it has come to represent—fairly or not—all the worst attributes of federal sentencing for many people. For nearly two decades, the crack-powder disparity has been "Exhibit A" for those who believe that the criminal justice system is racially biased. It has been "Exhibit A" for those who believe that the federal justice system is excessively severe. It has been "Exhibit A" for those who believe that Congress

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[10] USSG § 1B1.10, p.s., comment. (backg'd.) (discussing six-month time frame and quoting from S. Rep. 225, 98th Cong., 1st Sess. 180 (1983)).

[11] *See, e.g.*, Practitioners Advisory Group, *Response to Request for Public Comment Regarding Whether Certain Amendments Should be Included in U.S.S.G. § 1B1.10(c)*, at 2-3 (Oct. 31, 2007), available at http://www.ussc.gov/pubcom_Retro/PC200711_002.pdf ("But because the Commission is merely assigning new values to pre-existing thresholds, rather than changing the quantities that make a difference between one offense level and the next, this should not require additional fact-finding in more than a few cases."); *but see* Alice Fisher, *Letter to the Honorable Ricardo H. Hinojosa*, at 4 (Nov. 1, 2007), available at http://www.ussc.gov/pubcom_Retro/PC200711_001.pdf (noting new "trigger amount" of 4,500 grams of cocaine base).

> does not genuinely care about fairness and justice and would rather cultivate tough-on-crime political rhetoric than confront tough-to-solve sentencing realities. For these and other reasons, current federal cocaine sentencing policy has a corrosive effect on both the American criminal justice system and our society at large.[12]

Our criticism was (and still is) directed largely at Congress, which still needs to address the 100-to-1 quantity ratio at a statutory level. Yet, given this background, retroactive application of Amendment 706 seems the only principled and equitable course.

However, if one takes a broader view of the "difficulty" of applying the amendment retroactively, the practical details of this principled and equitable course – not its direction – become murkier. What will happen in individual cases? How can the system manage the burden of dealing with approximately 19,500 inmates whose cases may be impacted by Amendment 706 and numerous others who will incorrectly claim that their case may be impacted? How, if at all, does *Booker* implicate this process?

**III. Practical Considerations: Guidance from Congress.**

Starting with the Statute. The Commission's authority to make a guideline retroactive comes from Congress, and the statutory text provides an important and helpful guide to the practical issues facing this Commission. In 18 U.S.C. § 3582(c), Congress provided for just a few situations in which a sentencing judge may make changes after imposing a sentence. This statute provides in relevant part:

> The court may not modify a term of imprisonment once it has been imposed except that –
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> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994 (o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in

[12] Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT. REP. 291, 294 (2007) (footnotes omitted).

> section 3553 (a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.[13]

The statutory text suggests a § 3582(c)(2) proceeding is not a "sentencing." It seems that a § 3582(c)(2) proceeding is *not* a "sentencing," although loose language in various judicial opinions indicates otherwise. The statute uses the phrases "modify a term of imprisonment" and "reduce the term of imprisonment" rather than mentioning "a sentence" or opportunities for "resentencing." Furthermore, § 3582(c) proceedings are not mentioned in Federal Rule of Criminal Procedure 32, the standard rule for sentencing. More specifically, Federal Rule of Criminal Procedure 43(a)(2) requires the defendant to be present at "sentencing," but a few lines down the page, Rule 43(b)(4) states that the defendant need not be present when "[t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)." Section 3582(c)(2) authorizes judicial imprisonment term modification upon motion by the Director of the Bureau of Prisons and/or *sua sponte*, and it only authorizes *reductions* in those terms of imprisonment. This provision would create a very peculiar form of "resentencing."

So what exactly was the congressional vision of a § 3582(c) proceeding? Section 3582(c)(2) is an equitable mitigation device granted by Congress to the judiciary subject to significant regulation and control by the Commission. It is a form of equitable sentencing relief that Congress authorized the Commission and the district court, acting separately, to grant. Action by each body – the Commission and the District Court – is a necessary but not sufficient condition for this equitable sentencing relief. The District Court is authorized, but not required, to grant equitable sentencing relief in the form of an imprisonment reduction if three conditions are satisfied. First, a defendant must have

[13] 18 U.S.C. § 3582(c).

been sentenced to a term of imprisonment based on a sentencing range subsequently lowered by the Commission. Second, either the defendant, the Director of the Bureau of Prisons or the Court must move to lower the sentence. Third, the contemplated reduction must be consistent with applicable policy statements issued by the Commission. Without all three of these conditions, the District Court has no authority to reduce the imprisonment term at all. And, of course, all of the conditions are dependant upon judgments that an imprisonment reduction is consistent with the purposes of the SRA.

Congress provided more specific guidance concerning the power that the Commission has to authorize sentence reductions under § 3582(c) in 28 U.S.C. § 994(u). That provision states that:

> If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment of the offense may be reduced.

Thus, it appears that the Commission has not only the express authority, but an express statutory duty, to regulate with specificity the circumstances in which terms of imprisonment may be reduced. That is, this Commission has the power and the obligation to craft the minimum circumstances required for, and the maximum extent of, any retroactive application of the guidelines. Providing this guidance is crucial. Subject to the regulatory conditions set forth by this Commission, it thereafter becomes a discretionary decision for the District Court after considering § 3553(a) whether a particular defendant's term of imprisonment should be reduced. Of course, to further guide district courts, the Commission has already generally instructed District Courts to

"consider the term of imprisonment that it would have imposed had the [changed guidelines] been in effect at the time the defendant was sentenced."[14]

Many courts have acknowledged to one degree or another that a § 3582(c) proceeding is not a "do-over" sentencing,[15] though few courts have really attempted to articulate the full contours and implications of sentence reductions under § 3582(c), and no court appears to have adopted the interpretation advanced here. Before *United States v. Booker*,[16] this ambiguity was arguably harmless enough. This is no longer the case.

What About *Booker*? At least one appellate panel, *United States v. Hicks*[17] in the Ninth Circuit, has held that *Booker* applies to § 3582(c) proceedings. This seems inappropriate for many reasons, primarily because § 3582(c) is not a resentencing in which the guidelines apply. Rather, it is a clemency-like equitable sentencing reduction proceeding where the minimum nature and maximum extent of the reduction is, according to statute, regulated by the Commission. In exercising its discretion within those bounds, the District Court considers § 3553(a) factors. Viewed as a form of equitable sentencing mitigation, § 3582(c) proceedings do not even invoke the spirit of the *Booker* line of cases.[18] Rather, they can be analogized to a form of discretionary parole release, which is outside the ambit of the Sixth Amendment.[19]

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[14] USSG § 1B1.10(b), p.s.

[15] *See, e.g.*, *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999) ("But a proceeding under 18 U.S.C. § 3582(c) is not a do-over of an original sentencing proceeding where a defendant is cloaked in rights mandated by statutory law and the Constitution.").

[16] 543 U.S. 220 (2005).

[17] 472 F.3d 1167 (9th Cir. 2007).

[18] In *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000), Justice Stevens notes that there is a Sixth Amendment difference between "facts in aggravation of punishment and facts in mitigation. . . . If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater

Perhaps in part because it did not apparently consider § 3582(c) proceedings as the equitable sentencing relief devices I believe them to be, the *Hicks* panel did find that *Booker* applies to these proceedings.[20] It did so by asserting that "[w]hile § 3582(c)(2) proceedings do not constitute full resentencings, their purpose *is* to give defendants a new sentence."[21] It stated: "This resentencing, while limited in certain respects, still results in the judge calculating a new Guideline range, considering the § 3553(a) factors, and issuing a new sentence based on the Guidelines."[22] In short, the *Hicks* court concluded that once the Commission deems a guideline to be retroactive, a fairly normal *Booker* resentencing follows. But presumably *Hicks* would not allow for an increased sentence given the express language of § 3582(c).

Curiously, the *Hicks* court rejected the idea that the Commission's policy statements could provide a hard limit on the District Court's power to reduce a sentence consistent with *Booker*. The panel expressed this position (which is arguably dicta) by observing that, "under *Booker*, to the extent that the policy statements would have the effect of making the Guidelines mandatory (even in the restricted context of § 3582(c)(2)), they must be void."[23] In reaching this conclusion, the *Hicks* panel ignored the language of § 994(u), which when read in conjunction with § 3582(c), seems to grant the Commission the power and the responsibility to limit – and thus guide – the extent of District Court's ability to reduce a sentence based on a retroactively applied guideline.

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stigma than that accompanying the jury verdict alone. . . . Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme."

19 *See, e.g.*, Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 448-49 (2004) (discussing post-*Blakely* constitutionality of discretionary parole release).

20 472 F.3d at 1168-70.

21 472 F.3d at 1171 (emphasis in original). Once a § 3582(c) proceeding is viewed as a sentencing, Hicks's core holding that Booker applies become more persuasive.

22 472 F.3d at 1171.

23 *Id.*

Remember that § 994(u) states that the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment of the offense may be reduced." Thus, even if *Booker* somehow applies to the § 3582(c) proceeding (which, as suggested above, does not mesh with the statutory nature and structure of this proceeding), the Commission should have the power to place an absolute ceiling on the amount of the sentence reduction. This is not making the guidelines "mandatory" again; it is limiting the extent of the clemency-like equitable sentencing reduction the District Court can bestow.

What If Courts All Decide that *Booker* Applies? What if lower courts adopt the view set out in *Hicks*? What can and should the Commission do? It should still provide detailed guidance. The Commission can and should provide more specific policy statements no matter what their level of legal force. Even if they are simply deemed "advisory," these policy statements will be helpful. The Commission should, consistent with § 994(u), provide guidance concerning not only the extent of the sentence reduction but for which defendants they should apply. There may be wisdom in providing specific policy statements for each specific guideline amendment.

For example, the Commission could choose to make clear that it believes no retroactive application of the Amendment 706 should yield a sentence lower than two full levels below the sentence previously imposed. The Commission could also discourage judges from granting sentence reductions for certain offenders, perhaps for those with both a high Criminal History Category and a firearm adjustment. The Commission could also weigh in on whether a defendant who pled guilty pursuant to Federal Rule of

Criminal Procedure 11(c)(1)(C) should receive a §3582(c) reduction.[24] If *Hicks* is correct, all of these policy statements will simply be advisory. However, the Supreme Court in *Rita v. United States* gave trial judges a great incentive to follow the Commission's advice by creating a kind of appellate safe harbor. If *Hicks* is correct, the *Rita* presumption of reasonableness should attach and can be used strategically by the Commission to the degree it desires.

The Commission can also help to mitigate the logistical burden on the criminal justice system occasioned by the retroactive application of Amendment 706 by providing more procedural policy statements as well. If the Commission is so inclined, it could advise District Courts not only to work with the parties, as suggested by the Federal Defenders, but it could remind trial judges that Rule 43 excuses defendants from being present at §3582(c) proceedings, as suggested by the Criminal Law Committee of the Judicial Conference. Importantly, the Commission can encourage judges to solicit the views of the Bureau of Prisons concerning an individual's specific re-entry needs. Just as judges may decline to reduce the sentences of certain individuals at all, it may also be appropriate to provide a decreased sentence reduction (thus delaying release) for some inmates in order to allow for proper re-entry.

What if the Courts Disagree About *Booker*? The Department of Justice highlights a potential problem when it notes that there may be uncertainty and lack of uniformity concerning the applicable legal standard if some courts follow *Hicks* and others do not.[25]

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[24] Some courts have previously held that §3582(c) is inapplicable in some of these circumstances. *See, e.g., United States v. Peveler*, 359 F.3d 369, 379 (6th Cir. 2004).

[25] Some of these concerns are raised by the Department of Justice. Alice Fisher, *Letter to the Honorable Ricardo H. Hinojosa* (Nov. 1, 2007), available at http://www.ussc.gov/pubcom_Retro/PC200711_001.pdf. The Department's concern that these proceedings could not result in an increased sentence is, at bottom, a disagreement with the § 3582(c) itself and Congress which passed that law. *Id.*, at 9. The Department leaves one with the distinct impression that

While some uncertainty is inherent in any § 3582(c) retroactively applied guideline, especially after *Booker*,[26] it is arguably a larger problem in the context of Amendment 706 because of the high volume of cases.

These apprehensions cannot be allowed to spark paralysis and doom retroactivity. First and foremost, without retroactive application of Amendment 706, thousands of defendants will be serving longer prison sentences than that Commission believes – and has long believed – they deserve. Second, the Department's fear that retroactive application will unleash a tsunami of filings is somewhat curious given that the system recently survived *Booker* and has withstood other significant disruptions in the past. This worry over a potential flood of litigation also misses the point of what might happen if the Commission chooses *not* to apply Amendment 706 retroactively. This is more than the volume of creative *pro se* pleadings that may well exist regardless. In light of its years of factual findings, the Commission's refusal to grant retroactive application may raise the real specter of creative lawsuits by seasoned attorneys alleging constitutional violations (of whatever ultimate merit) stemming from the Commission's decision not to pursue the just results under the SRA that the Commission itself has identified. Society is unlikely to be better served by individual judges determining whether extraordinary relief is warranted in particular cases instead of a system of equitable sentencing reduction – however imperfect – actively managed by the Commission.

More Muscular Responses to the Uncertainty: Inter-Branch Collaboration. None of this is to deny that concerns about *Booker*-related uncertainty surrounding retroactive

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it would never want a guideline to apply retroactively. Such a result is inconsistent with Congressional will as expressed in § 3582(c) and § 994(u).

[26] Older retroactive guideline cases are working their way through the post-*Booker* system and more appellate case law should be forthcoming. Furthermore, the Commission recently made Amendment 702 retroactive. USSG App. C, Vol. III, Amend. 702 at 216

application of Amendment 706 (and other guidelines) are real. Not only can this uncertainty be reduced by the Commission as noted above (regardless of whether *Booker* applies), but the Commission can call on other governmental actors to work with it to create an even fairer, more equitable and reasoned approach. Inter-branch collaboration with the Congress and/or the President can yield a more muscular response to the concerns about uncertainty.

For example, Congress can reduce the uncertainty and lack of uniformity in any of several, related ways. First, as I have written elsewhere, Congress should create a Court of Appeals for Sentencing.

> This Court would have national subject-matter jurisdiction over at least certain aspects of sentencing law. In that way, it would be somewhat—but not completely—analogous to the Court of Appeals for the Federal Circuit's supervision of patent appeals. While Congress could direct this new Article III court to handle all criminal appeals, a less dramatic and disruptive option is available. . . . Specifically, Congress could require the Court of Appeals for Sentencing to resolve unsettled questions of sentencing law or Guidelines interpretation through a mandatory certification process triggered by request of a litigant or *sua sponte* by the traditional appellate court. It might even be possible for the parties to seek rehearing before the Court of Appeals for Sentencing of legal/interpretive issues they feel were improperly decided by the traditional appellate court. The pronouncements of the Court of Appeals for Sentencing would be binding on all other appellate courts and on all district courts throughout the country.[27]

This approach would solve more than just the problem of disparate interpretations of retroactive guidelines. It would also afford greater consistency and guidance for all aspects of federal sentencing. "By speaking with one appellate analytic voice on matters of broad sentencing policy, the judiciary would communicate more effectively with the Commission and Congress."[28]

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[27] Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 185-86 (2005) (footnotes omitted).

[28] *Id.*

There are several, more targeted variants of the Court of Appeals for Sentencing if less extensive change is desired. One option would be for Congress to direct that all § 3582(c) appeals go to a specific Court of Appeals. This could either utilize an existing Court of Appeals or Congress could create a special Court of Appeals staffed by current federal judges on a staggered term basis.[29] Another possibility would be for Congress to direct that all § 3582(c) motions be heard in the first instance by a special trial court. That court could even travel to correctional institutions if it deemed it appropriate to have numerous defendants appear before it instead of enduring the time and expense of inmate travel.

Importantly, all of these possibilities would serve to make the retroactive application of the guidelines more uniform while maintaining an individualized determination of how to proceed in each case. Of course, these options would require congressional action, which has not been forthcoming on the issue of crack sentencing.

There is an even simpler method to bring reasonable uniformity and procedural ease to the process of resolving the claims of defendants sentenced for crack offenses before November 1, 2007. It still requires Commission guidance, but *Booker* would no longer be an issue – even under the line of reasoning assumed in *Hicks*. Hard limits on who would receive a reduction and to what extent could be established in advance. Individualized determinations could still be made. Drawing inspiration from President

[29] There is ample precedent for Congress creating special purpose courts staffed by existing judges on a temporary assignment. If Congress was to follow this path, Professor Ruger makes a compelling case for *not* placing that assignment authority solely in the hands of the Chief Justice of the United States. Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004). Instead, that power could be given to the Supreme Court as an institution or to the Judicial Conference. *Id.*, at 388-89.

Ford's Clemency Board,[30] the President could issue an Executive Order directing the United States Parole Commission to review the cases of defendants sentenced under the former guidelines for crack offenses. The Parole Commission would seem to be particularly well-suited to this mission as they already engage in related tasks concerning sentence mitigation in the form of determining discretionary parole release and coordinating offender reentry.

Like the idea for specialized courts, this proposal is not something that the Commission can handle on its own. It would, however, address many of the concerns raised by the Department of Justice, especially those revolving around *Booker*, prisoner transportation costs, and excessive use of prosecutorial resources.[31] One can hope that the Department – seeing the broader arguments of fairness, equity and respect for the system that will be advanced by some form of retroactive application of Amendment 706 – may be willing to support this streamlined method.

## IV. An Opportunity for Transparency: An Academic's Non-Academic Plea.

No matter what the Commission chooses to do concerning the retroactivity of Amendment 706, it has the opportunity to improve the overall state of criminal sentencing. For more than thirty years, the United States has been experiencing a sentencing (r)evolution. The goals of reasonable uniformity and at least some form of centralized guidance have proliferated across jurisdictions. Few people would endorse the "Wild West"[32] approach of unbridled judicial discretion that reigned supreme not so

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30 Gerald R. Ford, Executive Order 11803, Establishing a Presidential Clemency Board (Sept. 16, 1974) (creating the Clemency Board, directing it to find facts and make recommendations concerning people who applied for clemency for draft evasion and related matters).

31 Of course, prosecutors will have to be involved, but not in as time-intensive a way as the Department described in its submissions.

32 Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 392 (2004).

long ago. Many jurisdictions, including the federal courts, actively strive for rationality and transparency in sentencing. In fact, those goals are particularly important in the post-*Booker* federal system with its "effectively advisory" Guidelines.[33] We ask United States District Judges to explain their reasoning so we can better understand the federal sentencing structure.[34] Greater understanding can lead to substantive improvements, and increased public respect for, as well as acceptance of, the criminal justice system.[35]

While much remains to be done to improve transparency at the trial court level,[36] the Commission has an opportunity to lead by example. The Commission should clearly and publicly explain its reasoning regardless of whether it makes the crack cocaine amendment retroactive. It is unfortunate that the Commission has not regularly given such accounts in the past.[37] Especially in light of the broad public interest in the crack amendment, this is the perfect time to begin a new, rigorous tradition of explanation.

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[33] Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142 (2006), http://www.thepocketpart.org /2006/07/berman.html. ("Instead of sentencing-by-the-numbers, *Booker* requires district courts to exercise independent reasoned judgment when imposing a sentence, and requires appellate courts to ensure sentences are both reasoned and reasonable.")

[34] *See, e.g.*, 18 U.S.C. § 3553(c)(2) (2000).

[35] *See, e.g.,* Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146 (2006), http://www.thepocketpart.org/2006/07/chanenson.html. ("Regardless, well-reasoned sentencing opinions and judicial transparency concerning sentencing are two of the best weapons judges have to bolster their legitimacy and preserve their decisional independence."); Marc L. Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & LAW 3, 4 (1989) ("Full written opinions, rather than transcripts or sentencing 'forms,' may provide the best source of commentary on the sentencing rules selected by a commission, and offer the best hope for further refinement, revision, and reform.").

[36] It has been an enduring problem for this Commission, the Administrative Office of the United States Courts, and the entire federal criminal justice system that neither the Statement of Reasons form nor other judge-specific information about sentencing is publicly available in a usable manner. It remains a source of mystery and disappointment to me why life-tenured federal judges cannot be held to the same standards of transparency as elected Pennsylvania judges. *See* Mark H. Bergstrom and Joseph Sabino Mistick, *The Pennsylvania Experience: Public Release of Judge-Specific Sentencing Data*, 16 FED. SENT. REP. 57 (2003) (discussing Pennsylvania's policy of releasing judge-specific sentencing information).

[37] *See, e.g.*, Jon Sands, *Letter to United States Sentencing Commission: Defender Comments and Written Testimony Regarding Retroactivity of Amendments to Crack Guideline and Criminal History Guideline* 5 n.24 (Oct. 31, 2007) *available at* http://www.ussc.gov/pubcom_Retro/PC200711_003.pdf ("Our ability to fully analogize to these prior retroactive amendments is constrained by the dearth of information in the public record that would shed light on the Commission's reasons for making these amendments retroactive."); *id.* at 5 nn. 23 & 24 (speculating, based on a Commissioner's comment at a

I have great faith that the Members of this Commission take their responsibilities seriously, have given, and will continue to give deep thought to whatever decision they make. Tell us about it. Tell us – in a manner accessible to all – why one argument was persuasive over the other. Help us to understand what this decision signals for the future. Serve as a shining example to the hundreds of federal judges who must make equally challenging individual sentencing decisions every day.

**V. Conclusion.**

Based on more than a decade of evaluation, the Commission took an admittedly small but significant step towards greater fairness – both actual and perceived – in federal sentencing by passing Amendment 706. While it is for Congress to truly finish this job, now is the time for the Commission to do all that it can by making Amendment 706 retroactive. In doing so, the Commission has many available options. It can act on its own to ease and narrow the implementation challenges through additional policy statements, and/or it can urge Congress to smooth the process more fully by court legislation. It can also recommend that the President take action that would functionally make Amendment 706 retroactive through non-judicial means. No matter what course it follows, the Commission should articulate its reasoning clearly and fully.

Not that many years ago, in the wake of the PROTECT Act, some observers were prompted to ask "Whither (or wither) the Commission?" This Commission has shown that by working collaboratively with the various branches of government (even when those branches disagree), it can meaningfully pursue the goals set out for it by the

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meeting, that prison overcrowding – which is not listed in U.S.SG. §1B1.10 – may also be a factor in the retroactivity decision).

Sentencing Reform Act of 1984. Making Amendment 706 retroactive is the logical next step.