

**Testimony of Hon. Irene M. Keeley Presented to the United States Sentencing
Commission on June 10, 2014, on the Retroactivity of the Drug
Guideline Amendment**

Thank you for affording me the opportunity to appear before you today on behalf of the Criminal Law Committee of the Judicial Conference of the United States. My testimony reflects the Committee's views on the retroactive application of the proposed amendment to lower by two offense levels most offense levels in the Drug Quantity Table.¹

As you know, on March 11, 2014, I submitted a letter to the Commission on behalf of the Committee supporting the proposed amendment, which would apply prospectively to defendants sentenced on or after November 1, 2014. In that letter, I cited the Committee's longstanding position that the Sentencing Guidelines should be set irrespective of any mandatory minimum so that the full array of aggravating and mitigating circumstances can be taken into account, not just the offense of conviction. The Committee's support for the two-level reduction in the Drug Quantity Table reflected the continued commitment to delinking the Guidelines from mandatory minimums.

Last week, the Criminal Law Committee discussed at length whether to support the retroactive application of the proposed amendment. Before our deliberations, we solicited the viewpoints of judges in many of the districts most affected by the amendment if it were applied retroactively. We also received input from the AO's Probation and Pretrial Services Chiefs Advisory Group. In our deliberations, we wrestled with many difficult issues including how to balance fairness and public safety, and the reality of significant financial pressures on the judiciary and other components of the criminal justice system.

After significant and careful thought and evaluation, Committee voted, by a large majority, to support making the proposed amendment retroactive, but only if (1) the courts are authorized to begin accepting and granting petitions on November 1, 2014, (2) any inmate who is granted a sentence reduction will not be eligible for release until May 1, 2015, and (3) the Commission help coordinate a national training program that facilitates the development of procedures that conserve scarce resources and promote public safety.

The driving factor for the Committee's decision was fundamental fairness. We do not believe that the date a sentence was imposed should dictate the length of imprisonment; rather, it should be the defendant's conduct and characteristics that drive the sentence whenever possible. The retroactive application of the amendment in this case will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future. Another important consideration for the Committee's position is that the retroactive application of the amendment will further reduce the influence of mandatory minimums on the Sentencing

¹ At its September 1990 session, the Judicial Conference formally authorized the Criminal Law Committee to act with regard to submission from time to time to the Sentencing Commission on proposed amendments to the sentencing guidelines, including proposals that would increase sentencing guideline flexibility. JCUS-SEP 90, p. 69.

Guidelines and, in turn, reduce the disproportionate effect of drug quantity on the sentence length.

However, the Committee is acutely aware of the diminishing resources of the probation and pretrial services system,² and of the significant demands that will be imposed on that system by the retroactive application of the amendment. The Committee hopes that a six-month delay in cases being released to supervision will allow additional time for the system to be provided needed resources and fill probation officer vacancies. In addition, the additional time will allow the probation and pretrial services system to marshal its existing resources as much as possible, and to minimize the threat to community safety stemming from too many inmates being released without adequate planning and supervision.

Criminal Law Committee's Prior Positions on Retroactivity

The Criminal Law Committee has weighed in on the question of retroactivity of Sentencing Guidelines amendments several times over the past 20 years. In July 1994, it agreed to support the retroactive application of an amendment to the Drug Quantity Table that capped the table at a level 38 (thereby eliminating offense levels 40 and 42).³ The Committee reasoned that “[t]he purpose, to minimize the effect of the sole factor of drug amount, is important and has been repeatedly urged by many observers, including the judiciary.”⁴ Moreover, it determined that “it would be relatively easy to identify potentially affected defendants; it can be applied with relative ease; the estimated number of defendants affected is not extremely high; and the reduction in 2 or 4 levels at the high end of the chart makes a significant difference in sentence computation.”⁵ On the other hand, it emphasized that “a sentence reduction is not automatic, and may be declined for those defendants . . . whose cases involved other aggravating factors.”⁶

² Between fiscal years 2003 and 2013, staffing strength in probation and pretrial services declined by 5 percent, falling from 8,176 full-time equivalents (FTEs) to 7,745. During the same time period, the daily post-conviction supervision population increased by 19 percent, growing from 110,621 to 131,869 persons.

³ Letter from Maryanne Trump Barry, Chair, Criminal Law Committee, to William W. Wilkins, Jr., Chair, U.S. Sentencing Commission (July 21, 1994).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* For two other proposed guideline amendments, the Committee wrote that it did not specifically oppose retroactivity and deferred to the Commission's judgment. The first amendment related to defining the statutory maximum for the career offender table. The Committee concluded that “given . . . the fact that there is no great concern to shorten the sentences of recidivists who fit the career offender criteria, we find no compelling reasons to make this amendment retroactive, particularly in light of some of the complications involved in its application . . . However, we do not believe that retroactive would be overly burdensome, and we defer to the Commission's judgment.” With regard to the second amendment, which related to chemical precursors, the Committee concluded: “The potential difficulties in both identifying defendants and it applying it, the lack of pressing policy consideration to effect a retroactive change here, and the small number of defendants affected are factors favoring non-retroactivity of this amendment. Moreover, we find no compelling reason to recommend retroactivity. However, if this amendment were to be made retroactive, the burden on the courts would not be overwhelming, and thus we do not specifically oppose retroactivity, but defer to the Commission's judgment.” *Id.*

In January 1996, the Committee declined to recommend that the amendment adding the safety valve to the *Guidelines Manual* be applied retroactively.⁷ It noted that significant logistical problems would exist including transporting inmates to debrief with the government and conducting additional court hearings to determine whether the safety valve criteria were satisfied.⁸ The Committee concluded:

The equities for making the “safety valve” retroactive are relatively weak and do not, in our opinion, outweigh the legal and practical difficulties. . . . This amendment is not one which corrects a prior “wrong” but, rather, represents an evolution in the thinking of the Commission and effects a modest adjustment to a small group of defendants pursuant to a recent (nonretroactive) statute. There is, in short, no strong policy or fairness argument for retroactivity here.⁹

In November 2007, the Committee recommended that amendments to the Drug Quantity Table that lowered the guideline ranges in crack cocaine offenses should be applied retroactively.¹⁰ The Committee cited the “corrosive effect” of the disparity between crack and powder sentences and stated that “[w]hile concerned about the impact that retroactivity may have on the safety of communities, a majority of the Committee believes that the Commission’s precedents, and a general sense of fairness, dictate retroactive application.”¹¹ The Committee also noted the significant workload that would result from the amendment being made retroactive, but it nonetheless believed that “the burden to the courts and probation officers associated with resentencings is not a sufficiently countervailing consideration.”¹² However, the Committee also “strongly recommend[ed] that procedures be put in place to reduce administrative burdens associated with retroactivity and ensure adequate supervision of the offenders who are released.”¹³ Judge Reggie Walton summed up the Committee’s position in his testimony before the Commission:

⁷ Letter from Maryanne Trump Barry, Chair, Criminal Law Committee, to Richard P. Conaboy, Chair, U.S. Sentencing Commission (January 3, 1996).

⁸ *Id.*

⁹ *Id.*

¹⁰ Letter from Paul Cassell, Chair, Criminal Law Committee, to Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission (November 2, 2007).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

[I]n my own deliberations on this matter, I was gravely concerned about the potential adverse impact that retroactivity could have on the courts, the probation and pretrial services system, and the communities into which offenders will return upon their release. Only after considering the procedures that can be implemented to mitigate the impact, and only after weighing the representation of the Probation and Pretrial Services Chief's Advisory Group that probation offices can handle the anticipated increased workload, did I determine that under the circumstances, fundamental fairness compels retroactivity. . . . Fundamental fairness *does* compel retroactive application of the guideline amendment. . . . Therefore, if . . . the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act. . . . then the same logic applies to those who were sentenced last year, or five years ago, as to those who will be sentenced for crack tomorrow. . . . The legislative history of the Commission's retroactivity authority suggests that Congress conferred this authority to the Commission in order to cope with *precisely* this kind of situation. Retroactivity was not intended as an instrument to make isolated or minor adjustments; rather, it was meant as a means to make sweeping and serious changes: changes precisely like those associated with crack retroactivity.¹⁴

In September 2010, the Committee recommended to the Commission that it not make the amendment abolishing U.S.S.G. § 4A1.1(e) (the "recency enhancement") retroactive.¹⁵ It reasoned that calculation of a defendant's criminal history was one of the relatively few areas in which the Guidelines explicitly invited a downward departure.¹⁶ Additionally, the Committee noted that there were approximately 43,000 defendants still in prison who received a recency enhancement, but only about 8,000 of those defendants would see their sentencing range lowered by elimination of the recency enhancement. While 35,000 of those defendants would ultimately not be eligible for a reduction, "district courts and probation officers would nevertheless be

¹⁴ Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on November 13, 2007, available at: http://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20071113/Walton_testimony.pdf.

¹⁵ Letter from Julie E. Carnes, Chair, Criminal Law Committee, to William K. Sessions, Jr., Chair, U.S. Sentencing Commission (September 10, 2010).

¹⁶ *Id.* Specifically, a sentencing court was permitted to downwardly depart if it deemed the criminal history calculation to have over-represented the seriousness of the defendant's criminal history or the likelihood that the defendant would commit future crimes. Accordingly, if a district court had concluded that the addition of recency points would elevate a defendant's criminal history calculation beyond what was warranted, the court was expressly permitted to consider a downward departure. After *United States v. Booker*, a sentencing court would have perceived even greater discretion to eliminate recency points in making its decision as to what a reasonable sentence would be, under 18 U.S.C. § 3553. *Id.*

required to expend a great amount of their scarce time dealing with these requests.”¹⁷ The Committee concluded that, while the 2007 amendment reducing the disparity between penalties for powder cocaine and crack cocaine addressed a disparity that had been almost universally criticized and that had undermined public confidence in the federal criminal justice system, it was unaware of any comparable level of criticism of the recency enhancement.¹⁸

In February 2011, the Committee again recommended that amendments to the Drug Quantity Table that lowered the guideline ranges in crack cocaine offenses should be applied retroactively. In his testimony before the Commission, Judge Reggie Walton noted that, while the workload associated with considering sentencing reductions in 2007 was well managed, steep reductions to discretionary spending were expected to place a great deal of strain on the courts, including federal defenders, probation officers, and court staff.¹⁹ The Committee believed, however, that “an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively,” and such a problem did not exist.²⁰ Judge Walton concluded:

[A]mendments that reduce . . . disparity should equally apply to offenders who were sentenced in the past as well as offenders who will be sentenced in the future . . . If the guideline is faulty and has been fixed for future cases, then we also need to undo past errors as well. Put another way, a crack offender’s sentence should not turn on the happenstance of the date on which he or she was sentenced. Equity and fundamental fairness suggest that a crack offender who committed a crime in 2009 should be treated the same under the guidelines as a crack offender who committed exactly the same crime in 2011.²¹

Retroactivity of Proposed Drug Guideline Amendment

If the necessary resources were available to address the workload from inmate petitions for retroactivity and the increased number of offenders supervised in the community, the Committee would support retroactivity of the two-level reduction without qualification. This is because the Committee believes that, as a matter of fairness, one’s sentence should not depend on the date on which the sentence is imposed.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Testimony of Judge Reggie B. Walton Presented to the United States Sentencing Commission on June 1, 2011, available at: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Reggie_Walton.pdf.

²⁰ *Id.* (emphasis added).

²¹ *Id.*

Additionally, the Committee supports efforts to reduce the influence of mandatory minimums on the Sentencing Guidelines and to reduce the disproportionate effect of drug quantity on the sentence length. When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities.²² The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties.²³

As stated above, on March 11, 2014, I wrote the Commission to express the Committee’s belief that the base offense levels in the Drug Quantity Table should be set irrespective of the statutory mandatory minimum penalties. For decades, the Criminal Law Committee has expressed its belief that setting the Sentencing Guidelines’ base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing two competing approaches to criminal sentencing.²⁴ According to a recent survey sponsored by the Commission, the majority

²² Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2014, available at: http://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20140430_FR_Final_Amendments.pdf.

²³ *Id.*

²⁴ *See e.g.*, September 17, 2013 letter from former Criminal Law Committee Chair Robert Holmes Bell to the Chair of the Senate Judiciary Committee (“Mandatory minimum statutes are incompatible with guideline sentencing and impair the efforts of the Sentencing Commission to fashion Sentencing Guidelines in accordance with the principles of the Sentencing Reform Act. . . . They deny the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy...Consideration of mandatory minimums in setting Guidelines’ base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses.”); March 16, 2007 letter from former Criminal Law Committee Chair Paul Cassell to former Commission Chair Ricardo Hinojosa (“Setting the base offense level at or near the guideline range that includes the mandatory minimum, as is often seen in drug cases, often leaves the court without guidance on what the appropriate guideline range should be in cases where the mandatory minimum term does not apply. For example, for mandatory minimum offenses covered by §2D1.1, the Commission has set the base offense level, as determined by the drug quantity table, so that the resulting offense level meets or exceeds the mandatory minimum; however, in cases where either §§5K1.1 or 5C1.2 apply, the courts are left with little guidance on what the appropriate sentence should be. If the Commission were to independently set the base offense level to reflect the seriousness of the offense, in its own expert opinion and irrespective of the mandatory minimum term of imprisonment, then the courts would have some benchmark to use when the mandatory minimum would not apply.”); March 8, 2004 Letter from former Criminal Law Committee Chair Sim Lake to Sentencing Commission (“The Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes. The Committee continues to believe that the honesty and truth in sentencing intended by the guidelines is compromised by mandatory minimum sentences”); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66, 108 (July 28, 1993) (statement of former Criminal Law Committee Chair Vincent L. Broderick) (“This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward. . . . As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.”).

of district judges “strongly agree” or “somewhat agree” that the guidelines should be “de-linked” from mandatory minimum sentences.²⁵ In my letter, I also conveyed the Committee’s support for prospectively amending the Drug Quantity Table so that the quantities that trigger the statutory mandatory minimum penalties trigger base offense levels that straddle rather than exceed the mandatory minimums. The Committee views this interim measure as being consistent with its longstanding opposition to mandatory minimums.²⁶

According to the Commission, one of the reasons for its proposed amendment is to reduce the influence of drug quantity given that numerous specific offense characteristics have been added to the Guidelines. As the Commission explains, the Guidelines “now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established.”²⁷ Since the initial selection of offense levels based primarily on drug weight, the Guidelines have been amended many times “to provide a greater emphasis on the defendant’s conduct and role in the offense rather than on drug quantity.”²⁸ While the original version of Section 2D1.1 contained a single specific offense characteristic (a 2-level enhancement if a firearm or other dangerous weapon was possessed), today’s version contains fourteen enhancements and three downward adjustments.²⁹ These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, “reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.”³⁰

The Committee has in the past supported efforts to reduce the disproportionate reliance on drug quantity to measure crime severity. As stated above, in July 1994, the Committee agreed

²⁵ U.S. Sentencing Commission, *Results of Survey of United States District Judges: January 2010 Through March 2010* (June 2010), at Question 3.

²⁶ In 1993, Judge William W. Wilkins, then Chair of the U.S. Sentencing Commission, proposed legislation titled the “Controlled Substances Minimum Penalty - Sentencing Guideline Reconciliation Act of 1993,” which would have directed the Commission to set base offense levels that incorporate mandatory minimum sentences within the guideline range. This would have led to a 2-level reduction in the base offense level for drug trafficking offenses. At its June 1993 meeting, the Criminal Law Committee determined that Judge Wilkins’s proposed legislation would be a significant improvement over current law. In September 1993, upon recommendation of the Committee, the Judicial Conference “endorsed the concept contained in the proposed legislation as being consistent with its previous position opposing mandatory minimum penalties.” JCUS-SEP 93, p. 46. In 2011, then Criminal Law Committee Chair Robert Holmes Bell wrote to the Sentencing Commission to recommend that in re-promulgating the temporary emergency amendments authorized by the Fair Sentencing Act of 2010, the penalty structure in the Drug Quantity Table for crack cocaine should be set so that the statutory mandatory minimum penalties were within rather than above the guideline ranges. Letter from former Criminal Law Committee Chair Robert Holmes Bell to Patti B. Saris, Chair, U.S. Sentencing Commission (February 24, 2011).

²⁷ Notice of submission to Congress, *supra* note 22.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

to support the retroactive application of an amendment to the Drug Quantity Table that would result in a two- or four-level reduction for certain offenders, reasoning in part that “[t]he purpose, to minimize the effect of the sole factor of drug amount, is important and has been repeatedly urged by many observers, including the judiciary.”³¹ In 2008, in response to questions from the Senate Judiciary Committee, Judge Reggie Walton wrote on behalf of the Judicial Conference that while the weight of the drug as measured by the Drug Quantity Table should be one of the relevant factors in sentencing, judges should be allowed to consider the totality of the circumstances, weighing the specifics of the offense and the offender, when tailoring an appropriately individualized sentence. Moreover, Judge Walton explained, numerous other mechanisms exist in the Guidelines and in statute to hold high-level drug offenders accountable:

[C]onsistently punishing individuals by drug weight *does* help to reduce unwarranted disparity; for example, when two different offenders, both possessing five grams of crack, appearing before two different judges both receive five years of incarceration for that crime, there is greater fidelity between sentences than there was under the old, indeterminate approach to sentencing. But the use of drug weights can result in a distorted perspective, and judges should be allowed to consider the totality of the circumstances, weighing the specifics of the offense and the offender, when tailoring an appropriately individualized sentence. . . . There are several provisions already within the sentencing guidelines that are designed to hold high-level drug dealers more accountable than small-time dealers. . . . [D]efendants who use violence or firearms, or who play leadership roles in a conspiracy may receive lengthier sentences than defendants who do not engage in such aggravating conduct. The sentencing guidelines contain a number of provisions that permit judges to carefully tailor a sentence to satisfy the goals of punishment. For example, U.S.S.G. §3B 1.1 increases the offense level, and exposure to imprisonment, for defendants who have had an aggravating role in the commission of the offense, while §3B 1.2 reduces the offense level for defendants who have been minor or minimal participants. Drug defendants who satisfy the criteria in §5C1.2 are eligible for a two-level reduction in their offense levels, and defendants who are eligible for a mitigating role reduction may have their offense levels lowered by an additional two to four levels per §2D1.1(a)(3). . . . Within this guideline framework, judges must also consider the statutory purposes of sentencing, which include the need to provide

³¹ Letter from Maryanne Trump Barry, *supra* note 7.

just punishment, afford adequate deterrence, protect the public, and provide necessary correctional treatment.³²

The Lack of Adequate Resources to Effectively Manage Retroactivity Immediately

In support of the proposed amendment to prospectively lower by two offense levels most levels in the Drug Quantity Table, the Commission stressed that it “carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety.”³³ In its extensive deliberations about whether to support the retroactive application of the proposed amendment, the Committee carefully considered whether the courts and the probation and pretrial services system could effectively manage the increased workload that would result while protecting public safety. We are mindful that the judge, relying on the investigation of the probation officer, plays an important public safety role when considering whether to grant petitions for sentence reductions. As Judge Walton stated in 2008, in response to questions from the Senate Judiciary Committee, the Sentencing Commission’s policy statement governing retroactive application of the guideline explicitly directs judges to consider the sentencing factors outlined in 18 U.S.C. § 3553(a), the nature and seriousness of the danger to any person or the community that the offender might pose, and the offender’s post-sentencing conduct (e.g., institutional adjustment in prison), and he “[was] confident that [his] fellow judges will be deliberative and thoughtful in making individualized determinations of eligibility.”³⁴

However, judges can only be “deliberative and thoughtful” if they are able to rely on careful and thorough evaluations by the probation officer. These evaluations consist of recalculating the offense level, investigating the inmate’s progress and behavior while in custody, assessing whether an inmate who would be eligible for immediate release has a viable release plan and, if necessary, recommending any new conditions of supervision – such as

³² Written Answers for the Record from Judge Reggie B. Walton, Judicial Conference of the United States, for Senate Judiciary Subcommittee on Crime and Drugs hearing on “Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity” held on February 12, 2008.

³³ Notice of submission to Congress, *supra* note 22. In particular, the Commission was informed by its studies that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission’s 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study “suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.” *Id.* Furthermore, existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, “ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences.” *Id.* Finally, the Commission states, it relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission “received testimony from several stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.” *Id.*

³⁴ Written Answers for the Record from Judge Reggie B. Walton, *supra* note 32.

placement in a halfway house or in home confinement – that may be needed to promote effective reentry.

In addition to having the probation officers' evaluations, judges weighing the effect of a sentence reduction on public safety must consider the availability of supervision resources, including staffing and treatment. Unfortunately, the federal judiciary has seen a significant reduction in staffing in recent years and it is unclear if additional resources will be made available to keep pace with any new workload. Notably, in the probation and pretrial services system, staffing and workload are moving in opposite directions. In the past 10 years, staffing declined five percent while the post-conviction supervision caseload rose 19 percent. Further complicating matters is the intensifying criminogenic profile of the offender population, which has worsened in terms of prior criminal involvement, level of culpability in relation to their federal crimes, and prevalence of mental health and substance abuse problems. The release of thousands of additional offenders to supervision when the system is already dealing with diminished resources and an increasingly risky offender population raises several public safety concerns.

At our meeting last week, the Committee consulted with the chair of the AO's Probation and Pretrial Services Chiefs Advisory Group (CAG). The CAG surveyed fellow chiefs across the country to determine their ability to absorb the workload that they would be expected to manage if the amendment is made retroactive. Candidly, a majority of the chiefs responded that without additional resources they would not be able to effectively carry out their duties if they saw a surge in workload next fiscal year. The CAG noted that while many chiefs have funding available in the current fiscal year budget, chiefs are reluctant to bring on new staff until more information is available about the amount of funding they can expect to receive next year. The CAG chair also reported that if there were assurances that supplemental funding would be available next year for chiefs who would need additional staff to manage the expected workload, then chiefs could begin hiring this year. Bringing on new staff as soon as possible would help with any workload increases expected next year, especially since it may take up to six months to fill an officer position due to requirements surrounding recruiting, testing, interviewing, and completing pre-employment medical examinations and background investigations.

The Committee also heard from the chief judges of many of the districts that would be most heavily impacted by making the amendment retroactive. The chief judges echoed the concerns raised by the chief probation officers, including the concerns that the Commission's impact analysis understates the true workload that the courts would need to manage, since many inmates who would be ineligible for a reduction in their sentences would nonetheless petition the court for relief. The Commission's own data confirms this problem, in that 67 percent of all of the petitions that were denied in connection with the 2007 amendment were found to be ineligible for a sentence reduction under §1B1.10.³⁵

In arriving at its recommendation, the Committee heard all of the concerns of the chief judges and the chief probation officers. The Committee also revisited its past positions, in particular, its position from 2007 to support retroactivity of the crack amendment. At that time, the Committee noted:

³⁵ U.S. Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report*, June 2011, at p. 14.

One possible countervailing consideration to this conclusion [i.e., making the crack amendment retroactive] is the administrative burden upon the courts that would be associated with resentencing crack offenders whose sentences have previously been determined. The Criminal Law Committee believes that, in evaluating such considerations, an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively.³⁶

The question that was presented before the Committee last week was whether the current fiscal climate coupled with the sizeable workload expected on November 1, 2014, results in an “extremely serious administrative problem” that would jeopardize public safety and counsel against supporting the amendment. At first blush, it would appear that retroactivity at this time would result in an “extremely serious administrative problem” that could jeopardize public safety. However, understanding the magnitude of this decision, the Committee considered whether there were ways to avoid or mitigate these problems. The Committee concluded that the best solution would be to give chief probation officers an assurance that they will have the resources they require and encourage them to begin hiring the staff they need to manage the expected workload. Unfortunately, that is not an assurance that this Committee can give to the chiefs at this time. Much is still unclear about the fiscal year 2015 appropriations levels for the courts. It is expected that we will begin the new fiscal year under a continuing resolution, and the interim financial plan that will determine how resources are distributed among the various court units and program has not yet been developed.

Because we cannot guarantee that sufficient resources will be available on November 1st, the Committee has determined that the only way to mitigate the extremely serious administrative problems would be to delay the date that the amendment becomes effective until May 1, 2015, but to authorize the courts to begin accepting and granting petitions on November 1, 2014. This delay in releasing inmates would allow the courts and probation offices across the country to first manage the influx of petitions and then, once the surge of petitions has been addressed, pivot available resources to deal with the increase in the number of offenders received for supervision. In the Committee’s opinion, requiring the courts and probation offices to manage more than 51,000 petitions and begin supervising thousands of offenders at the same time would result in substantial reductions in services that would jeopardize public safety.

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

In addition to recommending that no inmate should be released until May 1, 2015, the Committee would recommend that the Commission – together with the Committee, the AO, the BOP, DOJ and Federal Judicial Center – develop a training program to facilitate close coordination between probation officers, BOP staff, assistant U.S. attorneys, assistant federal public defenders and the courts. Similar programs were developed in connection with the 2007 amendment and proved helpful in streamlining procedures, prioritizing cases, and allowing for

³⁶ Letter from Paul Cassell, Chair, *supra* note 10.

careful evaluation of inmates' petitions. There are several reasons why such a program would be warranted should this amendment be made retroactive. First, this amendment has the potential to impact districts that were not significantly affected by crack retroactivity. These districts may not be prepared to manage the volume of workload associated with this amendment and a national training program will assist in their preparation. Also, many of the staff who were responsible for overseeing the implementation of the retroactive crack amendment are no longer with the courts, including many chiefs and deputy chiefs who have since retired. New staff, including unit executives, will benefit from a program that will help them plan accordingly. Finally, because the fiscal climate is different than what it was in 2007, local procedures may need to be refined further to address changes in staffing or availability of resources, and the national program may be a useful way to exchange ideas on best practices.

Conclusion

The Committee appreciates the opportunity to share its views with the Commission about this important issue. While we support making the amendment retroactive, we are concerned that the number of cases, at a time of diminished resources, may jeopardize public safety. We believe that the delay in the effective date that we have recommended will help the courts and probation offices manage the surge in workload while we try to secure additional resources. We are also confident in the ability of judges to discern suitable candidates for sentence reductions, and that through close coordination between staff in the judiciary and in the Executive branch this important amendment can be effectively implemented without putting public safety at risk. We understand the many competing views that the Commission will consider, and I offer the Committee's continued assistance as you deliberate.