

UNITED STATES SENTENCING COMMISSION

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2002 PUBLIC HEARING

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P R O C E E D I N G S

CHAIRMAN MURPHY: I'd like to call our second, or actually third public hearing in the last few weeks to order. And we do have a number of people that are going to talk to us this afternoon about a topic that we're working on this year. And we're very interested in getting the opportunity to hear from each of you. We do have to follow a very tight time limit, though. So I apologize in advance to the speakers because we are going to have a bell go off at six minutes, because everybody has eight minutes to make a presentation so that we have a little bit of time to interact if we have some questions or some comments that we feel are important to put out. And so at six minutes we'll have a little bell. And that means there are only two minutes left. So you better get to the main point if you haven't come to it yet.

And the first panel is William McColl, Director of National Affairs for the Drug Policy Alliance, and Laura Murphy, the Director of the National Office of the American Civil Liberties Union.

Mr. McColl, do you want to start us off?

MR. MCCOLL: Thank you, Your Honor.

I'd like to take a moment to thank the commission for allowing us to testify in front of you. We are very appreciative of the opportunity. The Drug Policy Alliance is a reform organization devoted to passion, science, public health, and human rights in drug policy.

Judge Murphy, when I testified last year in front of the commission, we had a short colloquy and you reminded me that we had a job to do as well as a reform organization, and that is that we need to take our message to the congress especially and to the public to create an understanding of mandatory sentences and to get our viewpoint across as well. And I believe that we have attempted to do so. And that's a little bit

where I'd like to focus today.

We believe, along with our colleagues in the ACLU and in ACDL and with the civil rights groups who have testified previously, that the time is right for change. Public sentiment is rapidly shifting from a punitive criminal justice approach towards drugs towards a public health approach. Since 1996 we have seen 17 out of 19 statewide ballot measures in support of drug policy reform passing, including sweeping treatment instead of incarceration initiatives in Arizona and California. There are now similar initiatives on the ballot in Michigan, Ohio, and Florida. And we're hoping Florida will have an opportunity to vote on this.

Legislatures across the country have passed dozens of significant reform measures, including the elimination of sentencing in some cases. Indeed, President Bush, our drug czar John Walters, DEA administrator Asa Hutchinson, and in fact despite the testimony that we will hear today, the Attorney General have all indicated their willingness to at least reexamine mandatory minimums.

Republican Senators Jeff Sessions and Orrin Hatch have already introduced legislation to deal with the crack versus powder disparity. Although we believe that by increasing penalties for powder cocaine, their bill will harm certain individuals who would not currently be harmed. So we are concerned that, first of all, with the crack/powder disparity that it creates gross racial and class disparities in how we treat our offenders. It is out of whack with the general organizing principles applied to other drug. And that is that those persons who are at the top receive the highest sentences. In fact, with crack persons at the very bottom of the chain receive extraordinary sentences in comparison to the harm that they are doing.

And while Congress has limited the commission's ability to propose a 1 to 1 ratio, we urge the commission to raise the crack cocaine threshold to as close to the powder cocaine threshold as possible without lowering the powder cocaine threshold. Raising powder cocaine penalties only result in more non violent cocaine offenders, predominantly hispanic, being subjected to harsh mandatory minimums.

Our recommendations therefore are that we propose statutory--that the commission, rather, propose statutory and guideline revisions reducing the crack versus powder cocaine sentencing disparity and raise the crack threshold as much as possible as I just suggested. That we approve the proposed amendment eliminating cross reference to the drug trafficking guideline for possession of 5 or more grams of crack cocaine. And we urge the commission to recommend to Congress that it thoroughly, thoroughly reexamine mandatory minimum sentencing laws.

We urge the sentencing commission not to approve the proposed amendment to consolidate the two alternative base offense levels for renting or managing an establishment where drug offenses may occur.

And I do want to go to that. I believe that the issue du jour is the crack versus cocaine. However, we are concerned about the crack house waive amendment. We are deeply

concerned that the commission's proposed amendment to consolidate the two alternative base offense levels for renting or managing an establishment where drug offenses occur will create problems for innocent businessmen. The current guidelines distinguish between businessmen operating an establishment where some of their customers commit drug offenses and businessmen who operate such an establishment and participate in the drug offenses.

The proposed amendment blurs these distinctions and subjects innocent business owners to increased penalties.

Drug use goes on in night clubs, restaurants, and indoor and outdoor events all over the country despite the best efforts of business owners to prevent it. Ironically, the government is punishing honest business owners for not being able to prevent their customers from using drugs when the government itself can't keep drugs outside of prisons.

Increased penalties will threaten high reduction strategies. And, indeed, we are concerned that free expression through music will also be threatened by these establishments, particularly with the waives.

So in conclusion what we would like to do is ask the commission again to propose statutory and guideline revisions reducing crack powder cocaine or approve the proposed amendment eliminating the cross reference to the drug trafficking guideline for possession of 5 or more grams of crack cocaine. Again, we recommend to Congress that it thoroughly reexamine mandatory minimum drug sentencing laws. And we are confident that if it does so, they will find that these sentencing laws have created inequities both racial and based on class in relationship to drug offenders.

And then finally, Congress should not approve a proposal to consolidate the two alternative base offense levels for renting or managing an establishment where a drug offense occurs. I'm open to any questions.

CHAIRMAN MURPHY: Actually, I have a question, and I'm sure others do too.

You mentioned that there were some recent state initiatives that change drug policy. And you mentioned Arizona and California. Where did the initiatives for that change come from? What were their concerns, if you could, you know, just briefly--

MR. McCOLL: Well, I think first of all I'd like to say that the initiatives originated with an organization called Campaign for New Drug Policy. And their concerns largely were the fact that particularly in California, but also in Arizona, that we had such an escalation of the number of prisoners, particularly non violent prisoners related to drug offenses, that there needed to be something done. That it's uncharacteristic of the United States to put so many people into prison. Therefore, the proposal that they came up with was to create an alternative sentencing scheme that allowed offenders to opt to go into treatment.

One of the things that we're really proud to say that we're seeing and initial reports are just coming out about California, but reports have been out about Arizona for some time now, is that these sentencing schemes do seem to work. They are reducing the costs associated with prisons. They are lowering the number of prisoners. And, indeed, people are finding that they have much more access to treatment.

Quite frankly, my organization would like to see treatment occur outside of the criminal justice system. But, of course, that's a little bit beyond the scope of the commission. But we are working in that area as well to increase treatment options.

COMMISSIONER SESSIONS: I wonder if you've reviewed the Leahy/Hatch bill that is now before Congress on mandatory minimums which suggest, there's a provision in that bill which would require or ask the commission to address mandatory minimum penalties. And you're asking us to contact Congress and to reconsider mandatory minimum penalties. At the same time they have a bill to tell us that we're suppose to do the same thing. And I'm wondering which one comes first.

MR. McCOLL: Well, I have to say that I believe that the commission's report is the first opportunity for meaningful debates since probably 1995 around this area. So I certainly urge the commission to move as far as possible to meet those recommendations, the requests of Congress. I'd say that Senator Leahy and Senator Hatch have expressed extraordinary interest in this. And actually, that's one of the reasons that we're saying that the time is right to recommend changes. We believe, frankly, that the commission got it right in 1995. We'd like to see the commission report as close to 1995 report as possible.

CHAIRMAN MURPHY: I guess we'll turn to Ms. Murphy here and maybe there will be more time for questions.

MS. MURPHY: Thank you, Commissioner Murphy and the other commissioners. It's a pleasure to have the opportunity to testify on behalf of the American Civil Liberties Union, which is an organization that's over 80 years old and has over 300,000 members nationwide. And I just want you to know that some of us have not forgotten the fact that it was this commission that made the courageous recommendation to remedy the disparity in sentencing between crack and powder cocaine in 1995.

It's, indeed, unfortunate that Congress blocked those recommendations. But we do believe that public sentiment towards drug policy has changed during the last 5 to 7 years. And if you were to try to modify the guidelines now, we believe that Congress would be more receptive. And it's noteworthy, as my colleague has pointed out, that even Senator Sessions, one of the most conservative members of the Senate Judiciary Committee, has been one of the members most involved in considering legislative changes to cocaine sentencing policy.

I won't go through the states that you mentioned that have also passed ballot initiatives on this issue, but I will say that we've also noticed that a lot of conservatives have stepped up to the plate in the last five years, conservative

columnist Arianna Huffington quoted President Bush as saying, "I think a lot of people are coming to the conclusion that maybe long minimum sentences for first time users may not be the best way to occupy jail space or heal people from their disease."

And I think the President is putting some money where his mouth is by offering a greater financial commitment to spend more money on drug treatment. For 2003, for example, the Administration proposed \$3.8 billion for drug treatment, an increase of more than 6 percent over 2002.

The ACLU has been very concerned about the role of mandatory minimums in our society. And we commissioned a poll last year. And we are offering to brief the commissioners on these poll results, because I think they show that the American attitudes and opinions on this issue are changing. It's--the study that we did revealed a strong dissatisfaction with the current state of the criminal justice system in the United States and abiding popular confidence in the goal of rehabilitation and alternative punishments.

And I'll just tell you a few of the key findings. The majority of Americans, 61 percent, opposed mandatory sentences that require an automatic sentence for non violent crimes. Most Americans believe that it's possible to rehabilitate non violent offenders and consequently, the overriding goal of prison is not punishment deterrent or retribution. A large majority of Americans want prisons to focus more on skills training.

Another finding was that the public draws a sharp distinction between trafficking in illicit drugs and buying, possessing, and using illegal drugs. While most believe drug dealers should always be sent to prison, far fewer agree that users, minor possessors or buyers should always be incarcerated. And that's a standing offered to brief you and your staff on the findings of that poll.

Since 1993 we have played a leadership role on this issue of the disparity between crack and powder cocaine sentencing. We held a conference here in Washington, D.C. that brought together pharmacologists, scientists, law enforcement officials, and civil rights leaders. And I dare say that had it not been for those efforts, you would not have had such broad testimony from civil rights groups such as the Leadership Conference on Civil Rights and the National Council of La Raza to name a few.

But we've also been working with conservative organizations, such as Americans For Tax Reform, the Competitive Enterprise Institute, the CATO Institute, the Eagle Forum, Concerned Christian Americans, and the National Review Magazine. They have all criticized current drug policy and called for reevaluation.

So we believe, therefore, that there is momentum on the side of the commission to make change at this time. And we also believe that the Congress lags behind the sentiment of the American people. So we are committing ourselves to work with you if you, if your goal is to reduce or eliminate this disparity.

Even though there is a lot of talk about equalizing the sentences. I strongly urge you not to raise the powder cocaine sentences in the process of coming out with your recommendations. Cocaine sentences are already severe. And increasing the number of people incarcerated for possessing small to moderate amounts of cocaine is not the answer. Raising penalties for powder cocaine increases the number of bed spaces needed in federal prisons. And to accommodate that need, resources that could be better put toward treatment will go into subsidizing more prison beds.

Because of current federal drug enforcement patterns, there is every reason to believe that increasing powder penalties will mean a disproportionate number of people of color, primarily Latinos, will be going to prison. And, of course, the war on drugs in general has created a host of civil liberties problems for our society, including asset forfeiture, racial profiling, erosion of Fourth Amendment Rights, increases in wire taps, internet surveillance, prison overcrowding, and felony disenfranchisement, to name a few.

Should the commission decide to reduce the disparity, I hope it would do so with the following points in mind, because I still think the commission plays a very important role in public education. Please clarify the outdated misperceptions that the same level of violence is associated with crack as it was over a decade ago. Many have argued that there is so much violence associated with crack that it's use deserves stiffer punishment and they have failed to recognize that judges already have the power to take in mitigating circumstances such as acts of violence in sentencing crack users. And please emphasize that cocaine is cocaine. The effects on the human body are largely the same. And you've had testimony on that very point.

And to the extent possible, I wish you would emphasize that punishment should be based on criminal culpability instead of a quantity based mode. Quantity based sentencing does not necessarily punish the most culpable offenders. Furthermore, quantity based sentencing can be manipulated by the government for sting operations and charging decisions.

I want to raise two other points with you before I conclude. One is, in our testimony we also address some of the other changes that you are about to propose. We urge the commission not to adopt the definition of domestic terrorism that Congress passed in the Patriot Act. USA Patriot Act did not require the commission to adopt its definition for purposes of creating a guideline definition. The current definition in the Patriot Act is overly broad and can sweep within it conduct which is not what common sense tells us is terrorism. We urge the commission not to amend the terrorism definition or to write a more stringent definition that is not so broad, e.g., add an element that the crime had to be a serious violent offense, instead of any crime that poses a danger to human life.

And there is an other issue concerning hoaxes. The commission is considering whether to amend guidelines for the treatment and threats of--and hoaxes. We urge the commission not to do so for two reasons. We support guideline 2 and 6 which differentiates between an intentional act and a threat to commit an act where the person does not have the

ability or intent to carry it out.

Also, Congress is considering a number of hoax bills. It seems likely that at least one bill will pass this year. Therefore, we think it's prudent that the commission wait until Congress acts in this area. Thank you very much for the opportunity to testify.

CHAIRMAN MURPHY: Thank you.

Professor O'Neill?

COMMISSIONER O'NEILL: I just had one question. Would it be possible--you mentioned about the possibility of giving us a briefing with respect to the survey. What I was wondering is would it be possible to get an actual copy of the survey instrument and also like an executive summary of its results?

MS. MURPHY: Yes.

I brought an executive--I didn't know the best way to give this out. But we have an executive summary for your use, if I give it to a staff person I can make copies available to you. And also, will have no trouble sharing with you the survey instrument.

COMMISSIONER O'NEILL: Okay. Thank you.

MS. MURPHY: But I think it would be even ideal if the firm that we use, Feldman & Stewart talked about the way they formulated the questions, how this survey is different from other surveys so that you can really have a full understanding of what the public sentiment is in this area.

COMMISSIONER KENDALL: Who did they survey?

MS. MURPHY: It was a significant sample size. We conducted the interviews between January 5, 2001, through January 22, 2001, 2,000 adults, 18 and older in the United States. Margin of sampling error is plus or minus 2.2 percent.

COMMISSIONER KENDALL: What community did they use?

MS. MURPHY: I'm trying to remember if we did a subgroup on African-Americans. Do you recall if we did a subgroup, any subgroups?

I think it was a national sample that reflected the diversity in our national population. But I can, I can find out further. I'm not sure whether or not we did a subgroup on this.

CHAIRMAN MURPHY: I think that we appreciate very much the offer to have a briefing for us. We're at that time of year, you know, where every endeavor has calendars. And crunch comes. And so I think that's what's prompted. I mean, there's a--we're interested in that.

MS. MURPHY: I don't mean to stand for the proposition that polling should guide what should be a principle decision. This should be a principle decision. And I think you've done the research to justify what you recommended to Congress in 1995. But in its rejection of that proposal, we have to come forward with something slightly different.

CHAIRMAN MURPHY: I understand that.

MS. MURPHY: I hope it doesn't vary greatly.

CHAIRMAN MURPHY: In effect you ended your testimony with something to that same effect about recognizing that there are decisions not just about what might be the best policy but also the best way for a group like ours to put that forward.

MS. MURPHY: Yes. And I do think there was an earlier question about Commissioner Sessions about, you know, which comes first the commission or the Congress. I think it's important to have a convergence of activity to demonstrate, especially to the Administration, that there really is an opportunity for us to work together on a common goal. That the commission shouldn't be over here acting at cross purposes with the Congress. And I think a number of members of Congress have stepped up to the plate. And I just find what the Administration is about to say tragic, because I don't think the sentences are proper. And I think so many national leaders realize that the sentences right now for crack cocaine are not proper.

CHAIRMAN MURPHY: Are there any other questions?

[No response.]

CHAIRMAN MURPHY: We thank you very much.

MS. MURPHY: Thank you.

CHAIRMAN MURPHY: It's really very helpful to us.

And we've got the Criminal Defense Bar representatives in the next group here. Irwin Schwartz, President of the National Association of Criminal Defense Lawyers, and Jon Sands, Assistant Federal Public Defender for the District of Arizona, and A.J. Kramer, from the District of Columbia Federal Public Defenders.

Mr. Schwartz, I guess I first learned about your publication last year when you had an editorial that had something to say about us and Ecstasy. And I wrote you a letter--

MR. SCHWARTZ: My predecessor, Your Honor.

CHAIRMAN MURPHY: Is that right? I wrote a letter back. I'm always interested in people who are following what we do and so on. That was, of all of the proposals we had last year, we had so many, Ecstasy did create the greatest public interest. But anyway, now here we are this year. So, Mr. Schwartz.

MR. SCHWARTZ: If it would please the commission, I think Mr. Sands will open.

CHAIRMAN MURPHY: Whatever. I don't care. We have it the other way, but--

MR. SANDS: Sure. Mr. Kramer and I wish to depart from the heartland of thanks to say we are extraordinarily gratified in being asked to come in front of you to discuss this important topic. We're dealing with crack and the disparity from the ratio. We applaud the commission for dealing with this difficult subject.

While we applaud the commission, we are dismayed with Administration and with the view of the Department of Justice that no change is necessary. The commission has undertaken an extensive study both in 1995 and recently has heard evidence, has asked questions, has looked at the area and has found that the ratio cannot be scientifically justified. Yet, the Administration says that things should stay the same. The commission, to its credit, says no, and is looking at changing this. It must simply for the moral conscience of such a position.

MR. KRAMER: I also want to thank the commission for their studies on the crack cocaine reports as well as the mandatory minimum studies which I think are extremely intellectually honest and say absolutely the right thing. I come from a district that's particularly affected by the crack cocaine sentencing disparities. The national average of drug cases crack was 21 percent of the cases. In the District of Columbia, it's over 55 percent of the cases. So we're double the national average.

The government has succeeded in the District of Columbia of locking up almost a whole generation of young African-American males. More than 50 percent are young African-American males in the District of Columbia are either in prison or on some kind of criminal justice supervision. The crack sentences have led to that, not only are the percentages being high, but the length of the sentence is being extraordinary and have led to numerous perversions of the guidelines by law enforcement and the government, including a DEA agent who gave testimony that when people have tried to sell him powder cocaine--when little street dealers have tried to sell him small amounts of powder cocaine, he would ask them to go cook it into crack cocaine, which is a very simple process and takes only a few minutes, they would go cook it into crack cocaine and come back and sell it to him for the same price and he said that his only reason for doing that was to get them up into the mandatory minimum in the higher guidelines penalties of crack. And we had a whole series of cases in the District of Columbia where that happened.

So not only is the disparity unwarranted because of the difference in the drugs, it also has a tremendous racially disparate impact which now the commission has told Congress about on several occasions.

COMMISSIONER JOHNSON: When did this hearing take place in which the DEA agent said that?

MR. KRAMER: It was actually during the trial and then it took place again at the

sentencing hearing. I have a transcript of it that I would be happy to send the commission.

COMMISSIONER JOHNSON: I'd like to have that.

MR. KRAMER: Yeah. Absolutely. I will send it to you.

And this kind of manipulation I think just shows the tremendous disparity in the crack, unwarranted and on racial lines.

MR. SANDS: The commission should not wait. And the reason it shouldn't wait goes to a matter of weight. I've brought some demonstratives. I like showing things. What we have is two, in two small--

COMMISSIONER O'NEILL: Hopefully not recovered from your former clients.

MR. SANDS: No. No. No. These are sugar cubes, sugar cubes. Here are 2 sugar cubes and a little fragment. That is a mandatory 5 years. Compare that with powder, which has, oh, an extra 5 sugar cubes in a pound. This powder is 5 years for a mandatory for powder. From this to this. The only difference is you take a little baking soda and you put it in a microwave or you bake it up and you have this transformation. Even more stark is the 5 pound bag of sugar, this is still under the mandatory 10 for crack. But, yet, when you compare it, this is all in the same ballpark. Finally for 10 years for crack, we have approximately 25 sugar cubes. That visually is what we are dealing with.

And that is why we favor the approach of the 1 to 1 ratio. You have heard science on this. You have seen that there's been no pharmaceutical difference in effect of the crack.

Congress in 1995 said to study it and to come back. And you've done that. Now, we realize that Congress has also said that traffickers and king pins should be treated differently. So if the commission wishes to make a distinction, we would urge you to look at the role and the function. And we have seen in your own data that traffickers, that the king pins, that the managers are really at the 250 gram level in the crack, about 125 of those sugar cubes. That is what your data is showing. And that would be an appropriate point of saying that those who are dealing that amount or higher might be punished more severely.

So one way you could do it is a hybrid approach which is a 1 to 1 ratio up to 250 and then to impose a higher penalty after that. That looks at the role and continuous with the commission's approach which is to look at a person's culpability and what he or she is doing. It also has the effect of following the states which basically have not differentiated between crack and powder cocaine.

COMMISSIONER JOHNSON: The 36 or 38 states don't differentiate?

MR. SANDS: It is above 30 and it is a, it is a majority.

COMMISSIONER SESSIONS: 38.

MR. SANDS: 38. Close to 40.

COMMISSIONER JOHNSON: We haven't figured the District of Columbia in there.

MR. SANDS: Or Guam or the Virgin Islands.

COMMISSIONER JOHNSON: That's right.

MR. KRAMER: It doesn't have the right to vote for Presidency.

COMMISSIONER SESSIONS: Isn't that another issues that you want to talk about?

MR. KRAMER: You're classed as a state, but I won't go into that one.

I'll show you that this is safe, by the way. The other thing we would ask the commission to do is if they make these amendments about crack retroactive, the commission took the principled stand on marijuana and LSD departing from quantities pegged to the mandatory minimums with respect to marijuana and LSD and hopefully the commission will take the same step with crack. And the commission made both the marijuana and LSD amendments retroactive. And the reason, the whole reason for the crack amendment is that the commission studies have shown that it's been an unjustified disparity with unwarranted racial connotations in it. And that has obviously been since the beginning. That's not something that occurred halfway through that it started to become unwarranted. That occurred from the beginning. And therefore, it should be for the same reasons of marijuana and LSD amendments were retroactive, it's been unjustified and unwarranted since the beginning.

And we would ask that the crack amendment be retroactive as well, because there's a huge number of people who are serving these enormous unwarranted penalties in the federal prison system.

MR. SANDS: My closing thought is to urge the commission to continue on this path to look at role. We are in favor of capping the minimal and minor because that looks at the culpability. Quantity is a poor marker. A role and a cap will address that. On the other hand, importing the many career offender into the drugs has the effect of bringing criminal history into a place it shouldn't be. Thank you.

CHAIRMAN MURPHY: Mr. Schwartz?

MR. SCHWARTZ: Thank you.

I'm a criminal law practitioner of 30 years experience. I started as an Assistant U.S. Attorney and then like Mr. Kramer I was Federal Public Defender for my district. Then after I left that, I went into private practice.

And I think back what the most important lesson that I learned was the lesson I learned

from my first chief judge. That what matters most in the way criminal justice is conducted is the appearance of justice. The public, those who are accused, the families of those who are accused must perceive the system as operating fairly. And as criminal justice professionals, all of us can say that we have strived for that.

But one of the biggest obstacles to a public perception of fairness is the disparity in the treatment of crack and powder cocaine. When families come to me and wonder why their kid got as much time for a few rocks of cocaine as somebody, usually with a newspaper article, as somebody who is a wholesale distributor of powder cocaine, when they ask me why it is that the white boy got less time than the black boy who had a fraction of the cocaine, I can't answer that question. I can't tell them that there is a scientific basis for it. I can't tell them that there is a logical basis for it. But I do have to tell them that it's a very sad fact of life.

When a client who is convicted for 5 grams gets a mandatory 5 year sentence and goes off to the institution, how do I explain to that young man that he shouldn't be bitter about the fact that the guy he's sharing a cell with sold 20, 30 times more cocaine in powder form and is getting less time. And how do I explain to that same young man that when he gets out of prison, he shouldn't be bitter about his experience. He should put it behind him and go on. When we know that he will not have the same opportunities, when we know that there are avenues foreclosed from him.

And if he's someone who has had a prior encounter with the law, I'll give you a specific example of a young man I represented who had a prior to aiding and abetting the sale of 1 marijuana cigarette, a \$5 marijuana cigarette, resulted, as you know, in doubling the mandatory minimum for him. And so here is a fellow at the age of 23 who is looking at 10 years in prison as a mandatory minimum. And how could I explain to him as a matter of logic that when he got out at the age of 31 and-a-half, that the difference in the form between the rock form and the powder form was going to be one that made a difference in the rest of his life? It's not logical. It's not scientific. And the public perceives it as not only unfair, but unfair with a disparate racial impact.

And we in the criminal justice system know that among the greatest tasks set before us is to come to a system that is racially just. When we fail in that, we see what happens in cities like Cincinnati. And yet when we talk with minority communities in our home states, time and again we are asking how this disparity that so adversely affects minority populations is permitted to exist?

When I was asked the question most recently, I responded that in 1995 this commission had gone to Congress and said it was time to change it. And the effort was not successful.

What I ask you to do and what the American people need for you to do is to take that position again by proposing an amendment that does correct the disparity in the difference between crack and powder cocaine. Not all good ideas are accepted the first time around. Hopefully, we have learned a great deal since 1995. And hopefully, the appropriate decision will be made this time around as people recognize the need for it.

I suggest proposing an amendment rather than going with a recommendation so that the debate is elevated to the congressional level where it can be joined in by many more than those who participate in discussions before the commission, where it can be more closely followed by the media, and by the American public.

When they have a debate on whether or not to eliminate the disparity between crack and powder, I would feel comfortable if it was on C-Span so at least some of the American people will be able to firsthand watch and hear the debate and understand what is at issue here. To us this is a fundamental issue of justice and of racial justice within the criminal justice system. The commission was right in 1995. That position is still right.

I join on behalf of NACDL with the others who suggest it is time to eliminate this disparity so that we don't have to try and explain to people the illogic that sends young black people to prison and young hispanic people to prison for far longer than white people dealing in exactly the same controlled substance. Thank you.

CHAIRMAN MURPHY: I had a question to go back to Mr. Kramer for a minute.

I just have read something, some statistics that suggest that the number of blacks convicted of crack offenses has actually gone up compared to the time period in which the statutes were used. Do you know anything about that?

MR. KRAMER: I think that is right, Your Honor. A more disturbing statistic, I think, is from the Sentencing Commission's own statistics where the percentage difference between the sentence as far as powder and crack have almost essentially doubled from 1992 to 2000. There are about 25 percent higher, the sentencing differential for crack over powder. And in 2000 the differential was well over 50 percent. So not only have the number of blacks, I believe, increased, but the sentencing disparity has almost doubled over the past eight years.

MR. SANDS: Plus the focus has changed in that crack is primarily neighborhood and local and powder is international, regional, and a more broader scope.

MR. KRAMER: And I can tell you that the vast majority of crack offenders in D.C., there are the big, you read about the big gang cases in the paper where there's murders and there's 6 or 8 defendants and they're convicted. And they're all sentenced to life. And I frankly think nobody has a quarrel that that's an appropriate sentence when there's dead bodies lying around.

The vast majority of crack offenders in the District of Columbia are very low level street dealers with no violence. The problem is they may have a prior conviction for simple possession or something that puts their criminal history, makes them ineligible for the safety valve. And I recognize the mandatory minimums are an enormous and all this. But the vast majority of crack offenders in D.C. are very low level street dealers, not the ones you read about in the paper, the big show trials.

COMMISSIONER JOHNSON: What is your opinion on this Sessions bill?

MR. KRAMER: I have to say obviously anything that would help in taking away the mandatory minimum sentence and alleviating that problem, which I recognize is obviously a big stumbling block, and the Sentencing Commission's mandatory minimum study in 1991 showed that the District of Columbia had the highest percentage of mandatory minimum sentences. So that's also a big problem here. It certainly would be extremely helpful if something was done to alleviate that.

COMMISSIONER O'NEILL: I can guess this sort of from the get go. But obviously the Department of Justice, I don't know if you got a chance to read the Deputy Attorney General's testimony, one of the considerations made there--one of the things we have to be concerned about are the victims. We've just seen in D.C. just within the past two weeks people going out and demonstrating and wanting to take back the night to make their street safe again.

From the department's perspective, the attitude is we not only have to worry about those individuals that we are incarcerating, but we have to worry about the people who are trying to be law abiding citizens, holding down jobs, trying to get work, whose neighborhoods are being devastated by these drugs and by the circumstances. And so in the department's view, it's we need to take people off the streets while making it possible for good law abiding to live. And, in fact, perhaps the solution ought to be if we want to sort of eliminate this appearance of disparity which certainly exists both in fact and as an appearance matter, by raising powder penalties. How do you answer sort of the victim's standard objection the department would have lowering the crack penalties and the signal that that sends out to communities?

MR. SANDS: No one is saying or has said that powder cocaine penalties are too low. A person who is found guilty and is punished is facing a significant amount of time for powder cocaine for which he is facing even more time for crack and a period of supervision. We are sensitive to the need for the community. But it makes no sense to punish a minority 100 to 1 ratio for the type of drug that there is no pharmaceutical difference.

I know that the Administration says that there are differences, but they're grasping at straws. Part of the abundance, as the testimony was here was from a market shake out. We are seeing that in meth too. It is also impossible from a scientific viewpoint to give you a number, a ratio as to what is worse than what. There is a hierarchy of drugs, but no scientist is going to say that crack is the worst or is 100 to 1.

MR. KRAMER: I also think another answer is that you go after the right people. It's one thing to go after the gangs who committed a number of murders. It's a whole other thing to go after the, which is much easier picking, the street level dealers and manipulate their sentences so they get higher.

And my guess is, and I recognize that obviously victims are a major concern and just rightly so. But I will guess that if you ask those people who are marching on the

streets of D.C. what they thought of the crack cocaine penalties, they would say the exact same thing the three of us have said. That it's just you should go after the people who have committed the murders and that it's terribly racially and scientifically and morally unjust to imprison the low level street dealers for vast amounts of time as compared to other dealers. And that has nothing to do--that is almost in an absolute sense as well--

COMMISSIONER O'NEILL: Now, one of the other claims that are made, of course, is that it's important to have mandatory minimums and higher penalties at the low end, otherwise you might think just for the idea that we need to have those people to be able to go after those people to move higher up the food chain, in order to get people to turn state's evidence, to, you know, give witness against people that are likely to be mid-level or higher level.

In your personal experience, and I recognize this is all anecdotal, it isn't a part of the Department of the Justice as well, but just in terms of your own personal experience in the Defense Bar, have you seen many of your clients who fall in the lower end of the scale being used to get people higher up the chain?

MR. KRAMER: No. Just the opposite, which I think is a problem with the 5 k guideline. But it also ties into this. It's just the opposite. And I'll give you a concrete example, not an anecdotal, a very recent one. I have a client who was caught with less than half a gram of heroin who is serving a 17 year--has 17 1/2 year sentence because a ring leader of the gang testified that he once sold him 62 grams of crack. No proof or anything of that, just their testimony. This person who admitted to several murders, several robberies, is out on the street. He's been released. He didn't--he served less than a year in prison who committed a number of robberies. My client caught with less than 1/2 a gram is serving 17 1/2 years. It has just the opposite effect. The low level people don't know enough. They're too scared and they don't know enough. The high level people are the ones who are getting out. There's no question that, that--and I think that a study of the 5 k I think that's been documented the problems with the, that you're not getting--the low level people are not getting the breaks, it's the high level people.

MR. SCHWARTZ: In both of the questions you asked, to respond to both at the same time, no one is saying don't take drug dealers off the street. And no one is saying don't try to persuade, induce, or threaten low level people into testifying against higher level people. But what we are saying is, if you are going to say take drug dealers off the street, you do great damage when you say we'll take the white drug dealers off the street for two years and the black drug dealers off the street for five years. And you do a great deal of damage when you say we'll make it impossible for the black drug dealer not to roll over on somebody, but it won't be nearly as harsh for the white drug dealer.

CHAIRMAN MURPHY: We've got a couple of other--

MR. SCHWARTZ: And all the stats show that that's what's happening.

CHAIRMAN MURPHY: We have a couple of other people dying to ask questions. So I thought you were done there.

MR. SANDS: I am.

CHAIRMAN MURPHY: I'm sorry.

Judge Sessions and then Judge Kendall?

COMMISSIONER SESSIONS: A.J., I'm interested in your 55 percent figure. Of the 55 percent of all of the criminal cases in Washington, D.C., the crack cases, what percentage of those involve cases between 5 grams and let's say 25 grams, essentially really small players? And that's the first question.

And the second question is that one of the side effects of guidelines which may be perceived to be unfair is that the courts sometimes adjust by I shouldn't say subverting the guidelines, but choosing to divert from the guidelines. And I wondered if in Washington, D.C., from your experience that happens?

MR. KRAMER: Let me answer your question with a simple I don't know the statistic, the number. And it has fluctuated over the years. There have been periods when 5 grams would get you prosecuted in federal court in the vast majority of 5 to 10 gram cases. It seems now that it's somewhat higher amounts, although that has fluctuated too even over the past several years.

Judges, there is very little--the D.C. Circuit had a case decided several years ago that said you cannot depart from the disparity in the crack and powder sentences. Every other circuit has said that as well. So there has been very little leeway, and Commissioner O'Neill's question, there's just been very little leeway for the little crack dealers who can't get the cooperation either. And the D.C. U.S. Attorney's Office, unlike many other districts in the country where the rates of cooperation fluctuate wildly, has a very strict policy on what you need to do to get substantial assistance. And most of the little people can't meet that anyhow. So I would say that the district judges in D.C. have had a very difficult time with first time, with small level crack dealers.

MR. SANDS: Watch out for the danger of relevant conduct too. Someone may do a small amount, but if he or she is doing it over a month or two, then it becomes a large amount.

CHAIRMAN MURPHY: I should say, Mr. Kendall, right?

COMMISSIONER KENDALL: Whatever. I've been called--question directed primarily in 30 years of experience, this debate is so much formulated along the lines of comparing ratios of powder and numbers that--how they were derived, I'm not real sure way back when. But in your experience would you compare crack cocaine and the societal harms that you see if it could be possible to return to those days of yesteryear with your

prosecutorial hat on but look--compare the societal harm that you see in your practice between those involving crack distribution, methamphetamine distribution and heroin distribution inasmuch as we currently punish crack 20 times as severely as heroin and 10 times as severely as meth?

MR. SCHWARTZ: I would put heroin at the top of the list in terms of societal harm, and methamphetamine second. And I would put cocaine far down the list, much closer to the marijuana end of the spectrum than I would toward the heroin end of the spectrum.

COMMISSIONER CASTILLO: Mr. Sands, would you disagree with that at all?

MR. SANDS: I think I would raise meth up above heroin just because of a person can work and use heroin. With meth it might be a different point. But, once again, crack and cocaine are lower. It's very hard to do a hierarchy of the dangers and abuses that drugs do. Look at the role, look at what the person does.

CHAIRMAN MURPHY: Commissioner Steer?

COMMISSIONER STEER: I wanted to ask Mr. Kramer and members of the panel a question about retroactivity. Before I do that, I just thought I'd put on the record some data that are in the commission's possession about the crack census in D.C. The median quantity is 77 grams for 57 cases for which we had the weight in FY 2000. And 10 of those cases, or 17 1/2 percent were less than 25 grams. For whatever that's worth.

Now, retroactivity, Mr. Kramer, you asked that the commission make any amendment retroactive. Of course, if we were to promulgate an amendment, we would be statutorily bound to consider retroactivity. Now, the--I don't know that the commission has ever confronted problems as anywhere near the magnitude that we would have to confront in order to make such a change retroactive. We don't have any idea how many thousands of cases or crack defendants are in prison serving sentences that might be reduced if the amendment were made retroactive.

So one question I want you to comment on is do you think the system could handle that? Particularly in a sense if we do an amendment, it might be likely that the commission would include in that amendment some new enhancements for which no factual record had been made at the original sentencing hearing, perhaps additional enhancements for weapons use, violence, drug use in protected locations. The ordinary approach to making an amendment retroactive would require that the court consider all of that when it is--not just the change and the quantity or ratio. So that's it in a nutshell as far as, you know, what would be your comment? How is the system going to--

MR. KRAMER: Well, I think a couple of things. First of all, again the perception of fairness is almost as important as fairness many times. The marijuana and LSD amendments were made retroactive. The vast majority of offenders imprisoned for those were white, but they were made retroactive. The vast majority of offenders for crack are obviously black. You say can the system handle it?

I think the simple answer is as the commission's study showed that the reason the commission recommended changing the ratio was because it was unwarranted, unjustified, and unwarranted disparity. I don't think just because of facilitating administrative reasons you keep people in jail whose sentences you've said are unwarranted and unjustified. Sure, can they be reassessed with whatever amendments the commission makes--what you said, weapon use or use of violence, sure. My guess is that the vast majority of those people are already serving very high sentences in any event because of the weapons or the violence that was associated with their offenses.

What I think you're really talking about are the low level street dealers without significant criminal history, you know, without violence and probably without a gun involved, which would be very easy to calculate. And I think that the fact that there might be a large number of these doesn't--it just shows how unwarranted it is. You don't keep them in and say it's just too hard for us so all of you people who have received this unwarranted and racially disparate sentences should be left in because we just can't--there's too many of you that we treated unfairly to begin with. So now we're going to treat you unfairly again I think is what you really--is what their argument really is.

COMMISSIONER CASTILLO: Mr. Kramer, when you're talking about low level dealers in terms of crack, what kind of level are you talking about just so I know?

MR. KRAMER: Well, there was a time in D.C. a number of years when our office first opened in 1990 and for a number of years thereafter, when anybody with 5 grams or more was prosecuted in federal court, 5--I think I ate the 5 grams, it was on the table, but anybody was prosecuted for 5 grams. That, that is a very small amount of crack. And most of them had, most of them--and it obviously came from that 10 pound bag, cut a number of times by somebody who made hundreds of thousands of dollars probably on the 10 pound bag while the street person made \$50 on the 5 grams. So there are, there are large numbers of people around the country, not just in D.C., I think that's a--as I said, our district has been particularly affected by it.

COMMISSIONER CASTILLO: Let me ask the question this way. If you were sitting at this table instead of that table, how would you define on the basis of your experience a low level crack dealer?

MR. KRAMER: Well, you're right. It may be easy--I think the commission's 25 gram level is certainly a valid cutoff level. 5 grams is so low. Somebody who has 5 grams is probably going to use part of it in any event. They're caught with the 5 grams in little baggies, they're going to use some of it, they're going to sell some of it, they're going to give some to a friend for something. I, I certainly think that at a minimum the 25 gram level that's been proposed. I think, frankly, it should be--and I understand the commission tried it--that it should be equalized with the powder obviously. But there are, if you--I mean, I think it would take, I think a study on people who have had no other enhancement supplied for weapon, managerial role, that would be very easy to figure out. And they probably fall into that category. And I think there's a vast number of them, and it's probably even higher than 25 grams.

CHAIRMAN MURPHY: Mr. Schwartz, do you want to respond to that also, that question of Judge Castillo about low level--

MR. SCHWARTZ: I wouldn't have anything to add to what Mr. Kramer said.

COMMISSIONER KENDALL: Can I just follow-up on that question? No low level dealer can afford to hire Mr. Schwartz.

MR. SCHWARTZ: Can I order a transcript, please?

COMMISSIONER SESSIONS: If I can just follow-up. You take low level dealer and mid level dealer, and somewhere there's a line between low and middle. And are you suggesting that 25 is the line?

MR. KRAMER: No. No. There is a minimum. Let me defer to Mr. Sands to correct.

MR. SANDS: I think it's the 250 grams that the commission has focused on with the offender, which is drawn from your own data.

MR. KRAMER: I left the zero off. I apologize.

MR. SCHWARTZ: He does that in the budget process as well. It's caused a lot of trouble.

MR. KRAMER: It seems like it happens to my salary.

CHAIRMAN MURPHY: When you ate all the crack.

[Laughter.]

MR. KRAMER: That's why I can't keep the numbers straight.

CHAIRMAN MURPHY: Can't resist telling that when the staff gave a presentation that they use macadamia nuts.

MR. KRAMER: I wish Mr. Sands had done that.

CHAIRMAN MURPHY: Any other questions?

[No response.]

CHAIRMAN MURPHY: Well, we really appreciate your input. And the Deputy Attorney General is slated to speak in about 7 minutes. So I have a minute free before he begins.

MR. KRAMER: Thank you.

MR. SANDS: Thank you.

MR. SCHWARTZ: Thank you.

[Brief recess at 4:15 p.m.]

CHAIRMAN MURPHY: We're just about ready to begin. I just want to be ready so that we can start immediately upon his entrance.

I would say that the fourth panel involves the representative for the Judicial Conference of the United States. Judge Sim Lake is going to testify for the subcommittee by video conference. We only could have one TV screen in here. And so you may not all be able to look at the screen, but you will be able to hear his testimony.

Standing here, waiting for you, I had thought we wouldn't waste any time, because we do know we want to have enough time with you, Deputy Attorney General Thompson, we're very glad that you've come over.

We have had a chance to briefly look through your written materials. We've had a meeting all day, and we're glad to have the opportunity to be able to ask you some questions. We're all ears now.

MR. THOMPSON: If you will first permit me to pour some water?

CHAIRMAN MURPHY: Absolutely.

I was just explaining that our next panelist is Judge Sim Lake who has a trial in Texas. So at some point presumably he's going to come out and sit in that chair. And then we'll know that we'll have to finish up.

MR. THOMPSON: I believe you have my prepared--

CHAIRMAN MURPHY: We do. We have looked at it, but we haven't had a chance to really read it carefully yet.

MR. THOMPSON: I have a statement that I would like to present to the commission with your permission. It is not by any means just reading a prepared testimony. It summarizes my prepared formal testimony and sort of enhances that if you permit me to go through that. And then we'll ask questions, if that's okay with you?

CHAIRMAN MURPHY: Yes, it is.

MR. THOMPSON: I appreciate the opportunity to appear before the Sentencing Commission this afternoon to discuss the important issues of federal drug sentencing policy. The focus of my testimony this afternoon will be on sentencing policy for crack and powder cocaine offenders. We have forwarded to the commission written comments on the other proposed amendments to the sentencing guidelines published in the Federal Register in January.

Now, at the outset I would like to thank the commission for being responsive to many of the Department of Justice's concerns regarding federal sentencing policy. In particular I want to make special note of all the work the commission is doing and has already

done in response to the passage of the USA Patriot Act. We deeply appreciate your efforts to implement the important new substantive criminal law and sentencing provisions of the act. This work is a critical part of the country's ongoing fight against terrorism.

The commission has asked for specific comments on whether federal cocaine sentencing policy should be amended. And for the reasons I will lay out in detail, we believe the current federal sentencing policy and guidelines for crack cocaine offenses are proper. And that it would be more appropriate to address the differential between crack and powder cocaine by recommending that penalties for powder cocaine be increased. Moreover, we will oppose any effort by the commission to issue guidelines that do not adhere to the congressionally enacted statutes that define and prescribe penalties for federal cocaine offenses.

Ladies and gentlemen, we are guided in all of our work on drug policy by the President's comprehensive national strategy to fight illegal drug use. As you may be aware, the strategy seeks to expand the national drug treatment system while recognizing the vital role of law enforcement in interdiction programs. The strategy recognizes that the individual consequences of drug use can be deadly to the user and that the consequences for society are no less serious.

Unfortunately, drug use continues to plague this country at unacceptably high levels. According to estimates generated by the National Household Survey on Drug Abuse, 2.8 million Americans are dependent on illegal drugs. An additional 1.5 million are non dependent abusers. In the year 2000 Americans spent almost \$63 billion on drugs. Of that, approximately \$36 billion was spent on cocaine alone.

We understand that the commission is considering lowering penalties for crack offenders. After thorough study and internal debate, we have concluded that the current federal policy and guidelines for sentencing crack cocaine offenses are proper. It would therefore be more appropriate to address the differential between crack and powder cocaine by recommending that penalties for powder cocaine be increased.

Current research shows that crack is an extremely dangerous substance for many reasons. The most common roots of administration for crack and powder calls crack to be the more psychologically addictive of the substances. This makes crack cocaine more dangerous, resulting in far more emergency room episodes and public facility treatment admissions than powder cocaine. Despite the fact that powder cocaine is much more widely used.

Further, crack can easily be broken down and packaged into small and inexpensive quantities for distribution, sometimes as little as single dose quantities for just a few dollars, making it particularly attractive to some of the more vulnerable members of our society.

As Professor Randall Kennedy has noted, because it is relatively inexpensive, crack has had the dubious achievement that it helped tremendously to democratize cocaine use. Crack dealers have fulfilled its promise by marketing it to these vulnerable groups.

Additionally, the open air street markets and crack houses used for the distribution of crack cocaine contribute heavily to the deterioration of neighborhoods and communities. Both the scale of marketing and its open and notorious nature enable many who would not previously have had access to cocaine powder to purchase, use, and become addicted to crack cocaine.

The present crack market is associated with violent crime to a greater extent than that of cocaine powder. Crack offenders are more frequently associated with weapons use than powder cocaine offenders. For example, in the year 2000 weapons were involved in approximately 10.6 percent of federal powder convictions and 21 percent of federal crack convictions. Federal crack offenses are also more frequently associated with violence and bodily injury than powder offenses.

Although the commission has proposed separate enhancement for offenders who employ weapons, violence by offenders themselves is only a portion of the crime that crack causes and thus would not reflect the dangers and the true nature of the use and distribution of this drug. Crack is linked to robbery and assault by customers seeking to finance their habit. Crack is strongly linked to prostitution as well. In one recent study, almost 87 percent of women surveyed were not involved in prostitution in the year before starting crack use. And fully one third became involved in prostitution in the year after they began to use crack. Women who were already involved in prostitution dramatically increased their involvement with rates nearly four times higher than before beginning crack use. And because of the incidents of prostitution among crack users to finance their habit, crack cocaine smokers have been found to have rates of HIV Infection as high as those among IV drug users.

Another recent study found that women who use crack cocaine had much higher than average rates of victimization than women who did not. Among an Ohio sample that I would like to bring to the commission's attention, a sample of 171 adult female crack users, 62 percent had been physically attacked since the onset of crack use. Rape was reported by 32 percent of the women since they began using crack. And among these, 83 percent reported being high on crack when the rape occurred as were an estimate 57 percent of the perpetrators.

These and many other statistics and studies tell the story of the devastation that cocaine and crack cocaine specifically bring to the nation, especially its minority communities. Lowering crack penalties would simply send the wrong message. The message that we care more about crack dealers than we do about the people and the communities victimized by crack. That is something we simply cannot support.

Further, lowering crack penalties is inconsistent with a rejuvenated national fight against illegal drug use. As we indicate in the national drug strategy, effective drug control policy reduced to its barest essentials has two elements. One, modifying individual behavior to discourage and reduce drug use and addiction, and, two, disrupting the market for illegal drugs. We think lowering crack penalties fails on both counts.

Now, we recognize that this commission and others have expressed legitimate and strong concerns that the current federal cocaine sentencing policy tacitly directs federal enforcement resources toward lower level drug traffickers. With this in mind today the Attorney General announced a new federal drug enforcement strategy that seeks to identify and target the most significant drug and money laundering organizations operating across the country for federal investigation and prosecution.

And as part of this strategy, I will personally be coordinating all of the department's drug enforcement efforts which will place increased emphasis on intelligence based targeting to reach the most significant drug trafficking organizations. We think that this new strategy, together with existing sentencing mechanisms, such as the safety valve and substantial assistance departures, will go a long way towards addressing the concerns over low level offenders and federal drug sentencing policy.

If the commission decides to amend the penalty structure for crack and powder cocaine, we strongly urge you to make only recommendations to Congress and not to issue guidelines amendments. By issuing guidelines the commission would, we believe, effectively decouple the guidelines from the mandatory minimums passed by Congress.

The Department of Justice opposes and has historically opposed departing from the penalty scheme established by Congress for two principal reasons. First, a sentencing system consisting of guidelines that are inconsistent with federal statutes could produce potentially a rash of sentences providing a 10 year sentence under the mandatory minimum statute for a defendant who trafficked in 50 grams of crack, while providing a far lesser sentence for an individual who trafficked in a 1/100th of a gram less.

Such a system would fail to honor the congressional mandate set forth in the commission's organic statute to avoid unwarranted disparities among defendants with similar records.

Second and more fundamentally, decoupling would disregard Congress' express wishes. The current mandatory minimums are the law of the land. The commission should not ignore the law and impose its own will in the face of clear congressional action. By changing the guidelines before any change in the existing provisions of Title 21, the commission would be doing just that, ignoring the existing law.

In our constitutional system, we believe the sentencing commission exists to effectuate the express will of Congress. The Supreme Court's decision upholding the constitutionality of the Sentencing Reform Act is fundamentally premised on the belief that Congress had appropriately dealt with the commission and set forth the commission's discretion.

As the court noted in *Estrata*, Congress instructed the commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the U.S. Criminal Code. We believe it would be wrong to depart from that understanding.

We appreciate the chance to share our views with the commission. We think the commission should be guided by the words of President Bush. And I'd like to read them to you. "We must reduce drug use for one great moral reason. Over time drugs rob men, women, and children of their dignity and of their character. Illegal drugs are the enemies of ambition and hope. When we fight against drugs, we fight for the souls of our fellow Americans."

Thank you so much for allowing me to present that opening statement. And I will be pleased to try and answer any questions that you may have.

CHAIRMAN MURPHY: I'm sure that there will be some. Professor O'Neill?

COMMISSIONER O'NEILL: Deputy Thompson, I just would first like to take a moment to thank you and the Department of Justice for coming here and representing the department and testifying for us today. And I also would like to thank the great work that the Bureau of Statistics and the National Institutes of Justice and also the Executive Office of the U.S. Attorneys have done both in providing the commission and also me personally with important statistics from the department. It's been very helpful not only in this, in dealing with the whole crack powder cocaine issue but also many of the other sentencing guidelines issues that we've been dealing with.

One of the things that interests me about your testimony from the beginning is that you seem to suggest that if we are going to change, if we're going to make any changes, to do it by recommendation, that perhaps we ought to consider raising the powder penalties. Is it the Department of Justice's position that current powder penalties for powder cocaine are simply too low? And if so, what evidence do we have that we need to raise penalties to achieve some of the aims of deterrence and retribution that 18 USC 3553 and the other congressional sentencing statutes set forth?

MR. THOMPSON: I'm not aware of any specific information that we have regarding the fact that the existing powder penalties are too low. What I was suggesting that if you wanted to address the concern that some have expressed with respect to the disparity between crack cocaine and powder cocaine, what we would suggest that the way to do that would be to increase the powder penalties as opposed to lower the crack penalty.

COMMISSIONER O'NEILL: Does the Department consider the mere fact that there is a discrepancy or a differentiation between crack and powder that the appearance of that has been something that, you know, some various groups has suggested is a problem because it affects the appearance of justice--does the Department consider that to be a problem in and of itself?

MR. THOMPSON: Professor, I do not believe that the Department considers that to be a problem at all. In fact, after undertaking a very extensive and intensive internal study on this issue, we have certainly come to the conclusion, and I have come to this conclusion personally too, that the existing guideline treatment for crack cocaine is appropriate given the nature of that substance, given the enormous victimization consequences to the use of this drug, the consequences it has on the quality of life of

the communities in which a lot of the users and distributors operate. We submit that the existing guidelines are appropriate.

COMMISSIONER O'NEILL: Even so, I mean, even recognizing all the harm that's involved and even if we give you the fact that crack is associated with greater violence, greater addiction, that it has more of an impact on the community, is it 100 times greater than powder cocaine, at least in the way the current ratios are set up regardless of what actual impact that they may have when prosecutors actually prosecute out cases? As a policy maker, that's obviously one of the things that we have to struggle with.

MR. THOMPSON: And I understand that. And as we have looked at the actual difference, the actual disparity, it's not 100 times. There's not 100 times disparity between the crack cocaine and the power cocaine. It's something a lot less than that. I don't recall the specific statistic, but it's in my formal testimony. So I think to say that there's a 100 times disparity or 100 disparity is not accurate.

And we believe, again, given the information that we've examined and reviewed the information that's before us, we believe the appropriate way to handle this is to keep the guideline levels as they are now. And as I mentioned in my testimony just recently, that we redeploy our resources and our effort with respect to drug trafficking and distribution. And I think that will answer some of the what I would call legitimate concerns, I will say they are legitimate concerns with respect to the appearance that this disparity or so-called disparity might present. I think that that is the better way to deal with that issue as opposed to lowering the crack penalty, Professor.

CHAIRMAN MURPHY: Judge Kendall has asked for the floor.

COMMISSIONER KENDALL: I just had a couple of questions.

MR. THOMPSON: Yes, sir, Judge.

COMMISSIONER KENDALL: Is the Administration's position from reading this, I want to make sure I'm understanding, that crack cocaine should be punished more harshly than powder cocaine?

MR. THOMPSON: It's our position that the sentencing levels and guidelines should stay as they are. There are some--I don't want to avoid your question directly, but there are some--

COMMISSIONER KENDALL: No, neither do I.

[Laughter.]

MR. THOMPSON: But I'll have to answer it first. There are some, I think, very, very disturbing empirical data regarding the use of crack cocaine, the impact it has on the community, the surrounding community, with respect to the person who uses it and how

that affects his or her conduct. There is also some I think very disturbing data I think with respect to the consequences of trafficking in crack cocaine with respect to increased crime, increased murder, the effect it has on prostitution, the effect it has on the victimization of women. Those are, I think, very, very disturbing statistics.

And to the extent that we have the disparity that we have today, I do not think it's inappropriate, given those consequences, Judge, that affect the quality of life in those communities in which the crack use and distribution seem to be flourishing.

COMMISSIONER KENDALL: Would that be, yes, that you believe that it should be treated harsher than the powder?

MR. THOMPSON: To the extent that the guidelines treat it more harsh today, then yes.

COMMISSIONER KENDALL: Well, a prior witness quoted the President, let me quote that was said in January 2001 by President Bush that in talking about the crack disparity, "It ought to be addressed by making sure that powder cocaine and the crack cocaine penalties are the same."

Is that no longer the Administration's position, they shouldn't be the same?

MR. THOMPSON: As I understand what the President said, he was talking about equalizing penalties, not the triggers for the mandatory minimums. And what we--not the triggers for the mandatory minimums. And what we would suggest is that if you are concerned about the disparities from the standpoint of recommendations, then the way to address that, we would prefer, is to increase the penalties for powder cocaine, Judge.

COMMISSIONER KENDALL: Let me just say, so the record is clear on this, I happen to be one who agrees that--and I don't, I'm not bashful about saying it, that from everything I've been able to read and study, crack cocaine does present more societal harm than powder cocaine does and should be punished more harshly. However, I'm not at all convinced it's 100 times more serious.

Given that, coupled with what everyone tells us is the widespread perception, rightly or wrongly, in the black community--and this comes from Black Congressional Caucus, from the Leadership Conference on Civil Rights, that rightly or wrongly there is a perception that the current penalty structure amounts to enshrined institutional racism given that some of us are former judge and judges that, you know, the appearance of impropriety or the appearance of unfairness can be as bad as the reality of it.

Given this perception, how do we address that perception to an entire segment of our society who has at least a historic distrust and feeling that the criminal justice system has not always been totally fair with them? What do we do about it?

MR. THOMPSON: I would like to answer both parts of your comment and question.

First of all, I do not believe that the actual figures reflect that there is 100 times

disparity.

COMMISSIONER KENDALL: Is that a consequence of prosecutorial decision?

MR. THOMPSON: Among other factors and enforcement patterns, etcetera. That's number one.

And number two, I understand, I understand the criticism especially among some in the African-American community and some leaders. What I would respectfully suggest is that some of that criticism may be misplaced. Some of that criticism may be incomplete, because in my considered judgment it doesn't take into consideration the victims, most of whom are African-American also.

And, Judge, I have been dealing with some of these issues for a great deal of my life too. And I've been active in a number of community organizations. I served as the Chairman of the Board of the Atlanta Urban League for two years. And I respect, I really respect--I'm not trying to say that these concerns are not valid or legitimate. I respect the concern that is expressed.

I would just submit that it's incomplete. We haven't looked at the victims and we haven't looked at the quality of life in these communities. And I would suggest that the way to deal with this issue is through the way we direct and deploy our prosecutorial and investigative resources. And we're not in favor of wholesale locking up of young men, first time offenders, with no prior history for a 5 year mandatory minimum. That's not what we want to do. And I would suggest that the better way to handle that is to deal with your enforcement priorities, how--what kind of drug enforcement issues are you trying to target from the standpoint of federal resources.

However, if you do end up with an individual who is in the ambit of our current trigger, and that individual, for example, has a prior or is an active drug trafficker, if that individual refuses to cooperate with the law enforcement authorities, if that individual refuses to accept responsibility, if that individual through his or her past conduct in the way they react to being caught trafficking in drugs, if they don't come within the ambit of the safety valve, then I would suggest that a severe punishment for them, even if it represents a slight disparity from the powder cocaine, is appropriate.

COMMISSIONER KENDALL: One last, I only have one last question and it's in response to something that you said about the delinking of the penalties.

Given that already there is a delinking from the mandatory minimums for other drugs, for example, LSD, if we did do an amendment delinking from the mandatory minimum and letting the mandatory minimum do what it does in the area of LSD, for example, function as a trump, how would we be violating the law as you seem to say?

MR. THOMPSON: I think that that's--the mandatory minimum is congressionally mandated and I would just suggest that that's something that Congress should deal with.

And may I follow up?

COMMISSIONER KENDALL: Sure.

MR. THOMPSON: Your point caused me to think about another issue with respect to race.

We always have to be sensitive to these issues. And I understand that there are a great deal of individuals in the African-American community because that's the community in which I have lived all of my life have some concerns about law enforcement. But there are other disparities in the way we handle and enforce our drugs. For example, with respect to meth, 60 percent of all the defendants are white. With respect to LSD, 94 percent of the defendants are white.

Yes, we need to be concerned about these disparities. But I don't look at the disparity as it relates to crack cocaine and automatically jump to the conclusion that we are operating a racist drug enforcement system.

COMMISSIONER KENDALL: I agree with you. I'm just saying that's the perception.

MR. THOMPSON: I understand that.

COMMISSIONER KENDALL: And I'm saying that that's something that as policy makers you don't dismiss lightly, even if you think they're dead wrong.

MR. THOMPSON: And I would ask you to consider what I've informed the commission today. And that is that we would like to address that concern. We think the better way to do it is through deployment of our prosecutorial and law enforcement resources.

CHAIRMAN MURPHY: Everybody wants to have time to have a dialogue with you.

We've got to give Sterling Johnson, Judge Johnson a chance here.

COMMISSIONER JOHNSON: Welcome to the Sentencing Commission.

MR. THOMPSON: Thank you, Judge Johnson.

COMMISSIONER JOHNSON: Who was my colleague before in another life in drug enforcement issues.

The disparity issue has been recognized by a lot of people, and one of those persons is Senator Sessions. And he has a bill in, whether you like it or you don't like it. What is the Administration's position on his bill with respect to lowering the penalty on crack?

MR. THOMPSON: Judge Johnson, could you refresh my recollection as to exactly the parameters of Senator Sessions bill?

COMMISSIONER JOHNSON: Instead of 100 to 1, 20 to 1. He also wants to raise the powder,

wants to raise it up, but a little bit, yeah. But it's neither here nor there. But what is the Administration's position with respect to his bill?

MR. THOMPSON: Well, I haven't studied his bill and I appreciate you giving me the parameters of it. And I couldn't say what the Administration's position would be on Senator Sessions' bill, all the provisions, but I would just say this, that with respect to changing the triggers, the Administration does not believe that that's appropriate. We believe the better way to address the issue is that individuals like Senator Sessions and other people have legitimately raised is to deal with it through our redeploying our enforcement resources. We just do not believe that's the way to handle this issue.

CHAIRMAN MURPHY: What is that--just a question about redeployment. The media indicates that a lot of federal law enforcement has to now be targeted to terrorism. And I won't go into any of the details that I've heard. But does that mean that there will be fewer resources available to redeploy on drug policy issues?

MR. THOMPSON: Certainly in the short term there has been a certain diminution in our available resources both in the FBI and Customs and for DEA. But in the long term, we will get those resources back. This is an important issue for the President. It's an important priority for the Attorney General. This is one of our top law enforcement priorities to effectively, and we think and we believe, more smartly deal with the supply side of this important problem. And as we get all the law enforcement resources back to the original efforts that they were designed to do, then we will redeploy them and go after the organizations, the leaders in the organizations, try to go after the finances. And we think that's the better use of federal resources. We don't want to, as I said before, we don't think that it's appropriate to target low level, first time offenders. That's not what we need to be doing from the use of our federal resources.

COMMISSIONER CASTILLO: Deputy Attorney Thompson, you mentioned prosecution and not dependence, does the Administration have any opinion as to how the crack drug compares to meth? Do they have any opinion on that at all?

MR. THOMPSON: I'm just simply not familiar with that comparison, sir.

COMMISSIONER CASTILLO: We don't understand that when it comes to this ratio, this is--in the first Administration has just said 100 to 1, everything's fine. You understand that reasonable minds can differ on that. And we're going into this again. The commission before in 1995 studied this, in 1997 studied this. Our view in looking at some of the victimization studies that you mentioned, some of them which predate the 1995 report, the 1997 report, and also predate drug Czar McCaffrey's opinion, Attorney General Reno's position, the Criminal Law Committee, the U.S. Probation Officers, they all disagree with the 100 to 1 ratio.

And in light of all that, the Administration still believes that the current drug penalties are, in fact, appropriate?

MR. THOMPSON: I have a response on two levels.

COMMISSIONER CASTILLO: Sure.

MR. THOMPSON: First of all, we don't accept that it's a 100 to 1 disparity. If you look at the actual data, the disparity is a great deal less.

COMMISSIONER CASTILLO: You're saying the actual sentences?

MR. THOMPSON: Exactly.

COMMISSIONER CASTILLO: Okay.

MR. THOMPSON: I think that's what you should be looking at. So that's number one.

And number two, we think especially given the times that we are--and the demonstrated link between drug trafficking and terrorism, we think we would be sending absolutely the wrong message to the American people, but more importantly with respect to crack we would be sending the wrong message to the victims of crack use and crack trafficking.

CHAIRMAN MURPHY: Commissioner Steer?

COMMISSIONER STEER: I'll defer to being on a tighter schedule.

CHAIRMAN MURPHY: Oh, that's right.

Judge Sessions?

COMMISSIONER SESSIONS: Thank you very for coming.

MR. THOMPSON: Thank you.

COMMISSIONER SESSIONS: You talked about the need to really follow the direction of Congress and respect what Congress has expressed to us.

MR. THOMPSON: Yes, sir.

COMMISSIONER SESSIONS: And I agree with that completely. We go back to the beginnings of the mandatory minimums, Congress said that when we apply mandatory minimums, they should be applied, take the 5 year mandatory minimum to essentially mid level dealers, not the street level dealer.

MR. THOMPSON: Yes, sir.

COMMISSIONER SESSIONS: That often times you see in crack cases. So that Congress has, in fact, expressed this intention that mid level dealers should get 5 year mandatory minimum as a general matter, and high level dealers should be getting a 10 year mandatory minimum. So that when you transfer that concept that Congress gave us to

crack cocaine, would you say that a person who deals or for that matter possesses 5 grams is necessarily called a mid level dealer or is at some higher figure like 25 grams or 40 grams or 50 grams? So if you're actually trying to follow what Congress has said, we need to figure out where the mid level dealer is. And is it in your view 5 grams?

MR. THOMPSON: I certainly don't think it's 25 grams. Based on what I understand is the translation between a gram and the dose, 5 grams of crack represents between 10 to 50 doses of crack. To me, and based upon my understanding, that is indicative of a mid level dealer, especially at the 50 dose level. And I think that's entirely consistent with the congressional mandate in terms of the mandatory minimum.

CHAIRMAN MURPHY: Commissioner Steer?

COMMISSIONER STEER: In 1986 Congress established the mandatory minimums for crack cocaine and most of the other street drugs. Of course, there were not yet any sentencing guidelines in effect. But you were starting to help us write them and appeared at one of our regional hearings in Atlanta. When Congress had a, I'll call it a bundle of concerns about crack cocaine, they took all of those things into account, the collateral violence and the greater victimness, the marketability to young people, the whole host of concerns, and rolled them into these mandatory minimum quantity ratios. And that, it seems to me, was quite appropriate for Congress to do at the time.

Now, of course, we have the sentencing guidelines. And we can take some of the factors that are concern about crack and more likely to be a concern like weapon use and possession into account directly in the guideline structure. We have been talking about ways of doing that in an enhanced fashion. I note from your testimony that that approach, whatever merit it may have, can never be perfect. But it can go further, we think, than what we have done.

Why is not that concept of now trying to take some of those factors into account directly in the guidelines and unbundle them a little bit, at least partially, from what we have put into that, that mandatory minimum quantity ratio, why is that not in your enlightened and fair sentencing policy in trying to assume that the mandatory minimum appropriately reflects all of these factors?

MR. THOMPSON: I think it's appropriate to take into consideration those enhancements. As I mentioned in my testimony, we believe that that simply doesn't reflect all the systemic consequences that flow from crack trafficking. And therefore, because it doesn't reflect I guess I would call it some of the upstream consequences, almost always very negative, we would suggest that it's not appropriate at this point in time, especially at this point in time to change the triggers or any way lower the penalties for crack cocaine. It just doesn't reflect all the consequences in our judgment.

COMMISSIONER O'NEILL: I think it's terrific that the Department is considering redeploying its efforts in terms of how it plans on fighting drugs. I think for a long time I think we had a chance to have this discussion with Attorney General Reno as well

about whether or not there should be national prosecutorial declaration policies or whether there should be just sort of general guidelines with prosecutors offices throughout the country given the fact that our individual circumstances and jurisdictions change and that the federal laws ultimately don't. And obviously the Federal Government with scarce resources has to have priorities and has to decide what its priorities are.

Just a couple of things that I would ask about with respect to your testimony and something you mentioned here, and also with respect to the redeployment issue. With respect to redeployment and also with this issue about in fact the way the guidelines actually work, is that it's only about I think 2 1/2 times or 2.9 times, you know, more severe in terms of the penalties for crack, vis-a-vie the penalties for cocaine powder, where the rubber meets the road, where the prosecutions actually occur in terms of what actually happens to the defendants. Could that, in fact, reflect some sort of an understanding based upon prosecutors in the field and defense attorneys and judges that the penalties as set up in the guidelines and as set up even in the statutes with respect to the mandatory minimum terms, frankly are out of whack? And this is in part a response to the field to try to bring penalties and people, at least perceived to be, not entirely appropriate to try to bring those penalties more in line with what reality is. Because even looking at the individual systemic harm that's occurring, part of the difficulty is that I think there's not probably a disagreement even in the defense--well, maybe, I don't know--I was going to say even the Defense Bar, that drug use is a terrible plight on society. And that there's no doubt that it has enormous consequences for communities.

But ultimately, of course, with respect to the Sentencing Commission, what prosecutors do and what individual defense attorneys do, are representing individual clients based upon their culpability for their specific actions. It's difficult to hold them responsible for the larger societal consequences of untoward conduct. We all just have to figure out what we're trying to sort of struggle with here is to determine what's the appropriate quantum of punishment for an individual who gets caught up in the criminal justice system who chooses to violate the law. And what's that appropriate ratio looking at crack versus powder versus marijuana versus methamphetamine? Is it really the case that this 100 to 1 ratio is appropriate? Can we, given the existence of mandatory minimums, really use the offense ultimately to affect the final penalties because of the way the mandatory minimums trump those penalties? Perhaps if the department supported us on getting rid of some of the mandatory minimums, and that might be more helpful in some of the circumstances.

But looking at the way the penalties are actually meted out, at least consider the fact that perhaps this is a reflection of the field in looking at a problem with the penalties as they currently exist and a way of ameliorating those penalties where the rubber actually meets the road.

MR. THOMPSON: That's an interesting question. And I don't know whether that's the product of some informal--

COMMISSIONER O'NEILL: I don't know either.

MR. THOMPSON: I will tell you this. After talking to several U.S. Attorneys and several Assistant U.S. Attorneys who, none of whom I talked to would support lowering the crack penalty, one of the things they are concerned about in terms of the way this actually operates in the field is that to increase the trigger and actually have a negative effect on law enforcement because it would reduce the ability of some defendants to cooperate. In other words, there would be no reason to cooperate. COMMISSIONER O'NEILL: Do we have empirical evidence on that? Because it's something we obviously hear anecdotally quite a bit. And I just, I would love to see it.

MR. THOMPSON: I'm not aware of--we may have it. I'm not aware of any, but I can tell you that that's what I get a lot in terms of anecdotal information when I talk to United States Attorneys and Assistant United States Attorneys who are doing drug enforcement work full time.

CHAIRMAN MURPHY: I know Judge Kendall says he has just one little bitsy question, but I'm really worried because Judge Lake has been waiting for half an hour. And he was on our screen and he stepped aside, I think. He's back in Texas where he had a trial. And he's going to testify on behalf of the Judicial Conference. So this little bitsy question on that will have to be the last one.

COMMISSIONER KENDALL: With regard to the announcement today, and I assume it will be in your press release, something with regard to this new policy initiative.

MR. THOMPSON: Yes, sir.

COMMISSIONER KENDALL: Will it be batched with a national declination policy that makes sure that the local case agent, the local AUSA out in the hinterlands aren't doing their own thing and are continuing for statistical reasons, to focus their prosecutorial efforts on low level dealers?

MR. THOMPSON: That's a good question.

We have no plans to have a national declination policy. But I can tell you that what we are going to do is closely monitor our drug enforcement efforts. Each of the nine regions, the OCDEF, Organized Crime Drug Enforcement Task Force Regions are being required to submit plans, to submit targets. This information will be closely monitored. I'm a little concerned about some kind of national declination policy because things vary from region to region and locality to locality. But we are going to closely monitor our drug enforcement efforts to make certain they are consistent with the Attorney General's directive. We're certainly going to do that.

CHAIRMAN MURPHY: Well, I would just like to in closing, Deputy Thompson, again thank you for coming. And I want to assure you that we take our responsibilities under sentencing reform act very seriously. And as you know, we have been studying the data and research all year and we are going to study the position papers and your underlying

statements very carefully and give it consideration. And it's been very helpful to be able to talk with you about it today.

MR. THOMPSON: Thank you so much for allowing us the opportunity to address the commission. And I want you to know that both the Attorney General and I appreciate and respect the very important and hard work you're doing.

CHAIRMAN MURPHY: Thank you.

MR. THOMPSON: Thank you.

CHAIRMAN MURPHY: Judge Lake, can you hear?

JUDGE LAKE: Yes, I certainly can hear.

CHAIRMAN MURPHY: Okay. Judge Sessions is sitting on the second circuit tomorrow and he has to leave for New York. It's nothing personal.

COMMISSIONER SESSIONS: Would you tell him to not hold it against me that I'm going to be on the Court of Appeals?

JUDGE LAKE: Just give deference to the last decision of the district judges.

COMMISSIONER SESSIONS: Absolutely. Thank you, Sim.

CHAIRMAN MURPHY: We understand that you're in trial and we appreciate your willingness to appear for our hearing. It's too bad that you aren't here, because we would love to be able to have you in person. And we've gotten your statement. We've had a chance to read that. But as always, we're very interested in what the criminal law committee and your subcommittee would have to say on issues of importance.

JUDGE LAKE: Thank you, Chairman Murphy, for allowing me to participate by video. I'm in the midst of a longstanding patent trial, and I can assure you I'd rather be with you than be in this trial. But nevertheless, I wanted to express the views of the Criminal Law Committee.

I'm not going to belabor the views that we've already submitted in writing. I know it's an hour later there than it is here. I wanted to comment on a proposed amendment change that I received after we submitted the written comment. I'm referring to the proposed amendment on discharge terms of imprisonment which I received late last week. And I have a comment and then a question if it would be appropriate to address that matter.

CHAIRMAN MURPHY: Go ahead.

JUDGE LAKE: The policy statement which appears in Section 5(g)1.3(b)(2) looks fine. That's something that I think I can speak for the entire committee that we would support. I think it accomplishes the objective that we set out in Judge Wilkins' letter to you last December.

But I have a question about what I understand the change to be in (b)(1)(A). And in particular I'm concerned about the language that says the court should adjust the sentence for any period of imprisonment already served as a result of the conduct fully taken into account in determining the offense level for the instant offense if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons.

That appears to be new language. And I'm wondering what the basis for that change is.

COMMISSIONER STEER: Actually, Judge, I think it's simply moving language that is now in the commentary up in the guidelines.

JUDGE LAKE: All right. Well, that--I'm concerned about the ability of probation officers in district courts to know whether at time of sentencing the Bureau of Prisons will take that into effect, has taken into effect. I, like many other district judges, receive a lot of mail from the guests of the Bureau of Prisons. They frequently complain that the Bureau of Prisons has not calculated the sentence as they understood the district judge's to have sentenced them. And from a practical standpoint, even if it's merely shifting language from the commentary to the guidelines themselves, I just am concerned that this language might precipitate more correspondence from sentenced offenders and make the job more difficult for those of us, probation officers departments and on the federal bench who have to apply this new language.

CHAIRMAN MURPHY: Well, we aren't set up really to--we discussed this a little bit today and we can talk about it again tomorrow at our meeting. We thank you for raising the question.

JUDGE LAKE: All right. I don't have any additional comments, other than those I have already expressed in writing. I'd be glad to answer any questions or--either precipitated by my comments today or any questions you may have about our written submission or any other matter that you may wish to ask me about. Obviously, I cannot give you the informed view of the entire committee, but I can give you my view as an individual and their representative.

CHAIRMAN MURPHY: Well, as you know, the focus of our hearing today and also on most of the hearing we had in February is on the cocaine policy. And we made two types of comments about that. One related to, you might say a substantive comment about what a change might consist of. And then the other was you might say a procedural point about whether the commission should make a recommendation or promulgate a guideline.

I wonder if you could just give us your views both about--the reason that we're running late is because the Department of Justice and the Administration have come out with their position on this. And we just received written testimony today and Deputy Attorney General Thompson came to talk with us. And so it was our first chance to have any little dialogue on that. And you haven't had the benefit of seeing that written document.

But while all of that is still fresh in our minds, if you could tell us the committee's position about whether the crack levels are appropriate in your committee's view and about your position on cocaine?

JUDGE LAKE: I think the committee, as we said, strongly endorses dramatically lowering the current 100 to 1 crack to powder cocaine ratio without increasing the guidelines for powder cocaine. I did listen to the question and answer part of the previous presentation from the Justice Department.

As you know, the Criminal Law Committee is not in a position to conduct studies and suggest what the correct ratio should be. But I think every member of our committee, without regard to their background, feel that the current ratio too severely punishes defendants who are responsible for crack cocaine.

To follow up on something the previous speaker mentioned, the disparity is ameliorated to a great degree, I think, because of the way, at least in my district, prosecutors decide which type of crack cocaine offender to indict. I don't think in almost 14 years on the bench I've ever sentenced a defendant for possession with intent to distribute or conspiracy with intention to distribute crack cocaine who was in criminal history category one. The typical offender I see has been through the state system two or three times for selling drugs and is ultimately referred to the federal system, and is not some first time street level dealer. He is a third or fourth time street level dealer.

So I share some of the previous speaker's views. But in the real world, the guidelines do not, as applied are not as harsh as they appear on paper. Nevertheless, I also share the commission's concerns, as indicated in the proposed amendments, that this is nevertheless a stark ratio and that perhaps the anti social conduct associated with the sale of crack cocaine could be addressed by guideline amendments increasing the offense level for that anti social conduct, while perhaps lowering these 100 to 1 crack cocaine going to powder cocaine ratio.

Is my answer responsive to your question?

CHAIRMAN MURPHY: Yes. Thank you for that. And if you could also address the other part of your comments to the issue about whether we should promulgate an amendment or whether we should make a recommendation about an amendment.

I think your committee may not have been unanimous on that point, but--

JUDGE LAKE: Well, the written materials we filed represented unanimous views of the committee. There were some on the committee who believed that the perceived disparity is so great that the commission should promulgate amendments notwithstanding the enormous cliffs that would be created whether or not statutory change is made at the same time.

I think the committee unanimously agrees that we recognize these enormous cliffs and that we would prefer that the commission and Congress act at the same time so you don't

have the effect of guideline amendments that would apply at a certain level, and then you face a huge cliff because you've gotten to the statutory minimum either at the 5 or 10 year statutory minimum. So we would like in a perfect world to see Congress act and the commission act in concert with one another.

COMMISSIONER STEER: Judge Lake, let me ask you if you would turn to the sentencing alternatives issues that your committee reviewed and kindly provided some guidance on.

As you recall last year your committee worked with us and we promulgated a revision to the, what we're calling the white collar guidelines for fraud, theft, and so forth. We increased penalties at the top end and we decreased them some at the lower end.

Now, the break point was about \$70,000, all that we decreased above, we increased. On the heels of that we've got some proposals here that would allow a greater use of home detention. And the question is, should it be all home detention or a mix of home detention and something else, either prison or community confinement.

And these alternatives basically would--the break point there depends on the type of offense. But basically for fraud it's \$120,000, for tax evasion it's about \$70,000, for price fixing, antitrust volume commerce was 6 1/4 million. Basically below those thresholds under Option 1 basically we would be saying that these offenders do not have to spend even one day in imprisonment or community confinement. They can satisfy their obligation entirely by staying at home on home detention.

I just wonder do you think that's ordinarily appropriate for these more serious offenses?

JUDGE LAKE: No, certainly not. But Option 1 gives the sentencing judge the discretion to make informed decisions among different defendants. It doesn't say to us that you must give home detention as a condition. I have seen defendants with a--who would fall in a 0 to 6 month guideline range who I have sentenced 6 months to jail because I believe that particular defendant deserved that sentence.

We favored Option 1 for two reasons. First, it simplifies the current scheme by reducing one category. It merges, I believe, those B & C and eliminates a zone. Speaking for myself and many other district judges and probation officers, understanding the discrete differences between zones B & C has always been difficult. This eliminates one of those zones. It gives us discretion.

I realize that it also creates the possibility that a judge might abuse that discretion in an individual case. All I can tell you as members of my committee, all of whom are judges, don't think they would abuse the discretion.

Now, let me also point out that Chairman Wilkins strongly supports Option 2. And the committee alternatively would support Option 2. But we, given our druthers, I think we would prefer Option 1 because it gives us increased flexibility and it simplifies the guidelines.

COMMISSIONER STEER: Thank you. It may be that this group will decide on Option 1 or see if we--none of them. But I guess for myself, you know, I have to be concerned about the institutional concern, you know, what's the role of the Sentencing Commission in setting sentencing policy. And it seems to me if we, if we all generally agree that a straight home detention sentence is not ordinarily appropriate for that class of rather serious offenders, and they're not all white collar. Some of them are, for example, a reckless homicide would be in that same category, then the commission, it seems to me, should set the policy as to what's appropriate. That's sort of our job.

JUDGE LAKE: I'm not criticizing that. But I guess to use--I think it was Commissioner O'Neill that used the term "rubber meets the road" as your previous test. As someone who is there and applies the rubber to the road, we get a lot of defendants who really are not appropriate for anything other than home confinement given the facts surrounding the commission of their crime.

I agree if we have a, a white collar criminal who is a sophisticated person who intentionally committed this crime, home detention is not appropriate. We get a lot of people who, for want of a better word, I'll just call them abused bank teller syndrome, these are generally women working as bank tellers who steal money from the banks, many times over time, either because they have a family who cannot survive on the amount of income they have or more commonly they're being abused by the man with whom they live. And they steal because of--it's not always spousal, these are not always marriages, but they are being abused by people and they steal money from banks. I don't think in many of these situations, even if they fall within zone C, that straight prison or prison where you serve half your sentence is appropriate. I think in many of these cases, and many of these are first time offenders, the appropriate sentence is to give them home confinement so they can work and support their families and can be rehabilitated. That's the type of decision we have to make as district judges who apply these guidelines. We have to be able to distinguish between people who are on paper fall within the same guideline range, but because of the facts of each individual case should be sentenced differently. That's why I favor Option 1, because it gives me the ability to do that without having to search for departure ground to move the defendant out of zone C into zone B.

So, yes, there are certain people who clearly deserve something other than home confinement as a special provision. There are others who would be appropriate for home confinement. And I think these district judges would favor giving us the most discretion we can have in order to determine who falls into which group. And I think Option 1 gives us that discretion. And that's why we favor it.

COMMISSIONER STEER: Thank you very much for your comments and for your analysis.

CHAIRMAN MURPHY: Are there any other questions?

[No response.]

CHAIRMAN MURPHY: I think what you see is a sort of a worn out group of folks. We've

been meeting all day and we always care a lot about the committee's insights. So we appreciate you. You must be tired out too from your trial.

Thanks so much for meeting with us this afternoon. And we look forward to seeing you in St. Louis.

JUDGE LAKE: Thank you again for allowing me to participate in a video conference. Good luck with these amendments. They're very important.

CHAIRMAN MURPHY: Thank you.

COMMISSIONER STEER: Good luck with your trial.

JUDGE LAKE: Thank you.

CHAIRMAN MURPHY: The meeting, the hearing is adjourned.

[Whereupon, at 5:30 p.m., the public hearing adjourned.]