Congress of the United States
Washington, DC 20515

June 10, 2011

The Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Saris,

We write to express our strong opposition to the Commission's proposed Re-Promulgation of the Fair Sentencing Act of 2010. The Act of 2010 eliminated the mandatory minimum sentence for simple possession of cocaine base ("crack" cocaine), reduced statutory penalties for crack cocaine offenses, and directed the Commission to review and amend the Sentencing Guidelines to account for specified aggravating and mitigating circumstances in certain cases. The law is devoid of any mention of retroactivity.

As required by the law, the Sentencing Commission instituted an emergency amendment in Appendix C, Amendment 748. This emergency amendment immediately raised the offender levels 2 points, from 24 and 30 to 26 and 32 respectively. By doing this, the Commission returned the cocaine offense levels to their original status, and satisfied the will of Congress by setting the sentencing disparity at 18 to 1. Now, however, without any legislative impetus, the Commission proposes making the Fair Sentencing Act of 2010 applicable to every federal defendant convicted of cocaine-related offenses in the country, regardless of when they committed the crime or when they were sentenced. This proposal would reduce the consequences for crack cocaine offenses yet again for every single offender– a proposal that directly violates both the statute and congressional intent.

The Fair Sentencing Act of 2010 is titled for a specific year: It is not titled "The Fair Sentence Act for All Years." As we noted in our last letter to the Commission, the Fair Sentencing Act of 2010 makes no mention of retroactivity. That is by design. The Act was carefully negotiated and debated over months. In the floor statements on the bill, not one Senator, from either party, mentioned retroactivity. In addition, retroactivity was not implicated in the House deliberations, either. Had Congress intended that the Act be applicable retroactively, there would have been bi-cameral debate about it instead of silence. And we assure you that Congress knows how to write a law that is retroactively applicable.

In addition, the law is quite specific regarding the role of the Commission. It is only authorized to promulgate the statutory changes to the Guidelines and to "study and submit to

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Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act."[1] It is our position that since there is no provision in the Fair Sentencing Act of 2010 regarding retroactivity; it is beyond the role and authority of the Sentencing Commission to impose that change without direction or guidance from the popularly accountable legislative branch. Should the Commission amend the Guidelines to make these changes retroactive, it will usurp legislative prerogatives, and bring into serious question the scope of its authority.

The Commission's proposal to apply the 2010 amendments retroactively would have the effect of allowing an entire category of convicted criminals to reduce their judicially-imposed sentences. All had their day in court and a judge specifically found that their sentences were deserved. Retroactive application of the amendments would not change that finding, but rather serve to make it meaningless. It would result in the release of many drug offenders from prison into America's communities. A recent report from the Commission indicates that approximately 12,000 inmates would be released because of the proposed retroactivity, the equivalent of four U.S. Army brigades.

Worse, making the law retroactive could result in its application to those defendants who already received the benefit of the Commission's largess in 2007, when the crack sentencing schedule was lowered without congressional approval – and applied retroactively. Over half of the inmates the reduction will be applied to were sentenced after the Rita, Gall, and Kimbrough rulings. The judges who sentenced this group of offenders were not required to follow the Sentencing Guidelines, and received the option of any sentence the judge wished to impose. Thus, under retroactivity, the majority of offenders would be granted another "bite at the apple" at sentence reductions.

The sentencing windfall contemplated by the Commission is not trivial; the average inmate would find his sentence reduced by more than three years. Hundreds of inmates will have their sentences reduced by 10 years or more. Some inmates may be released immediately. A glance at the high recidivism rate of those released from prison reveals the risk of early release to American communities. According to the Commission's own studies, the recidivism rates for those offenders who were released earlier due to 2007 Commission reductions is quite similar to the recidivism rates for the control group of defendants released after completion of their sentences . This high recidivism rate (over 30%) confirms that, in all likelihood, many of these offenders will commit new crimes if they are released. Despite the assurances of many sentencing reform advocates, early release has no affect whatsoever on deterring criminal activity. It merely gets criminals back into action faster. Thus, the most effective way to preserve public safety is to keep these criminals incarcerated until the completion of their sentences.

Although Congress endowed the Commission with the authority to, in very limited circumstances, give certain Guideline changes retroactive effect, we do not believe that Congress intended such authority to be exercised over the objections of Congress and contrary to its

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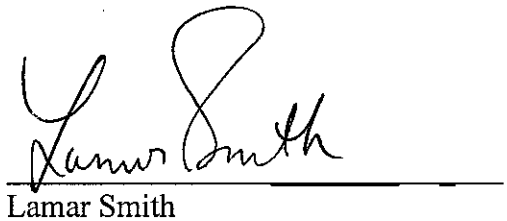
[1] See Fair Sentencing Act of 2010, §10

specific legislative intent. The Commission's rulemaking authority, including retroactivity, is intended to complement, not contradict, the will of Congress. The Commission's duties are weighty, and of great import to law abiding citizens, who must live with the consequences of its decisions. As such, the Commission must make its decisions with the safety of the American people in mind.

We therefore urge you not to apply the Fair Sentencing Act of 2010 retroactively.

Sincerely,



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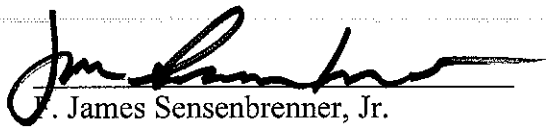

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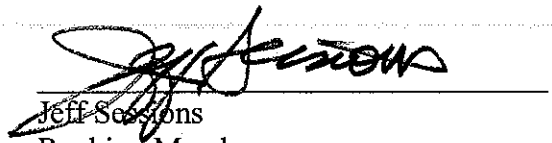

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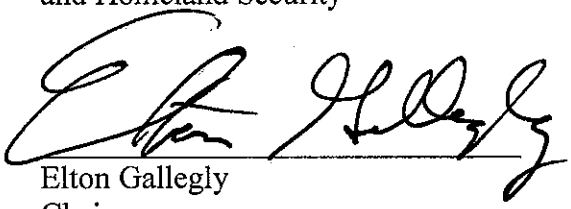

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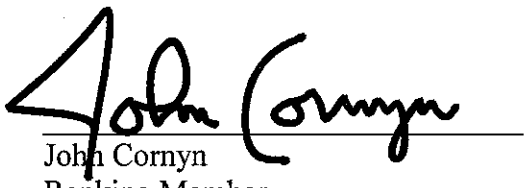

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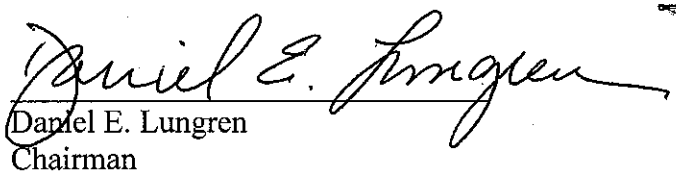

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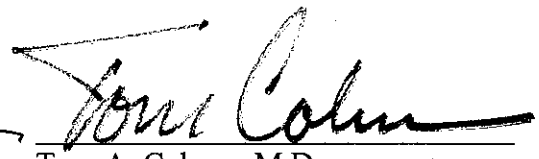

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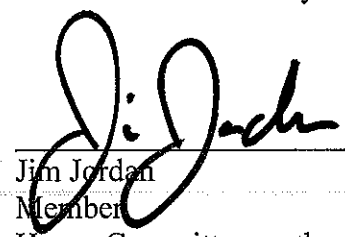

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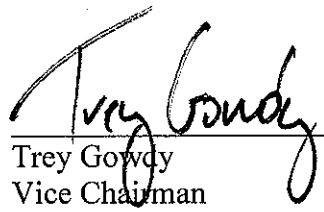

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